Outline from R. Blake Chisam for "PERM 2006: Getting Your Cases Approved In The Year Of The Dog" session 1.

Applications to Qualify for the Second Preference

Given the current backlogs, one often finds it necessary to try and squeeze cases into the second preference.

The statute provides that a second preference petition may be approved for "qualified immigrants who are members of the professions holding advanced degrees or their equivalent."

USCIS takes a decidedly job centric view of this statutory language, mandating in its regulations that the job offer portion of a labor certification require a Master's degree. Section 204.5(k)(4) of Title 8 of the Code of Federal Regulations states:

> The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that *the job requires* a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

This would seem to suggest that, under the regulations, a labor certification application for a professional position requiring a bachelor's degree and five years' experience, but which states that it will accept a Master's degree in the alternative, would be suspect. In such cases, it would be best to require the Master's degree, then state the Bachelor's degree and five years' experience as the alternative.

This, however, may not always be possible to do. In such cases, what is one supposed to do?

Let's take a look at the statute again. The second preference is open to aliens who are members of a profession who hold an advanced degree or its equivalent. This language could be read as being more worker centric, by which I mean that so long as the job offered is in a profession, as defined by section 101(a)(32) of the Act, and the alien also happens to hold an advanced degree or its equivalent, then we should give preference to that worker. It's the worker we want, not necessarily the job. It is the verb "to hold" that makes the difference in this view of the statute.

If we read the statute as being more worker centric and consider what the purpose of the preference system ought to be, then we can begin to make the argument that USCIS's interpretation of the statute,

as expressed in its regulations, is at best problematic, and at worse, beyond the scope of the statute.

If it's beyond the scope of the statute, then it ought to be subject to challenge. Should USCIS begin to take such a position, I would think that affected employers might begin to challenge the regulations in court. Would they win? To be honest, I don't know. I can imagine a court finding the agency's reading of the statute to be reasonable, particularly if the issues were not defined very well. But I can also imagine a court finding that the regulation defeats the purpose of the preference system, particularly as applied to workers who hold the advanced degree or its equivalent.

I should also note that the regulations require that a second preference beneficiary actually hold a Bachelor's degree. This directly contradicts the agency's position in the H-1B nonimmigrant category, which draws its meaning of specialty occupation directly from the lineage of the statute's definition of profession. Again, the agency's reading of the statute in this regard appears to be suspect.

Finally, the problems associated with experience requirements in second preference equivalency cases are worth noting. For example, let's say the labor certification application is drafted in such a way that the job requires a Master's degree and two years of experience or, in the alternative, a Bachelor's degree and five years of experience. Is this sufficient? The answer is that it depends on whether the required experience is pre- or post-magisterial. If the job requires a Master's degree and two years' post-magisterial experience, then the alien would need to have a Bachelor's and seven years of experience to satisfy the job requirements. If, on the other hand, it doesn't matter whether the professional experience was gained before or after receipt of the Master's degree, the alien would qualify with a Bachelor's and five years' experience. One must take care when drafting alternative requirement cases.

Notes on DOL's Substitution Rule

On February 13, 2006, the Labor Department published a Notice of Proposed Rulemaking entitled "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." The NPRM is available at 71 Fed. Reg. 7655

(Feb. 13, 2006). Among other things, the NPRM would change the labor certification rules to:

- Prohibit substitutions on labor certifications
- Prohibit changes to applications once they're submitted
- Prohibit trading in labor certifications
- Require employers to pay for "any activity related to obtaining permanent labor certification," including legal expenses
- Provide for the expiration of labor certification applications 45 days after certification unless an immigrant petition is filed during those 45 days
- Allow for the suspension of, and debarment from, filing labor certification for those who violate the labor certification rules in certain circumstances

Comments to the NPRM are due on or before April 14, 2006, so if you don't like the proposals, now's the time to tell the agency why you think they are bad.

I'm most concerned with the proposals to prohibit changes and substitutions, and then mostly with substitutions. Given the mobility of workers today, it can be hard to hold a case together. Since it's so expensive to do a labor certification application and the advertising for the opening all has to be done before filing, it seems to be a pretty big burden on employers who aren't cheating.

One of the problems with an attestation-based system is that it penalizes those who play by the rules and can benefit those who don't. This is an example. Because job openings aren't reviewed so much as passed over by computer, Labor can't really be sure that there's not fraud going on. It also has to take your word in most instances that you did all the advertising. (Of course, they'll say that's what the audits are for, but, as you know, that worked really well for, say, Enron, didn't it?)

Because the application is electronically reviewed, it's even more alien specific than ever, which means that Labor is dealing with the who, rather than the what. And it's the “what” that matters most. The labor certification test is supposed to show that there aren't any U.S. workers available for a job, not that there is a foreign worker available for the job.

Unfortunately, Labor has made it about the “who.” In fairness that's partly because of the abuse they've seen. But it's also because of the mousetrap they've built.

Finally, I know a bunch of lawyers are probably concerned with the payment issue in the NPRM. I'd recommend fighting it now, because I'm afraid it will pass muster if it goes through and is challenged in court. Why? Because I don't see it as a big stretch that legal fees for labor certification are primarily for the benefit of the employer. Again, remember, we need to be focused on the “what,” not the “who.” The alien shouldn't really come into play much at the labor certification stage, unless he or she has some undue influence over the recruitment of U.S. workers. The point is supposed to be that the employer can't find U.S. workers, not that an alien can find work.

There are likely some strong counter-arguments to this, and many immigration lawyers certainly have the incentive to think of them. Still, I think Labor has wanted to go in this direction for a while. I'm afraid that this one will go through and that it will stick.

I'm also concerned about the breadth of this language. Employers are on the hook for anything related to the process. It seems to me that employers ought not be required to pay legal fees for things that are only for the employee's benefit. There are some potential ethical issues out there.

What about agreements to repay green card fees if an employee terminates his employment shortly after getting his green card? Does this rule reach that far? These are the kind of issues that deserve comment.