

**U.S. Department of Labor**

Board of Alien Labor Certification Appeals  
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**Issue Date: 15 April 2010**

**BALCA No.: 2009-PER-00405**  
**ETA No.: A-071211-61757**

*In the Matter of:*

**WISSEN, INC.,**

*Employer,*

*on behalf of*

**HARISHPAL SINGH,**  
*Alien.*

Certifying Officer: William Carlson  
Atlanta Processing Center

Appearances: Kavitha Ramasami, Esquire  
New York, New York  
*For the Employer*

Gary M. Buff, Associate Solicitor  
Julia R. Fuma, Attorney  
Office of the Solicitor  
Division of Employment and Training Legal Services  
Washington, DC  
*For the Certifying Officer*

Before: **Colwell, Johnson and Wood**  
Administrative Law Judges

**DECISION AND ORDER**  
**AFFIRMING DENIAL OF CERTIFICATION**

**PER CURIAM.** This matter arises under Section 212 (a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (“C.F.R.”).

**BACKGROUND**

On July 31, 2007, the Certifying Officer (“CO”) accepted for filing the Employer’s Application for Permanent Employment Certification for the position of “Senior Software Engineer.” (AF 85-100).<sup>1</sup> 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. (AF 86). The Employer required that the applicant have a bachelor’s degree and three years of experience in the job offered. (AF 87).

On November 23, 2007, the CO issued an Audit Notification. (AF 81-84). In explaining the reasons for the audit, the CO found, “The employer’s stated minimum requirements exceed the SVP[<sup>2</sup>] level assigned by O\*NET to the SOC[<sup>3</sup>] code for the occupation identified in F-2 of ETA Form 9089, and the employer must, therefore, demonstrate its requirement as arising from business necessity. (AF 84). The CO stated 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.*

On January 22, 2008, the Employer responded to the Audit, submitting evidence of recruitment and documentation to demonstrate business necessity. (AF 28-80). The Employer asserted, “Although our requirements of a Bachelors Degree and three years of

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<sup>1</sup> In this decision, AF is an abbreviation for Appeal File.

<sup>2</sup> Specific Vocational Preparation.

<sup>3</sup> Standard Occupational Classification.

experience may be beyond the SVP listed by DOL, we believe that such requirements are normal for the position of Senior Software Engineer, based on the advanced knowledge and technical experience required to perform the position's highly complex duties and responsibilities.” (AF 56). The Employer contended that “[a]n individual who possesses merely a bachelor's degree in the above-stated fields will only have a basic theoretical knowledge of the same. Such an individual would not possess the skills, knowledge or ability to perform the highly complex duties without extensive supervision and constant guidance.” *Id.* In support of its argument, the Employer stated that it was “attaching real time advertisements to show that it is common for employers and the clients to require the same.”<sup>4</sup>

The CO denied certification on December 29, 2008, on the ground that “[t]he employer's stated minimum requirements exceed the SVP level assigned by O\*NET to the SOC code for the occupation identified in F-2 of ETA Form 9089, and the employer has not adequately documented its requirements as arising from business necessity.” (AF 25-27). The CO explained that the SVP derived from the Employer's education and experience requirements is 8.0, which is a total lapsed time for the education, training and experience listed of over 4 years. (AF 26). He determined that the SVP level assigned to the occupation is 7.0 to < 8.0, which permits a maximum of total lapsed time of preparation up to and including 4 years. The CO contended that the Employer's assertions alone are not sufficient to support that 5 years of training/experience is essential to perform the job. *Id.*

On January 28, 2009, the Employer submitted a request for review. (AF 3-24). The Employer asserted:

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

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<sup>4</sup> It is unclear what attachment the Employer is referencing here. The Employer included newspaper advertisements from the Star Ledger, where it advertised its position, but the Appeal File contains no additional advertisements. There were other computer advertisements in the Star Ledger; however the Employer did not mark any advertisements on the attached tear sheets or explain how they supported its position.

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.

(AF 3). 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. The Employer noted that it was attaching advertisements it found on the Internet for similar jobs, most of which require more education and experience than what it requested. (*See* AF 9-23).

