

## **BUSINESS NECESSITY**

### **“NECESSARY ARGUMENTS”**

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### **Introduction**

The Department of Labor’s (“DOL”) application system popularly known by its acronym, PERM (Program Electronic Review Management)<sup>1</sup> brought with it a welter of contradictions between the needs of U.S. businesses and the DOL’s restrictive view on job requirements in the context of labor certification.<sup>2</sup> While the Twenty-First Century businesses depend for their survival on workforce that has advanced knowledge, cutting-edge skills, and vision of new and emerging technologies that hold promise for the future, the Department of Labor insists on fitting the requirements for each job within one of the five JobZones defined in the DOL’s O\*Net Database, with standardized, measurable set of variables based on statistical information from the past.<sup>3</sup>

PERM represents an online filing and certification system, which assists the employer by checking the application for obvious errors, and then inputs the data into an ETA database.<sup>4</sup> The new alien labor certification application represents a single form, ETA Form 9089.<sup>5</sup>

PERM’s stated goal was to “streamline processing and ensure the most expeditious processing of cases, using the resources available.”<sup>6</sup> The DOL introduced it as customer friendly and simpler labor certification process.<sup>7</sup> However, despite the DOL’s promise of expediency and simplicity, nothing about the labor certification process is simple. The process has programming logic that must be reconciled internally and externally. Importantly, the information inputted in the online application feeds into an ETA database<sup>8</sup> where it is data-mined, and checked against fraud triggers. The electronic filing is part of a “deliberate, coordinated fraud reduction and prevention framework within the permanent labor certification program.”<sup>9</sup>

Thus, it is imperative that any PERM application be *internally and externally consistent* with (i) other PERM applications filed by the employer; (ii) other PERM applications filed on behalf of the alien by other employers; (iii) any statements made on a nonimmigrant petition filed on behalf of the alien; (iv) similar jobs within the industry; and (v) the DOL’s O\*Net Database.<sup>10</sup> The application, therefore, requires careful analysis of the employer, industry, alien, occupation, and the O\*Net Database, to determine what requirements would be considered “normal” for the occupation or whether the employer must document the job requirements as arising from “business necessity.”<sup>11</sup>

Under the PERM regulations, 20 CFR § 646.17(h)(1)(2005),

The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones..20 CFR § 646.17(h)(1)(2005)

This article presents an overview of the DOL's requirement for business necessity. It will first review the triggers of business necessity and when the requirements can be considered normal. It will then attempt to review business necessity cases in order to give practical advice on how to prepare the PERM application offensively in an attempt to minimize the probability of an audit. Finally, the article will provide a checklist of documents that have been used successfully to document business necessity in cases of an audit.

### **1. Normal Job Requirements.**

According to the DOL the job opportunity's requirements are not normal if:

- (i) they are not those normally required for the occupation and
- (ii) they exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones.<sup>12</sup>
- (iii) if the job requires foreign language
- (iv) if the job involves a combination of occupations, and neither the employer's past practice, nor the industry practice is to combine the occupations.<sup>13</sup>

Thus, if the requirements implicate any of the above conditions, they are not normal. Consequently, the PERM regulations identify four occasions that require an employer to document business necessity.<sup>14</sup>

- if the job requirements are not those normally required for the occupation;<sup>15</sup>
- if the job requirements exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*Net job zones;
- if the job requires foreign language;
- if the job involves a combination of occupations;

To establish a 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." 20 CFR § 646.17(h)(1)(2005). The DOL stated that its Certifying Officers will look at the SOC/O\*NET code and Occupation Title from the National Processing Center ("NPC") on the Prevailing Wage<sup>16</sup> as a starting point. Consequently, preparation of each PERM application should begin with careful analysis of the job description that will go on the Request for Prevailing Wage.<sup>17</sup> The job must be analyzed against the occupations listed in the O\*Net Database, in order to identify the core duties and suggest an appropriate occupation to the NPC.

As the classification determined by the NPC on the Prevailing Wage Determination will drive the entire application process, it is extremely important for a practitioner to review occupations which may share core tasks with the tasks listed by the employer in order to determine the proper occupation. This comparison may allow an employer to identify an occupation, within a job zone that would be commensurate with the employer's requirements and suggest it to the NPC. For example, if an employer has a position, which shares core tasks with Computer Systems Analyst (15-1051.00) (Job Zone 4)<sup>18</sup> and Operations Research Analyst (15-2031.00) (Job Zone 5)<sup>19</sup>, the NPC may be able to classify the job as Operations Research Analyst if the job has more core duties of one over the other, even though some of the duties are shared.

The DOL noted that "any requirements in addition to those *listed in the summary* will be considered not normal for the occupation and the employer should be prepared to provide proof of business necessity if requested by the Certifying Officer."<sup>20</sup> The summary reports can be accessed at <http://online.onetcenter.org> and are usually the first page of a particular occupation. The web page for each occupation provides several views, Summary, Details, and Custom. The Summary view provides information about Tasks, Knowledge, Skills, Abilities, Work Activities, Work Context, Job Zone, Interests, Work Styles, Work Values, Related Occupations, and Wages & Employment. According to the DOL, if the job requirements are listed in the O\*Net Job Summary, they are normal. Thus, the O\*Net should be a point of reference for each practitioner.<sup>21</sup>

While it seems that in the FAQ the DOL has limited the scope of the inquiry only to the Summary Report for the occupation on the O\*Net,<sup>22</sup> the regulations do not contain such a limitation. Thus, other pages like Detail and Custom are part of the occupation. If the requirements are not normal for the occupation or the duties exceed the SVP for the job zone, the employer has an affirmative duty to indicate this on the ETA 9089, or risk a denial. If the employer fails to attest correctly that the requirements are not normal for the occupation, the DOL will deny the labor certification whether or not the employer can prove business necessity.<sup>23</sup>

## **2. Specific Vocational Preparation**

The employer must document business necessity if the job requirements exceed the SVP as listed in the JobZones SVP is defined as "the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation."<sup>24</sup>

Lapsed time is not the same as work time. For example, 30 days is approximately 1 month of lapsed time and not six 5-day work weeks, and 3 months refers to 3 calendar months and not 90 work days. The various levels of SVP are explained as follows<sup>25</sup>

