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# PERM: PWDs & Ethics

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AILA TX Chapter Spring Conference 2022, El Paso, TX



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# DETERMINING MINIMUM JOB REQUIREMENTS

## 20 CFR § 656.17(h) et seq

Job duties and requirements.

(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.



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# DETERMINING MINIMUM JOB REQUIREMENTS

## Intake Questions to Ask Employer

- Are all the job duties and requirements truly necessary to perform the job? 20 CFR § 656.17(h)(5)(i)(1)
- Are the qualifications (skills, experience, education) normal for the occupation?
- Are duties as customarily performed by other U.S. workers similarly employed in the occupation?



# DETERMINING MINIMUM JOB REQUIREMENTS

## Intake Questions to Ask Employer

- Has the employer has previously provided required experience through on-the-job training or has hired others with lesser qualifications? 20 CFR § 656.17(h)(5)
- Can an applicant acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training?



# DETERMINING MINIMUM JOB REQUIREMENTS

## Common issues

- Preferred vs. Minimum requirements
- Hard Skills vs. Soft Skills
- Position tailored to beneficiary employee's skills/experience/education or beneficiary can't meet minimum requirements
- Foreign language requirements 20 CFR § 656.17(h)(2)
- Alternative experience requirements 20 CFR § 656.17(h)(4)



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## RECONCILING H-1B & PERM DIFFERENCES WHEN THE POSITION IS THE SAME

- Easy if the H-1B position and the PERM position are not the same. More care is needed when they are.
- If you use DOL PWR wage process, no issue. Address discrepancies with DOL if you believe the PWD is wrong.
- If you self-assess the SOC for H-1Bs the standard is good faith, reasonable, and best SOC for the position. Don't select a SOC because it fits the wage the employer wants to pay. Ethics come into play.
- An LCA SOC can be different than a PWD PERM SOC. This doesn't immediately indicate error in the H-1B self-assessment.



# EXAMPLES OF H-1B/PERM SOC DIFFERENCES

- Example 1: Practicing Physicians with Faculty Titles
  - Academic medical centers hire physicians for clinical duties and faculty duties (teaching, research). All have faculty appointments
  - H-1B SOC is always 25-1071 (Health Specialties Teachers, Post-Secondary) because this description includes academic and clinical duties.
  - PWD is almost always a 29-xxxx series SOC and DOL adds the “combination of duties explanation
  - Use PWD SOC for PERM and I-140 for consistency, of course.
  - USCIS does not question why the academic SOC was used for the PERM filing.



- Is DOL correct? No, because they only apply the combination of duties explanation to physicians and dentists, and no other health specialty teacher in 25.1071 even if they provide paid clinical services.
- Has anyone seen differently?

## Example 2: Medical Scientists

- SOC wage often higher than other science SOC.
- Avoid temptation to use Biophysics/Biochemist, Biological Scientist, Biological Technician, or Microbiologist SOC if the job description accurately aligns with the medical scientist SOC. There is a difference between basic sciences research and medical sciences research. A medical scientist commands a higher wage than a basic sciences researcher.



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# SOC RESOURCES

- When different SOC codes are reasonable you may have a true “combination of duties” – follow the rule for the LCA and the PWR
- Sometimes job title doesn’t align with job duties because employer likes using “inflated titles” or employee negotiated inflation as a condition of job acceptance. You must ignore the job title.
- Other options:
  - OWL (one maintained by State of Utah is a favorite:  
<https://www.flcdatacenter.com/OESWizardStart.aspx>)
  - O\*Net: <https://www.onetonline.org/find/> and DOT Crosswalk  
<https://www.onetonline.org/crosswalk/DOT/>





# FACEBOOK'S PERM SETTLEMENTS

- <https://www.justice.gov/opa/pr/justice-labor-departments-reach-settlements-facebook-resolving-claims-discrimination-against>
- DOJ Settlement: citizenship & immigration status discrimination. Resolved claims that Facebook routinely refused to recruit, consider or hire US workers for positions for PERM blind market test recruitment postings, and hired only its H-1B/O-1/TN workers. “No qualified US worker found.”
- Civil penalty of \$4.75 million to US govt; \$9.5 million to eligible victims of alleged discrimination; train its employees on the anti-discrimination requirements of the INA.
- Conduct more expansive advertising and recruitment for its job opportunities for all PERM positions, accept electronic resumes or applications from all US workers; ensure that recruitment for PERM positions closely matches its standard recruitment practices.