On August 4, 2009, the CO issued a letter of reconsideration, finding that since the Employer had not demonstrated adequate business necessity supporting a job related need for requiring experience in excess of that established by O\*NET, the CO had determined the denial to be valid. (AF 1-2).

BALCA issued a Notice of Docketing on August 17, 2009. The Employer filed a Statement of Intent to Proceed with the appeal on September 8, 2009, but did not file an appellate brief. The CO filed a Statement of Position on October 1, 2009, contending that the Employer misread the regulations in its argument that normal requirements are sufficient for a grant of certification. The CO asserted, “The requirements must be normal for the position **and** must not exceed the SVP assigned in the O\*NET job zone.” (CO’s Brief at n.1)(emphasis in original). The CO further contended that the Employer had an opportunity to demonstrate business necessity for its education and experience requirements, but failed to do so.

## **DISCUSSION**

The regulation at 20 C.F.R. § 656.17(h)(1), provides, in pertinent part:

(1) 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. 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.

In the instant case, the CO properly found that the Employer's education and experience requirements exceeded the SVP assigned to the O\*Net Job Zone for a "Senior Software Engineer" position, and therefore properly directed the Employer in the Audit Notification to establish business necessity for its experience requirement as required by 20 C.F.R. § 656.17(h)(1).

The O\*Net is a database containing information on hundreds of standardized and occupation-specific descriptors.<sup>5</sup> 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."<sup>6</sup> The Job Zones are split into five levels, from occupations that need little or no preparation, to occupations that need extensive preparation.<sup>7</sup> Each Job Zone level specifies the applicable SVP.

In the instant case, the Employer's position was classified under the O\*Net Code 15-1031 – Computer Software Engineers, Applications. The position summary found on the O\*Net web site describing the Job Zone for the position states an SVP Range of 7.0 to < 8.0.<sup>8</sup> The O\*Net describes the various SVP levels of preparation as follows:

Level	Time
1	Short demonstration only
2	Anything beyond short demonstration up to and including 1 month
3	Over 1 month up to and including 3 months

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<sup>5</sup> [online.onetcenter.org/help/onet/](http://online.onetcenter.org/help/onet/).

<sup>6</sup> [online.onetcenter.org/help/online/zones](http://online.onetcenter.org/help/online/zones).

<sup>7</sup> *Id.*

<sup>8</sup> [online.onetcenter.org/link/summary/15-1031.00](http://online.onetcenter.org/link/summary/15-1031.00).

4	Over 3 months up to and including 6 months
5	Over 6 months up to and including 1 year
6	Over 1 year up to and including 2 years
7	Over 2 years up to and including 4 years
8	Over 4 years up to and including 10 years
9	Over 10 years <sup>9</sup>

The same definition is printed in the definitions section of the PERM regulations. 20 C.F.R. § 656.3. The position summary for O\*Net Code 15-1031.00 goes on to state under the “Job Training” portion of the “Job Zones” section: “*Employees in these occupations usually need several years of work-related experience, on-the-job training, and/or vocational training.*”<sup>10</sup> Thus, when the SVP range is stated as “7.0 to < 8.0,” it means that O\*Net determined the SVP level of preparation to be anywhere from two years up to and including four years.<sup>11</sup> Stated another way, the top end of the total preparation required must be *less than* an SVP of 8.0 (over 4 years and up to and including 10 years).

Per the preamble to the PERM regulations published in the Federal Register, the educational SVP equivalents are: a general associate degree is equivalent to 2 years, a bachelor’s degree is 2 years, a master’s degree is 4 years, and a doctorate is 7 years.<sup>12</sup> The Employer required 5 years of preparation for this position: a bachelor’s degree (2 years) and 3 years of experience. These requirements exceed the top end of the SVP, which is 4 years. Although the Employer argued that education and experience should not be combined, this is plainly incorrect. As the CO asserted in his appellate brief, the definition of SVP is broad enough to encompass both education and experience and by translating degrees into years of preparation. (CO’s brief at n.1). Moreover, as the CO

<sup>9</sup> [online.onetcenter.org/help/online/svp](http://online.onetcenter.org/help/online/svp) (citing U.S. Department of Labor. (1991). *Dictionary of Occupational Titles* (Rev. 4th ed.). Washington, DC: U.S. Government Printing Office).