Level 1      Short demonstration

Level 2	Anything beyond short demonstration up to and including 30days
Level 3	31 days up to and including 3 months
Level 4	3 months and 1 day up to and including 6 months
Level 5	6 months and 1 day up to and including 1 year
Level 6	1 year and 1 month up to and including 2 years
Level 7	2 years and 1 day up to and including 4 years
Level 8	4 years and 1 day up to and including 10 years
Level 9	Over 10 years

In a 1994 guidance, the DOL explained how it calculates the SVP, and in the supplementary information to the PERM rule, the DOL has stated that that this guidance will continue to be utilized in determining the appropriate SVP levels. Accordingly, the SVP is calculated as follows:

- Each year of experience *in the job* is counted as *one* year of SVP.
- A general associate degree is not counted toward the SVP for a job as it is not centered around a vocation.
- An associate degree for *specific vocation* is counted fully. Thus, a 2-year vocational associate degree is counted as 2 years of SVP.
- Four-year college degree is counted as 2 years of SVP because the DOL equates the first two years of college as general education not centered around a vocation
- A master's degree is counted toward SVP based on the years needed to finish the master's program. Thus, a one-year master's degree adds 1 years of SVP; A two-years program adds 2 years of SVP. A person with Master's Degree will have SVP of 3 (2 bachelor + 1 masters) or 4 (2 bachelor + 2 masters).
- A doctorate degree is normally counted for three additional years of SVP. A person with a doctorate degree would have SVP 7 (2 bachelor + 2 Masters + 3 doctorate).

### 3. O\*Net JobZones

In order to compile the O\*Net Database, the DOL used the SVP values from the Dictionary of Occupational Titles<sup>26</sup> as a means of stratifying occupations by level of required vocational preparation. The DOL compressed 12,000 jobs into 1,122 O\*NET Occupational Units, averaged the SVP for each Occupational Unit, and used the aggregated SVP ratings to sort the resulting 1,122 Occupational Units into 5 JobZones:<sup>27</sup> Each JobZone has a range of SVP values.

JobZone 1	Little or No Preparation (SVP <4)
JobZone 2	Some Preparation Needed (SVP 4.0 to < 6.0)
JobZone 3	Medium Preparation Needed (SVP 6.0 to < 7.0)

JobZone 4     Considerable Preparation Needed (SVP 7.0 to <8.0)  
JobZone 5     Extensive Preparation Needed (SVP 8.0 and above).

The relationship between the SVP and the JobZones was discussed in *Matter of Wissen, Inc.*, 2009-PER-00405 (Bd. Alien Lab. Cert. App. Apr. 15, 2010). In this case, the employer filed PERM for “Senior Software Engineer.” The Employer indicated it used the SOC/O\*NET code 15-1031.00 for the position of “Computer Software Engineers, Applications” when applying for a prevailing wage determination. The Employer required that the applicant have a bachelor's degree and three years of experience in the job offered. The Certifying Officer required the employer to establish business necessity, claiming that the SVP level assigned to the occupation was “7.0 < 8.0,” which permits a maximum lapsed time of preparation up to and including 4 years, as opposed to the 5 years required by the Employer. *Id.*

The employer argued in its response that the regulations pertaining to SVP of 7<8 are “vague and opaque”:

DOL has not made clear, in its regulations, what it means by an SVP of 7<8. Is it an SVP of 7, higher than 7 but lower than 8, or an SVP of 8? It is our position that an SVP of 7<8 represents a continuum of 7 up to and including 8. This position requires a bachelor degree plus 3 years of experience. Our requirements equate to 5 years of training/experience, well within the confines of an SVP 7 < 8 and therefore the requirements are normal.

*Matter of Wissen, Inc.*, 2009-PER-00405 (Bd. Alien Lab. Cert. App. Apr. 15, 2010)<sup>28</sup>

The Employer also contended that education and experience requirements for the position should not be combined to determine whether the requirements of the position are within the SVP or exceed it. *Id.* BALCA disagreed and held that the employer's requirements exceed the top end of the SVP of 7, which is 4 years. “Although the Employer argued that education and experience should not be combined, this is plainly incorrect.” *Id.* “Moreover in translating degrees into years for the purpose of SVP, clearly envisioned that SVP levels include both.” *Id.*

A slightly different issue involving the SVP was raised in *Roberto's Mexican Food, Inc.*, 2009-PER-00206 (Bd. Alien Lab. Cert. App. Mar. 31, 2010) and *La Cantina Toscana*, 2009-PER-00237 (April 7, 2010). Both cases involved PERM applications for a Cook and the issue was the top SVP value within a JobZone. The position summary in O\*Net for a Cook under the “Job Training” portion of the JobZones stated that employees in these occupations “need anywhere from a few months to one year of working with experienced employee.” BALCA noted that “when the SVP range is stated as “4.0 to < 6.0,” it means that O\*Net determined the SVP to be anywhere from three months up to including one year. Stated another way, the top end of the experience requirement must be *less* than the lowest limit of the SVP of 6.0 (over 1 year and up to including 2 years).”

The issue of the SVP's upper limit was again raised in *Fortune Dev. Sales*, 2010-PER-00388 (Bd. Alien Lab. Cert. App. Mar. 30, 2011). In this case, the employer filed a

PERM for an Investment Analyst and required a Bachelor Degree and five years of experience. The employer argued that the SVP provided by O\*Net is a range of 7-8 and that since an SVP of 7 is equivalent to four years of training and experience, while an SVP of 8 equals ten years of training and experience, the stated SVP range of 7-8 equals a training and experience range of four to ten years, and therefore a showing of business necessity was not required.