## FB Settlement, continued...

- DOL Settlement: DOL audit of Facebook's PERM recruitment. FB used recruiting methods designed to deter US workers from applying requiring applications to be submitted by mail only; refused to consider US worker applicants; and hired only temporary visa holders.
- DOL giving FB opportunity to re-recruit for all PERM applications submitted to DOL
- Settlement Agreement: <https://www.justice.gov/opa/press-release/file/1443336/download>



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## NON-DISCRIMINATION REQUIREMENT

- 20 CFR 656.10(c)(5): The job opportunity does not involve unlawful discrimination by race, creed, color, national origin, age, sex, religion, handicap, or citizenship.
- 20 CFR 656.10(c)(8): The job opportunity has been and is clearly open to any U.S. worker.
- 20 CFR 656.10(c)(9): The US workers who applied for the job opportunity were rejected for lawful job-related reasons.
- N.B. With PERM, FN applicants are summarily excluded so “everyone had the same application requirement” defense carries no weight.



## COMPLIANCE: GOOD FAITH EFFORT

- It is a sensible expectation that a permanent position should be offered to a qualified citizen/permanent resident.
- The immigration attorney's role is not to find ways to circumvent US laws and regulations to the benefit of the FN or US employer. Attorney's role is to ethically advocate and assess whether the recruitment effort is non-discriminatory and aligns with the regs.
- PERM recruitment is a higher bar than H-1B or OPT recruitment. "Meets minimum qualifications" in PERM; "Best qualified candidate" in H-1B/OPT.



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## NOTA BENE FOR ATTORNEYS

- Review your client's standard and PERM-based recruitment procedures and ensure they are substantially the same. See FB settlement agreement if you need points of comparison.
- At a minimum, the application process and job posting sites should be the same (with the exception of DOL's newspaper posting requirement). Application reviewers should also be the same.
- If you see a discrepancy – which would be obvious from the job posting “how to apply” requirement, question it. Encourage compliance, note the compliance and reputation risks. Withdraw from representation if you must.



# ABA MODEL RULE: 1.16

## DECLINING OR TERMINATING REPRESENTATION

Relevant portions of Rule 1.16:

- a) [A] lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if ...  
**the representation will result in violation of the rules of professional conduct or other law;**
- b) [A] lawyer may withdraw from representing a client if:
  - (2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent;
  - (3) the client has used the lawyer's services to perpetrate a crime or fraud;
  - (4) the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement;



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# AILA ETHICS RESOURCE

- **When Good Lawyers Go Bad: Strategies to Reduce Your Risks**
- *AILA Doc. No. 07051560 | Dated March 27, 2017 | File Size: 641 K*
- [DOWNLOAD THE DOCUMENT](#)
- Most lawyers never see it coming – the point where their behavior crosses the line and triggers disciplinary complaints, malpractice claims, civil charges, or even criminal indictments. Learn more about strategies and precautions to avoid ethics issues in this article from **AILA's PPC.**



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# AILA's BALCA BRIEFINGS by HARRY SHEINFELD

- <https://www.aila.org/infonet/harrys-balca-briefs>
- Harry provides quarterly summaries of BALCA decisions with a touch of humor and snark. He's also open to constructive criticism and provides his email address for members who want to share pros & cons.



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# QUESTIONS/COMMENTS?



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