

PREFACE*

At this moment, the King, who had been for some time busily writing in his note-book, called out, "Silence!" and read out from his book, "Rule Forty-two. All persons more than a mile high to leave the court."

Everybody looked at Alice.

"I'm not a mile high," said Alice.

"You are," said the King.

"Nearly two miles high," added the Queen.

"Well, I shan't go, at any rate," said Alice; "besides, that's not a regular rule: you invented it just now."

—Lewis Carroll
*Alice's Adventures in
Wonderland*, p. 180

Through this exchange, Lewis Carroll captured with light humor the sense of unfairness that is a common reaction to rules that are created and applied without prior notice or review. It is a situation that the Administrative Procedure Act attempts to prevent through its notice requirements for formal regulations as well as for formal adjudications performed by administrative tribunals. Unfortunately, there are many issues that arise in the daily practice of immigration law for which no formal rule or tribunal exists, and attorneys must comb through agency memos, liaison minutes, and unpublished decisions to discover what informal agency rules or standards may exist to guide the case preparation decisions that must be made on a daily basis.

The purpose of this book is to assist attorneys in understanding and applying the elusive, constantly shifting, "ad hoc" rules that govern degree equivalency determinations for I-140 petitions in the employment-based second (EB-2) and third (EB-3) preference categories, particularly for beneficiaries who hold three-year bachelor's degrees. By understanding the many factors that can affect the contours of

* **DISCLAIMER:** The suggestions, practice tips, and opinions presented in this book are solely those of the author and should not be construed as legal advice, but should instead be tempered with direct experience. They are based on the information available at the time of publication, and due to the constantly evolving nature of adjudication standards and policies in this area of practice, important details may be expected to change over time without notice.

these ad hoc rules, we can gain insight on how to structure PERM applications to minimize risks and maximize the success of green card applications in the EB-2 and EB-3 categories. We can also understand how each new decision or shift in adjudication policy changes the landscape, and spot issues that may be successfully appealed to the Administrative Appeals Office (AAO) and the federal courts.

The AAO has made an issue of three-year bachelor's degrees through a long series of unpublished, nonprecedent decisions rendered over the past several years. While unpublished AAO decisions are not binding, it has become apparent that the U.S. Citizenship and Immigration Services' (USCIS) Nebraska Service Center (NSC) has closely followed the AAO's interpretations of degree equivalencies, rendering the AAO's interpretations de facto precedents. Since AAO nonprecedent decisions are not published, they are not available in a searchable format;¹ they are also case specific, and are a poor vehicle for stating general adjudication standards or policies.² The de facto "law" on this issue has evolved slowly over the past several years, and has not been consistently applied by USCIS service centers. The result is that many practitioners remain understandably confused about what the rules are, and how to structure a labor certification application that best serves the interests of both the employer petitioners and the beneficiary employees in this situation.³

I have witnessed and actively followed the evolution of these issues since 2000. I served as class administrator in the EB-2 class action litigation, *Chintakuntla v. INS*,⁴ which stimulated the legacy Immigration and Naturalization Service (INS) to issue the Cronin Memo of March 20, 2000, and the subsequent memorializing of that memo via a court-ordered, nationwide permanent injunction. It was during the final "mop up" phase of cases involving *Chintakuntla* class members that the first two decisions appeared from the AAO denying EB-2 petitions for beneficiaries with three-year bachelor's degrees from India. A third case involved a beneficiary who held a three-year bachelor's degree and also held a two-year master's degree; that case was remanded by the AAO to the California Service Center to decide whether the beneficiary's three-year bachelor's degree was equivalent to a U.S. bachelor's

¹ The Administrative Appeals Office (AAO), based on Freedom of Information Act (FOIA) considerations, has been posting unpublished decisions at www.uscis.gov/uscis-ext-templating/uscis/jspsoverride/errFrameset.jsp (note that the awkward setup for the new U.S. Citizenship and Immigration Services (USCIS) website makes it necessary to drill down through a few webpages to find specific decisions, organized by visa category and date; these decisions are not indexed or searchable and one must laboriously plow through much irrelevant material to find the occasional pearl.).

² Nonprecedent AAO decisions are poor vehicles for stating adjudication standards or policies because: neither USCIS service centers nor the AAO are bound to follow them in other decisions; they may be highly case specific; and they are not announced, distributed, or made publicly available in any convenient format. Only after many similar decisions are issued, and such decisions are shared among practitioners, does it become obvious that a de facto policy is being created and applied.

³ The American Immigration Lawyers Association (AILA) Nebraska Service Center (NSC) Liaison Committee is engaged in continuing discussions with the NSC on this issue. As of this writing, the NSC has refrained from providing general guidance on the issue of degree equivalency, expressing instead its policy of evaluating the individual merits of each case.

⁴ *Chintakuntla v. INS*, No. C99-5211 MMC (N.D. Cal. May 4, 2000).

degree. That case was approved after I filed an argument as to why the beneficiary's master's degree qualified him for the position. I have been filing appeals and tracking unpublished decisions involving degree equivalency issues ever since.

In 2005, while serving as chair of the American Immigration Lawyers Association (AILA) Amicus Committee, the attorneys of record in the EB-3 case, *Grace Korean United Methodist Church v. Chertoff*,⁵ contacted me to request assistance from AILA in filing an amicus brief. I subsequently consulted with the American Immigration Law Foundation (AILF) and outlined the legal argument for the amicus brief that AILF expertly prepared and filed in that case. The district court's decision followed the reasoning set forth in the AILF amicus brief.

In 2006, as a member of the AILA USCIS Liaison Committee, I was involved in an unproductive effort to convince USCIS to clarify its policies regarding degree equivalencies that ended when the agency declined to issue a clarifying memorandum. In 2007, as a member of the AILA NSC Liaison Committee, I have been working with the NSC to understand, clarify, and publish NSC's interpretive policies regarding degree equivalency issues. This latter effort has proven fruitful, as shown by recent AILA InfoNet postings and informative Q&A documents.

In 2006, AILA published my article, "Perm Strategies and Ad Hoc Rules for Beneficiaries with Three-Year Bachelor's Degrees," in the *Immigration & Nationality Law Handbook*.⁶ While the response to this article was uniformly positive, my discussions with numerous attorneys since then, many of whom were encountering degree equivalency issues for the first time, have made it clear to me that a more comprehensive guide, including both original source materials as well as "nuts and bolts" discussions, was needed. This book is an attempt to fill that need.

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September 2007

⁵ *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005).

⁶ R. Wada, "Perm Strategies and Ad Hoc Rules for Beneficiaries with Three-Year Bachelor's Degrees," *Immigration & Nationality Law Handbook* 432 (AILA 2006-07 Ed.).