BALCA disagreed with the employer. Citing *Wissen, Inc.*, 2009-PER-00405 (April 5, 2010), it noted that an SVP range of “7.0 to <8.0” requires “anywhere from two years up to and including four years. Stated another way, the top end of the total preparation required must be *less* than the lower boundary of SVP of 8.0 (over 4 years and up to and including 10 years).” BALCA stated that for Investment Analyst, O\*Net lists an SVP range of “7.0 to < 8.0” and the overall experience is described as “[a] minimum of two to four years of work-related skill, knowledge, or experience.” The SVP range thus requires experience from two years up to and including four years. Since the employer has stated a requirement of seven years of education, training and experience, the employer had to prove a business necessity for such a requirement under 20 C.F.R. § 656.17(h)(1). *Fortune Dev. Sales*, 2010-PER-00388 (Bd. Alien Lab. Cert. App. Mar. 30, 2011)

Under current precedent, numerous jobs would exceed the SVP codes. As stated earlier, SVP codes were initially assigned to jobs listed in the Dictionary of Occupational Title. When the National Center for O\*Net Development was looking for the best way to connect occupations with people, it determined that the SVP is the best and most simple approach because it is the common denominator of an employee and a job.<sup>29</sup>

However, the O\*Net used the SVP codes to fit the jobs from over 11,000 DOT jobs into 1,122 occupational units (OU). The ratings generated by averaging SVP ratings for the representative DOT job codes facilitated the classification of the 1,122 O\*NET OUs into five Job Zones.<sup>30</sup> When the O\*Net collapsed the various jobs into occupational units, it averaged the SVP codes from the different jobs but if the SVP of a specific occupational unit had a fractional amount, the O\*Net eliminated the fractional amount and retained the whole number only. Thus, if an occupational unit ended up with average SVP of 7.89, the final result would be 7. In 2002 the DOL used this analysis to interpret the Job Zones as encompassing the SVP level only on the lower level of the job zone.<sup>31</sup> As a result many jobs were downgraded to a lower SVP than before, and may now require business necessity documentation.

#### **4. Documenting Business Necessity**

As noted above, the regulations impose limitations on the job opportunity requirements. Unless adequately documented as arising from business necessity, the requirements must be those (i) normally required for the occupation and (ii) must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones, and (iii) must not require a foreign language, and

(iv) must not be a combination of occupations.<sup>32</sup> To be normal, the job must meet each condition. *Lucky Horse Fashion, Inc*, 1997-INA-182 (Aug. 22, 2000) (en banc) (. requirements must be read conjunctively).

If the requirements do not meet any of the above conditions, they are not normal. The PERM regulations identify four occasions that require an employer to document business necessity.<sup>33</sup>

- if the job requirements are not those normally required for the occupation;<sup>34</sup>
- if the job requirements exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*Net job zones;
- if the job requires foreign language;
- if the job involves a combination of occupations;

To establish a business necessity, “an employer must demonstrate that 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.” 20 CFR § 646.17(h)(1)(2005)

#### **5. The two-part test to establish business necessity.**

BALCA defined the test for business necessity in *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989)(en banc). To establish a business necessity, an employer must demonstrate that the job duties and requirements

- (i) bear a reasonable relationship to the occupation in the context of the employer's business, and are**
- (ii) essential to perform the job in a reasonable manner.**

We can break down the DOL's description of “business necessity,” further into four elements, each of which must be satisfied:

- (i) the *job duties* must bear a reasonable relationship to the occupation in the context of employer's business;
- (ii) The *job duties* must be essential to perform the job in a reasonable manner;
- (iii) the *job requirements* must bear a reasonable relationship to the occupation in the context of employer's business;
- (iv) The *job requirements* must be essential to perform the job in a reasonable manner.<sup>35</sup>

A *foreign language requirement* must always be justified by business necessity. In case of foreign language, business necessity can be based on

- (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.<sup>36</sup>
- (C) Needing to communicate with co-workers or subordinates who can not effectively communicate in English and/or having a working environment where safety considerations would support a foreign language requirement have been added to the ways to justify business necessity for a foreign language requirement.

A job opportunity that involves a *combination of occupations*, must be justified either with employer practice, industry practice, or business necessity. If the employer's practice or the industry practice is to combine occupations, the "business necessity" requirement is not triggered if :

- (i) the employer has normally employed persons for that combination of occupations,
- (ii) and/or workers customarily perform the combination of occupations in the area of intended employment,
- (iii) and/or the combination job opportunity is based on a *business necessity*. Combination occupations can be documented by
  - (A) position descriptions and relevant payroll records,
  - (B) and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment,
  - (C) and/or documentation that the combination occupation arises from a business necessity.<sup>37</sup>

BALCA held that under this standard an employer cannot obtain alien labor certification by showing that the job requirements merely "tend to contribute to or enhance the efficiency and quality of the business," nor does an employer have to establish dire financial consequences if the job is not filled or is filled by a U.S. worker who is not fully qualified.<sup>38</sup>

Therefore, the starting point in establishing business necessity is analysis of the duties in the context of the employer's business. In order to meet both prongs of *Information Industries, Inc.*, the employer must establish a link between the business itself and the job duties and requirements. This necessarily requires thorough understanding of the business itself as well as the industry. As any requirement must be reviewed against the business itself, every aspect of the business is

important, as any of them may justify the business necessity for the employer's requirements:<sup>39</sup>

- product
- research
- equipment
- techniques
- management
- workforce
- customers
- vendors
- markets
- processes
- procedures
- logistics
- operations
- marketing and sales
- services

For example, if the job requires a foreign language, because of the business's clients, or the business's workforce, it is important to identify the clients or the workforce and specify why a foreign language is required. Thus, if the clients prefer to speak in the foreign language, and would take their business elsewhere if they cannot, or if the workforce's safety requires communication in the native language, business necessity may be established.

The second prong of the test requires that the job requirement is relevant to the job duties. If a foreign language is required, the employer must describe how the employee will perform its duties by communicating, reading, or translating in the foreign language. Similarly, if a computer professional needs to know particular programs, the employer must describe how the employee will use the knowledge of the particular programs to achieve particular objectives. Although in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1990) (*en banc*), BALCA noted that the test applied only to job requirements and not to job duties, it is incumbent upon the employer to relate the job requirements to the job duties with a specific objective in mind in the context of the employer's business.

Therefore, for a successful PERM, it is important to understand not only the particular job, but the *employer's business* and *industry* as well, because the employer must show that the requirements are reasonable in the context of this employer's business and the industry, and are essential to perform the job duties in a reasonable manner for this particular business. If an employer's requirements are not reasonable in the context of the employer's business and are not essential to performing the job duties in a reasonable manner the employer cannot meet the test of business necessity.

*Information Industry* gives an example of a job requirement for a lawyer to know how to play golf. Although this requirement may make sense in an employer's business, it is not essential to perform the duties for this particular job. Thus although a lawyer that can play golf may "tend to contribute to or enhance the efficiency and quality of the business socially and perhaps even economically, playing golf generally does not bear a reasonable relationship to the occupation of practicing law."<sup>40</sup> No amount of documents can justify this requirement as a business necessity.