<sup>10</sup> [online.onetcenter.org/link/summary/15-1031.00](http://online.onetcenter.org/link/summary/15-1031.00) (Job Zone Detail section) (emphasis added).

<sup>11</sup> As the CO asserted in his appellate brief, “<” is the universal symbol for “less than” and the Employer’s position that this symbol actually means “less than or equal to” is unsubstantiated.

<sup>12</sup> ETA, Final Rule, Labor Certification Process for the Permanent Employment of Aliens in the United States [“PERM”], 20 C.F.R. Part 656, 69 Fed. Reg. 77326, 77332 (Dec. 27, 2004).

argued, the preamble, found in the Federal Register publication of the final PERM rules, “in translating degrees into years for the purpose of SVP, clearly envisioned that SVP levels include both.”<sup>13</sup> *Id.* The Employer also argued that its requirement of a bachelor’s degree and three years of experience are normal for the position, but the regulations clearly state that the requirements must be those normally required for the occupation **and** must not exceed the SVP level assigned to the occupation. 20 C.F.R. § 656.17(h)(1).

Thus, in order to require 5 years of preparation for the job opportunity, the Employer had to establish business necessity. The seminal decision on business necessity was *Information Industries, Inc.*, 1988-INA-82 (Feb. 9, 1989) (en banc). The basic business necessity test is reflected in the PERM regulations at 20 C.F.R. § 656.17(h)(1): “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.” The Employer asserted in its audit response that an individual with merely a bachelor’s degree would only have “a basic theoretical knowledge” and would “not possess the skills, knowledge or ability to perform the highly complex duties without extensive supervision and constant guidance.”<sup>14</sup> (AF 56). This statement is no more than a generalized assertion and does not demonstrate how the Employer’s requirements are essential to perform the job in a reasonable manner, as is required for business necessity. Accordingly, the Employer’s statement is not sufficient to meet the Employer’s burden of proof.<sup>15</sup>

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<sup>13</sup> ETA cited Field Memorandum No. 48-94, Policy Guidance on Labor Certification Issues (May 16, 1994), as providing the guidance it would follow in determining educational equivalencies for purposes of determining the SVP level. 69 Fed. Reg. at 77332.

<sup>14</sup> As the CO pointed out in his appellate brief, the Employer never formally tried to show business necessity, but got the closest to trying to explain why it needed more experience than the SVP level associated with the position permitted with this assertion. (CO’s brief at 4).

<sup>15</sup> A bare assertion without either supporting reasoning or evidence is generally insufficient to carry an employer’s burden of proof. *See Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (en banc); *Aquarius Enterprises*, 1987-INA-579 (Mar. 24, 1988) (en banc) (the employer’s statement that he had found it essential for a press operator to have more experience than established by the SVP was not, standing alone, sufficient to establish business necessity.)

The Employer also submitted advertisements it found on the Internet for similar jobs, most of which require more education and experience than what it requested. (*See* AF 9-23). However, the Employer did not offer any explanation for how the requirements of other employers bear a reasonable relationship to the occupation in the context of the petitioning Employer's business. 20 C.F.R. § 656.17(h)(1). Thus, these advertisements were not shown to be relevant to whether the Employer had a business necessity for its excessive education and experience requirements.

Based on the foregoing, we affirm the CO's denial of labor certification.

### **ORDER**

**IT IS ORDERED** that the denial of labor certification in this matter is hereby **AFFIRMED**.

Entered at the direction of the panel by:

**A**

Todd R. Smyth  
Secretary to the Board of  
Alien Labor Certification Appeals

**NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW:** This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk  
Office of Administrative Law Judges  
Board of Alien Labor Certification Appeals  
800 K Street, NW Suite 400  
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.