Most employers have reasonable requirements, which would have been normal had the DOL decided to treat the job zones as zones, instead of a lower boundary (for example JobZone 4, where SVP is 7 but less than 8 is treated as SVP 7). Therefore, employers can and should be able to document requirements for a higher degree or more experience, as a business necessity. Although exceeding the SVP may increase the likelihood of an audit, it is entirely possible to draft a job description offensively, with enough information to allow the Certifying Officer to decide based on the job description alone that the job requirements are normal. Drafting a job description offensively, while likely decreasing the audit odds, does not alleviate an employer from the requirement to document business necessity (which will be needed if the case is audited and the employer must respond defensively with documentation).

## 6. Business necessity cases

**Need for specific documentation.** To establish business necessity, the employer's mere statement that job requirements are normal is not enough. The employer must be specific and identify the sources and bases for these assertions in the context of its business. Counsel's statements are not evidence unless counsel has personal knowledge.

In *Matter of Gencorp*, 87-INA-659 (Jan. 13, 1988), BALCA stated that written assertions which are "reasonably specific and indicate their sources or bases shall be considered documentation." See *ARCO Oil & Gas Company*, 89-INA-295 (May 22, 1991) (Ph.D. degree was justified by a business necessity for the position of "Senior Research Reservoir Development Sedimentologist and Geologist."). The employer cannot meet its burden of establishing business necessity with vague and incomplete documentation. *Analysts International Corporation*, 90-INA-387 (July 30, 1991).

In other words, the employer must be specific and identify the sources and bases for these assertions in the context of its business. For example, in *Matter of Tri-P's Corp., d/b/a Jack-In-The-Box*, 87-INA-686 (1989) (en banc), the employer required familiarity with Jack-In-The-Box fast food operations. BALCA, however, denied certification explaining that the employer's affirmation that this requirement is normal is deficient, because the employer "has not explained nor has it documented why Jack-In-The-Box operations are so different that an applicant who has general fast-food managerial experience cannot perform the duties of Jack-In-The-Box

manager after a reasonable amount of training.” BALCA gives substantial persuasive weight to statements from disinterested third parties in regard to establishing business necessity.

In *Fortune Dev. Sales*, 2010-PER-00388 (Bd. Alien Lab. Cert. App. Mar. 30, 2011), a letter from the employer’s HR Manager that described the duties of an Investment Analyst as “highly specialized” and requiring a “great deal of expertise and knowledge” without providing further detail or industry information did not meet the burden to justify business necessity. BALCA found that the employer’s letter in support of a business necessity written by the HR Manager was inadequate.

In contrast, in *PayMed/Health Assistance for Travelers, Inc.*, 89-INA-166 (Feb. 6, 1990), the employer filed a labor certification for a Medical/Health Services Administrator” to provide services to Canadian tourists in the U.S. The employer sought medical license in Florida and Canada. The CO found the requirements for a Canadian license unduly restrictive, however, BALCA disagreed, noting that in support of this requirement, the employer submitted a letter from the Ontario Ministry of Health confirming that it is necessary for any physician employed by Pay Med/Health Assistance for Travelers, Inc. to have a Canadian medical license.

In order to draft a job description offensively there are various approaches an employer can incorporate to provide enough information to the CO that the business necessity standard is met and no audit is required. However, the employer must document business necessity if the case is audited.

**Describe and incorporate in the job description supervisory duties, salary, and the educational credentials of people supervised.** For example, a well-drafted job description for a Chief Accountant, which describes the size and complexity of the employer, and lists supervisory duties over other accountants may avoid audit even though the employer requires a Master’s Degree. In *Matter of The Cherokee Group*, 91 -INA- 280 (1992), BALCA held that where the employer is seeking a labor certification for the position of Chief Accountant “of a sizeable corporation, with supervisory duties over six other accountants, we conclude that Employer's requirement of a Master's degree in accounting is normal for the job.”

Likewise, in *Matter of Key Management Group, Inc.*, 94-INA-00590 (1996), BALCA found that the following special requirements were justified on business necessity grounds for a Chief Computer Programmer: “Experience must be with business applications, including programming ability with AS/400, S/36, PS/2 and UNIX. Must be fully familiar with RPG, Cobol, and networking. Must have knowledge of imaging, 4th generation languages and upper and lower case tools like SYNON, LANSA, and ADW. Must have knowledge of relational RDBM's like ORACLE and INFORMIX.” BALCA noted that the CO incorrectly determined that “the chief programmer should not be required to have a higher skill knowledge than the 20 programmers under his supervision.”

**Describe and incorporate in the job description the employer's, type, size and the position's complexity.** A well-drafted job description will describe the size and complexity of the employer within the job description. In *Matter of Verifone, Inc.* 91-INA-98 (1992) the employer filed a labor certification for a Market & Product Development, V.P. and listed the following duties: "A Master's Degree, or equivalent, in Business Administration, and 7 years of experience in the job offered, or 7 years experience in International Marketing experience with computer, or electronic goods.". The application included other special requirements: "Experience in directing marketing personnel and engineers, performing marketing research, directing marketing strategies, preparing budgets, and providing technical consultation; and knowledge of electronic markets in Asia, Europe, and the U.S., data processing, an information systems, operations research, accounting, and International Marketing/finance sought." BALCA concluded that the employer has met its burden because "the position in this case is a Vice President for Marketing and Product Development in an electronic goods firm employing over 800 persons, with gross annual sales in excess of \$120 million. The Vice President will supervise 280 professional employees, many of whom have Bachelor's Degrees, and commands a salary of \$120,000 per year." Similarly, in *American Export Trading Co.*, the job requirements for a lawyer experienced in international trade issues was shown where the statement from employer explaining duties and the litigious nature of its business was found to be adequate to meet Information Industries criteria. 1988-INA-220 (June 15, 1990) (en banc)

**Describe and incorporate in the job description customer's expectations to maintain the employer's credibility.** In *Matter of Verifone, Inc.* 91-INA-98 (1992), BALCA accepted as business necessity the expectations of potential clients to protect the employer's credibility. BALCA found the employer's requirements justified where the employer had stated that "potential clients expect the Vice President to be well-educated and have a long history of prior experience; that to hire a person with fewer qualifications would cost the company credibility, confidence of clients, and loss of business."

**Describe and incorporate in the job description clients' specifications.** In *Matter of Princeton Information, Ltd.* 91-INA-116 (1992), the Certifying Officer found that the requirements for a Master's Degree for a Systems Consultant was unduly restrictive. The employer submitted a letter from its client AT&T that stated that "nearly all of the System Consultants employed by us possess Master's degrees as opposed to Bachelor's degrees. In our experience, an individual with only a Bachelor's degree will not be able to perform the above-mentioned responsibilities which, in turn, will adversely affect our business." BALCA determined that Master's degree is justified on business necessity because "the client is insisting that a person with such a degree be furnished for the particular consultation position involved in the instant case. . . The context of the Employer's business is that it furnishes consultants to its clients in accordance with the client's specifications. Consequently the Master's degree requirement bears a reasonable relationship to such business as

it is being required by the client. It follows that it is essential to the performance of the consulting position that the employee have the required degree.”

**Describe and incorporate in the job description contract requirements.** BALCA has found that an employer has justified requirements for specific coursework and GPA (as measurement of knowledge) where a contract with its most important customer requires it. In *Matter of Waste Documentation and Control, Inc*, 89-INA-229 (1990), the employer produced documentation that similar Research and Development firms require a G.P.A. of 3.5 and produced a letter from its client that reported that experience and expertise in Expert Systems was essential to continuing one of its most important contracts. The letter stated, in part “The development of software systems for Fluor Daniel requires experience with artificial intelligence Expert Systems... Waste Documentation and Control, Inc. must maintain this experience in order to be able to continue to work under our existing technical services contract. . . .”

**Whenever experience is at issue, ensure that the business necessity justifies not just the type of experience but the length of such experience** In *Venture International Associates, Ltd.*, the employer established business necessity in requiring experience with protocol relating to VIPs and foreign investors. However, while the employer established that such experience was necessary it failed to establish that *three* years of such experience was necessary. 1987-INA-569 (Jan. 13, 1989) (en banc).

**Business necessity may be triggered whenever the requirements are lesser than the ones defined by the O\*Net.** For example, the CO found unduly restrictive job requirements where the employer required one year of secretarial college. The CO properly found that this was unduly restrictive: "One year of college would not guarantee a successful employee, especially when no degree or diploma is required. Requiring one year of college without a certificate of completion would only serve to exclude qualified U.S. workers who may have demonstrated experience as successful secretaries who have not attended college for one year." *Business Men's Insurance*, 1988-INA-78 (May 31, 1989) (en banc)

**Describe and incorporate in the job description prior employment practices and accreditation requirements.** In *Matter of Adelpi Laboratory, Inc.*, 93-INA-285 (1994), the employer sought a labor certification for the position of Clinical Laboratory Technologist and required a Bachelor of Science degree in medical technology or biochemistry and 2 years experience in the job offered. The employer also listed special requirements as the ability to perform diagnostic immunology and diagnostic immunohematology tests. The Certifying Officer denied certification because the special requirements were unduly restrictive. However, BALCA reversed, finding that the employer has provided sufficient documentation that it has consistently required the ability to perform immunology and immunohematology tests in all Medical Technologists it has previously hired. In addition, BALCA found that the requirements are based on business necessity

because the ability to perform these tests were necessary in order for the employer to maintain its ability to service its clients, as a diagnostic medical service, and failure to list these requirements would jeopardize the Employer's continued accreditation by the state of New York.

Similarly, in *Highland Hospital of Rochester*, 88-INA-564 and 569 (Nov. 16, 1989), the employer's professional judgment was accorded "particular respect" where the job opportunity was for a "Resident, Internal Medicine," and the question was the business necessity for a special requirement that graduates of foreign medical schools have either one year of residency training in a University hospital, or formal clinical education in an American teaching hospital. BALCA agreed that such deference was appropriate because the position involved patient contact. The employer has supported its judgment regarding the need for adequate clinical experience with reports of the Comptroller General and various medical articles showing the inadequacies of medical schools in certain countries, and evidence that many U.S. hospitals have even more stringent requirements.

#### **7. Unduly restrictive requirements - foreign language.**

**Describe and incorporate in the job description the need for a foreign language of the business and describe performance of the duties by using a foreign language.** The business necessity standard of Information Industries, 88-INA-82 (Feb. 9, 1989) (en banc) applies to a foreign language requirement. See *Coker's Pedigreed Seed Co.*, 88-INA-48 (Apr. 19, 1989) (en banc). Under the first prong, the job description must describe the business in regards to clients, co-workers, contractors, or employees who speak a foreign language, and identify what percentage of the employer's business involves this foreign language. Under the second prong, the job description must include duties which will be performed using the foreign language.

**Describe and incorporate in the job description the significant portion of clients who speak the foreign language.** There is not a bright line as to what exactly is a "significant" portion of the business to establish business necessity for a foreign language. It depends on percentages named as well as significance of the client.

In *Raul Garcia M.D.*, 89-INA-211 (Feb 4, 1991), BALCA found that the first prong was met because a significant share of the employer's business was conducted in the foreign language. The employer submitted copies of 100 bills issued to patients with Spanish surnames and argued that this should be enough because further supporting evidence would be difficult to collect due to confidentiality issues. BALCA held that they did not dispute the employer's credibility and "[t]he weight to be given to statements not capable of support by independent documentation must depend in large measure on the credibility of the person making the statement. . . . In this particular case we can well see the business necessity of a therapist being able to converse with patients in their native tongue even if the patients are

bilingual.” Similarly, in *Construction and Investment Corp., dba Efficient Air*, 88-INA-55 (Apr. 24, 1989) (en banc), the employer met its burden that Arabic was a business necessity because a significant share of its business operations included negotiating contracts and financial agreements with Middle Eastern clients. The Employer submitted letters from prospective clients in the Middle East, written in English, stating “Please contact us as soon as possible for arrangements to send your rep. with the prices, catalogues, to my country (Damascus). For our convenience, he must speak arabic.” BALCA concluded that the written statement of the employer constitutes documentation, since it is reasonably specific and indicates its sources and bases.

**Describe the use of foreign language in order to perform the duties of the position.** Just because a significant portion of the clients speaks a foreign language is not sufficient to establish business necessity. The employer must show that there is a relationship between the clients, the use of foreign language, and job to be performed. To meet the second prong of the test, the employer must show that the use of the foreign language is essential for the reasonable performance of the job duties. Therefore the employer must establish that the use of the language is essential for performance of the job duties in a reasonable manner. The employer can show that there is a frequent and continuous need to communicate in the foreign language. In *International Student Exchange of Iowa, Inc.*, 89-INA-261 (Apr. 30, 1991), aff'd, 89-INA-261 (Apr. 21, 1992) (en banc) (per curiam), the employer showed that the assistant to the placement administrator had to use foreign languages in correspondence to parents of international students between 40 to 80 percent daily. BALCA noted, that the detailed statement of the employer was convincing.

**Describe the use of foreign language in terms of clients’ preference and preventing the clients from taking their business elsewhere.** The Board has found in some decision that where the employer’s clients prefer to communicate in the foreign language, this would support business necessity. For example, in *Mr. Isak Sakai*, 90-INA-330 (Oct. 31, 1991) BALCA found that business necessity was established because 20 to 30% of the employer's business involved clients who would take their business elsewhere if they could not conduct business in Farsi. Note that the preference must be not of the employer but of its customers. In *Alywa Computer Corp.*, 88-INA-218 (Sept. 21, 1989), BALCA noted, that the employer has clearly documented that the Chinese language requirement bears a reasonable relationship to the position of Financial Controller, in the context of Employer's business, since the company transacts all of its business with companies located in Taiwan. BALCA disagreed with the CO, who had denied certification because speaking Chinese was only a preference of the clients. BALCA stated, “even assuming the CO's statement is true, this preference is a preference on the part of the companies with which Employer does business; it is not Employer's preference. The regulations do not require Employer to document that these companies' use of the Chinese language is a business necessity, only that Employer's requirement of fluency in Chinese arises from business necessity. . . If the companies with whom Employer does business choose to transact business in Chinese, as was asserted

without contradiction by Employer, then it is a business necessity, not a preference, for Employer's employees who deal with these companies to be able to communicate in Chinese.”

**Identify the safety issues for the employer’s workforce justifying the need for requirement of foreign language. Also, describe the need to communicate with vendors and suppliers especially in regard to technical matters.** In *Tel-Ko Electronics, Inc.*, 88-INA-416 (July 30, 1990) (reconsideration en banc) the employer met the requirements for business necessity because it showed that a significant portion of its suppliers require communication in a foreign language for technical matters.

**If the need to communicate in foreign language is due to the plans to expand in foreign or ethnic markets, describe with specificity these plans and if expansion is in ethnic markets, identify the sources showing that the population spoke the foreign language.** Note that BALCA has announced that it will apply strict scrutiny to documentation presented in cases involving foreign language requirements that are based on proposed plans for expansion into foreign markets. *Cable Car Photo and Electronics*, 90-INA-141 (June 5, 1991). In *Remington Products, Inc.*, 89-INA-173 (Jan. 9, 1991) (*en banc*), BALCA noted that where the employer has provided documentation that approximately forty percent of the people in the expansion area do not speak English, and that advertisements would be in the native language, business necessity was met. The employer has provided numerous internal and external documents, price lists, and foreign language advertisements.

#### **8. Unduly restrictive job requirements: business necessity: combination of duties:**

The regulations require that if a job opportunity contains a combination of duties, the employer must document that 1) it has normally employed persons for that combination of duties, and/or 2) that workers customarily perform the combination of duties in the area of intended employment, and/or 3) that the combination job opportunity is based upon business necessity.<sup>41</sup> ”

The first two prongs of this provision, the "normally employed" and "industry norm" tests, are fairly straightforward and easily applied. For example, the Board has previously held that, where a combination of duties is consistent with the description of the job in the Dictionary of Occupational Titles (DOT), the combination is normal and business necessity need not be shown. *Alan Bergman Photography*, 88-INA-404 (Sept. 28, 1989). Similarly, in *Van Boerum & Frank Associates*, 88-INA-156 (Dec. 5, 1989), a small engineering firm justified a combination of managerial and training duties by documenting that, although it had never used the combination, it was customarily used by firms in the area of intended employment.

The business necessity prong in “combination of duties” cases is only reached if the employer cannot establish one of the first two prongs. Accordingly, for a combination of duties to be based on business necessity an employer must

document that it is necessary to have one worker performing the combination of duties, in the context of the employer's business, including a showing of such a level of impracticability as to make the employment of two workers infeasible. The intent of this formula is to focus the parties on addressing the fundamental issue of why it is necessary to have one worker perform the duties instead of two or more. Implicit in this standard is a showing by the employer that reasonable alternatives such as part-time workers, the purchase of new equipment, and a reordering of responsibilities within the organization are infeasible. In addition, though not necessary to satisfy the test, a showing that the duties are essential to perform each other would weigh heavily in favor of business necessity. A mere showing that the combination produces financial savings, or adds to the efficiency or quality of the employer would not satisfy the above standard. If the employer can establish the business necessity of the combination of duties, it must still establish the business necessity under the Information Industries standard of the job requirements for each set of duties. *Robert L. Lippert Theatres*, 1988-INA-433 (May 30, 1990) (en banc)

### **Summary**

The employer must provide a detailed statement, describing the industry, business, its needs, its complexity, its clients, its workforce, contracts, prior hiring practices, and the job requirements in terms of goals for the business. Every statement must indicate its source with specificity. The employer must provide documentation from disinterested parties to back up its statements. To document language requirements, if they are not obvious from the occupation, the employer must describe its business, detailed plans, clients, preferences, and describe the requirements in terms of duties to be performed. Each statement of the employer must identify the source of the information. Remember, mere assertions are not enough!

### **Checklist to Document Business Necessity**

- The employer should also document education and experience requirements with job postings from similar organizations (i.e., printouts from job search websites)
- Affidavits from supervisors or project managers directly responsible for the position.
- Letters from clients seeking specific educational credentials or experience;
- Contracts with clients that specify certain experience and educational credentials;
- Accreditation requirements;
- Evidence of prior hiring practices;

- Letters from professional organizations in the field familiar with the occupation, attesting that the education and experience is justified for the particular job;
- Expert opinions familiar with the industry;
- Letters from academic institutions attesting that a specific level of knowledge can only be attained by a certain degree;
- Letters or assessments from Risk Managers or insurance companies assessing risk if certain requirements are not present;
- Letters from venture capitalists, that require certain credentials in order to invest in the business, and others.

### **Foreign Language**

- The employer must submit documents showing the number of its clients and the proportion that do not speak English;
- Letters from customers, vendors, clients, contractors, indicating the need to communicate in foreign language;
- Copies of advertising in ethnic directories, newspapers, or other media;
- Printout of webpages in foreign language;
- Detailed marketing plan to expand in a foreign country;
- Detailed description why the workforce needs clear guidance in the foreign language (i.e., safety issues), and others.

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<sup>1</sup> 69 FR 77326 (Dec. 24, 2004)

<sup>2</sup> Under section 212(a)(5)(A) of the Immigration and Nationality Act (INA or Act) (8 U.S.C. 1182(a)(5)(A)), before the Department of Homeland Security (DHS) may approve petition requests and the Department of State (DOS) may issue visas and admit certain immigrant aliens to work permanently in the United States (U.S.), the Secretary of Labor (Secretary) must certify to the Secretary of Homeland Security and the Secretary of State that:

(a) There are not sufficient U.S. workers who are able, willing, qualified, and available at the time of the application for a visa and admission into the United States and at the place where the alien is to perform the work; and

(b) The employment of the alien will not adversely affect the wages and working conditions of similarly employed U.S. workers.

If the Secretary of Labor, through the Employment and Training Administration (ETA), is satisfied in his or her review of a sponsoring employer's application for certification that these two requirements have been met, he or she so certifies by granting a permanent labor certification. If DOL cannot make both of the above findings, the application for permanent labor certification is denied. The Department of Labor's regulation at 20 CFR part 656 governs the labor certification process for the permanent employment of immigrant aliens and sets forth the responsibilities of employers who wish to employ immigrant aliens permanently in the United States.

<sup>3</sup> The Standard Occupational Classification (SOC) system is used by Federal statistical agencies to classify workers into occupational categories for the purpose of collecting, calculating, or disseminating data. All workers are classified into one of 840 detailed occupations according to their occupational definition. To facilitate classification, detailed occupations are combined to form 461 broad occupations, 97 minor groups, and 23 major groups. Detailed occupations in the SOC with similar job duties, and in some cases

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skills, education, and/or training, are grouped together. See, <http://www.bls.gov/soc/> (last accessed May 5, 2013). The O\*Net is a database containing information on hundreds of standardized and occupation-specific descriptors. O\*Net job descriptions contain several standard elements, one of which is a “Job Zone.” An O\*Net Job Zone “is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work.” The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable SVP. *Matter of La Cantina Toscana*, 2009-PER-00237 (Bd. Alien Lab. Cert. App. Apr. 7, 2010). For more information, See <http://www.onetcenter.org/research.html> (last accessed May 5, 2013).

<sup>4</sup> 69 FR 77332 (Dec 27, 2004).

<sup>5</sup> 69 FR 77327 (Dec. 24, 2004)

<sup>6</sup> 69 FR 77327 (Dec. 24, 2004)

<sup>7</sup> 69 FR 77326, 77330 (Dec. 24, 2004) (“We view centralized application processing as a customer-friendly change that will simplify the labor certification application process...”). See also *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 FR 27904-01 (Jul. 16, 2007)

<sup>8</sup> 69 FR 77332 (Dec 27, 2004).

<sup>9</sup> The Department laid the groundwork for greater integrity and security during the planning and promulgation of the 2004 Final Rule to implement the re-engineered PERM system. While fraud prevention has always been a goal of the Department's labor certification programs, our continuing program experience and that of other Federal agencies has demonstrated the need to focus on the specific opportunities for fraud and abuse addressed in this rule. *Labor Certification for the Permanent Employment of Aliens in the United States; Reducing the Incentives and Opportunities for Fraud and Abuse and Enhancing Program Integrity*, 72 FR 27904-01 (Jul 16, 2007)

<sup>10</sup> The O\*Net is a database containing information on hundreds of standardized and occupation-specific descriptors. O\*Net job descriptions contain several standard elements, one of which is a “Job Zone.” An O\*Net Job Zone “is a group of occupations that are similar in: how much education people need to do the work, how much related experience people need to do the work, and how much on-the-job training people need to do the work.” The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation. Each Job Zone level specifies the applicable SVP. *Matter of La Cantina Toscana*, 2009-PER-00237 (Bd. Alien Lab. Cert. App. Apr. 7, 2010). O\*NET OnLine was developed for the U.S. Department of Labor by the National Center for O\*NET Development and can be found at <http://online.onetcenter.org> (last accessed Apr. 9, 2008).

<sup>11</sup> There is much need for business necessity documentation as a result of the O\*Net downgrading the SVP levels, its interpretation of the job zones inconsistently with the SVP ranges, and the DOL's position that the SVP in the lowest range of a job zone is the SVP for an occupation (i.e., that job zone of SVP 7<8 means only 7).

<sup>12</sup> *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 FR 77326-01.

<sup>13</sup> 20 CFR § 646.17(h)(1)(2005) (The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones.)

<sup>14</sup> See n. 13.

<sup>15</sup> Although business necessity is triggered by job requirements that are not normal and not the actual job duties, the job requirements must bear reasonable relationship to the job duties.

<sup>16</sup> DOL ETA, Permanent Labor Certification Program, Final Regulations, Frequently Asked Questions (PERM FAQ 1), available at , <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#jobreq1> (last

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accessed on Apr. 9, 2008). On or after January 1, 2010, the functions of SWAs were transferred to the NPC. Upon receipt of a written request for a PWD on or after January 1, 2010, the NPC will determine whether the occupation is covered by a collective bargaining agreement which was negotiated at arms length, and, if not, determine the arithmetic mean of wages of workers similarly employed in the area of intended employment. The wage component of the Bureau of Labor Statistics Occupational Employment Statistics survey shall be used to determine the arithmetic mean, unless the employer provides an acceptable survey. The NPC shall determine the wage in accordance with secs. 212(n) and 212(t) of the INA. If an acceptable employer-provided wage survey provides a median and does not provide an arithmetic mean, the median shall be the prevailing wage applicable to the employer's job opportunity. In making a PWD, the Chicago NPC will follow 20 CFR 656.40 and other administrative guidelines or regulations issued by ETA. The Chicago NPC shall specify the validity period of the PWD, which in no event shall be for less than 90 days or more than 1 year from the date of the determination. Labor Certification Process and Enforcement for Temporary Employment in Occupations Other Than Agriculture or Registered Nursing in the United States (H-2B Workers), and Other Technical Changes, 73 FR 78020-01

<sup>17</sup> ETA Form 9141

<sup>18</sup> <http://www.onetonline.org/link/summary/15-1121.00> (last accessed May 3, 2013)

<sup>19</sup> <http://www.onetonline.org/link/summary/15-2031.00> (last accessed May 3, 2013)

<sup>20</sup> PERM FAQ, <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#jobreq1> (last accessed on Apr. 9, 2008).

<sup>21</sup> 69 FR 77332 (Dec. 24, 2004)

<sup>22</sup> Compare 69 FR 77332 (December 27, 2004) (In administering this final rule, the Dictionary of Occupational Titles (DOT) will no longer be consulted to determine whether the training and experience requirements are normal; O\*NET will be used instead.) with the PERM FAQ 1 at 17 (In administering this final rule, the Dictionary of Occupational Titles (DOT) will no longer be consulted to determine whether the training and experience requirements are normal; O\*NET will be used instead.) <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#jobreq1> (last accessed on Apr. 9, 2008).

<sup>23</sup> PERM FAQ, <http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#jobreq1> (last accessed on Apr. 9, 2008).

<sup>24</sup> 20 C.F.R. Sec. 656.3 Definitions

<sup>25</sup> 20 C.F.R. Sec. 656.3 Definitions

<sup>26</sup> (DOT, U.S. Department of Labor, 1991)

<sup>27</sup> For a detailed explanation of the JobZones, See Procedures for O\*NET Job Zone Assignment, The National Center for O\*NET Development (March 2008), available online at <http://www.onetcenter.org/reports/JobZoneProcedure.html> (last accessed May 4, 2013).

<sup>28</sup> For an interesting mathematical approach agreeing with the employer's argument see David Froman, *A Math Major's Take on JobZones and Matter of Wissen, Inc.* 17 Bender's Immigr. Bull. 1133 (May 15, 2012).

<sup>29</sup> See generally, Rod McCloy, Gordon Waugh, Gina Medsker et al., Determining the Occupational Reinforcer Patterns for O\*NET Occupational Units, National Center for O\*NET Development (Volume I, 1999), available online at <http://www.onetcenter.org/reports/ORP.html>.

<sup>30</sup> National Center for O\*Net Development (1999), Stratifying Occupational Units by Specific Vocational Preparation SVP at 15-16. The five Job Zones used with the O\*NET Career Exploration Tools present the user with five broad groupings of OUs that may be explored. Descriptions of the five operational strata (i.e., Job Zones) and their SVP boundaries are provided below. Sample OUs from each of the Job Zones are provided in Table 2 above. The actual Job Zone definitions that are used in the O\*NET 98 Viewer and the Career Exploration Tools are presented in the Appendix.

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Job Zone 1: 182 OUs {Boundary - mean SVP < 4.0}. This Job Zone represents the lowest level of educational and training preparation and includes occupations that require up to 3 months of training. It includes a large number of less complex service occupations, as well as materials handlers and machine/equipment tenders or operators.

Job Zone 2: 265 OUs {Boundary - 4.0 less or equal mean SVP < 6.0}. This Job Zone includes occupations that are judged to require more than 3 months, but not more than one year, of occupation-specific training. It includes a large number of service positions as well as clerical, maintenance, and operator positions.

Job Zone 3: 259 OUs {Boundary - 6.0 less or equal mean SVP < 7.0}. Occupations in this Job Zone require from one to two years of occupation-specific training. Many different kinds of technicians, administrative personnel, and skilled machine operators fall at this level.

Job Zone 4: 287 OUs {Boundary - 7.0 less or equal mean SVP < 8.0}. This Job Zone includes occupations that require more than two years, but typically not more than four years, of specific training and education. A large number of professional and technical occupations fall in this category, as well as a broad range of supervisory and management positions.

Job Zone 5: 129 OUs {Boundary - 8.0 less or equal mean SVP}. This Job Zone represents the highest level of preparation and includes occupations that would require more than 4 years of specific education and training for achieving at least an average level of performance in the occupation. This would include most engineers, scientists, and high level professional positions, as well as directors/managers of scientific or professional personnel and occupations that require a very high level of technical skill (e.g., airline pilot, concert musician).

<sup>31</sup> The DOL agreed with the statement that “Correctly interpreted, an SVP of (7<8) means an SVP of 7, less than and not including 8 (i.e., SVP 7) , and an SVP of ( 6<7) means an SVP of 6 less than and not including 7 (i.e., SVP 6.) Therefore, Zones Three and Four do not provide ranges; they only reflect the lower SVP code, that is, SVP 6 for Zone Three and SVP 7 for Zone Four.” Minutes, AILA Liaison Meeting with DOL (Sept. 10, 2002), AILA Doc. 02101631.

<sup>32</sup> 20 C.F.R. § 656.17(h)

<sup>33</sup> 20 CFR § 646.17(h)(1)(2005) (The job opportunity’s requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation and must not exceed the Specific Vocational Preparation level assigned to the occupation as shown in the O\*NET Job Zones.)

<sup>34</sup> Although business necessity is triggered by job requirements that are not normal and not the actual job duties, the job requirements must bear reasonable relationship to the job duties.

<sup>35</sup> 20 C.F.R. § 656.17(h)

<sup>36</sup> 20 C.F.R. § 656.17(h)

<sup>37</sup> 20 C.F.R. § 656.17(h)

<sup>38</sup> Information Industries, Inc., 1988-INA-82 (Feb. 9, 1989)(en banc).

<sup>39</sup> A good checklist of the business analysis can be found in the definition of “specialized knowledge” found in the context of L-1B petition. Specifically, the regulation lists important aspects of any business each of which can be a basis for business necessity: organization's product, service, research, equipment, techniques, management, or other interests and its application in international markets, or ...the organization's processes and procedures.” 8 C.F.R. § 214.2. We have used these and have added additional business aspects. For a useful guidance, see also <http://www.quickmba.com/entre/business-model/> (last accessed May 9, 2013)

<sup>40</sup> Information Industries, Inc., 1988-INA-82 (Feb. 9, 1989)(en banc). N.9

<sup>41</sup> If the job opportunity involves a combination of occupations, the employer must document that it has normally employed persons for that combination of occupations, and/or workers customarily perform the combination of occupations in the area of intended employment, and/or the combination job opportunity is

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based on a business necessity. Combination occupations can be documented by position descriptions and relevant payroll records, and/or letters from other employers stating their workers normally perform the combination of occupations in the area of intended employment, and/or documentation that the combination occupation arises from a business necessity. *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 FR 77326-01. 20 C.F.R. § 656.17(h)(3).