BENDER'S IMMIGRATION BULLETIN
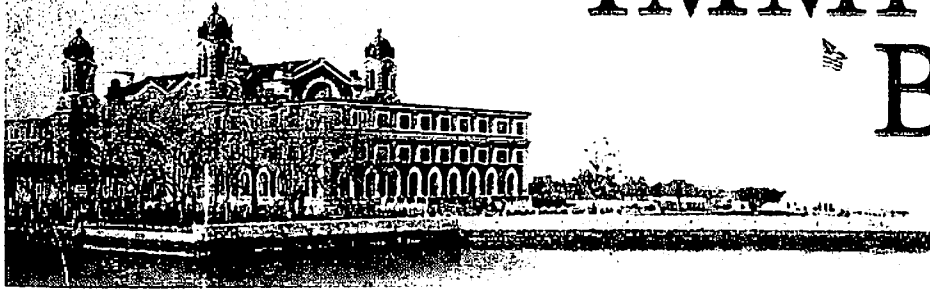
"It's always been about people."

Immigration Activity in the Supreme Court

On April 25, the U.S. Supreme Court heard oral argument in the case involving Arizona's controversial S.B. 1070. The transcript is available on lexis.com at 2012 U.S. Trans. LEXIS 35. The decision is expected by the end of June.

Also pending are decisions in the companion cases of *Holder v. Gutierrez* and *Holder v. Sawyers*, which involve "tacking," or using a parent's time in the United States to make a child eligible for cancellation of removal. Those cases were argued in January, and also should be decided by the end of June. That oral argument is at 2012 U.S. Trans. LEXIS 10.

The Supreme Court has already granted certiorari in key immigration cases for the term beginning in October. *Moncrieffe v. Holder* and *Garcia v. Holder* will decide whether the defendants' marijuana offenses are aggravated felonies that make them removable. Garcia was convicted of attempted possession of marijuana with the intent to deliver it, Moncrieffe of possessing it with the intent to distribute it.

Most recently, the Court granted cert. in *Chaidez v. United States*, in which the Seventh Circuit held that *Padilla v. Kentucky* does not apply retroactively. The Seventh Circuit split on that issue, and other courts have disagreed.

Reminder: Provisional Unlawful-Presence Waiver Is NOT in Effect

On May 1, USCIS reminded the public of what it has said before: In late March, DHS published a Notice of Proposed Rulemaking in the *Federal Register* outlining its plan to reduce the time U.S. citizens are separated from their immediate relatives while those family members are in the process of obtaining immigrant visas. However, the proposed waiver is not in

A Math Major's Take on JobZones and *Matter of Wissen, Inc.*

by David Froman

This essay will explore the mysterious realm of SVP (specific vocational preparation) codes as implemented by the O*NET JobZone classification system. Business immigration practitioners have long understood the critical importance of SVP codes in establishing employment-based second-preference (EB-2) advanced-degree education and experience qualifications *normal to the occupation*—particularly with the chronic waits experienced by EB-3 skilled workers and professionals. Unfortunately, the chief authority analyzing JobZones to date, *Matter of Wissen, Inc.*,[1] suffers from incomplete analysis, faulty logic, and self-contradiction.

Having come to the law via mathematics has colored my approach to analyzing legal questions: Do all parts "add up"? Does any part contradict any other part? Have the proper principles and "theorems" been applied? Does the result "make sense"? Four years ago, I had to analyze the meaning of O*NET JobZone Four for an EB-2 labor certification application. Since then I have reused the explanation on multiple occasions with minor modifications. Then in April of 2010 came the Board of Alien Labor Certification Appeals (BALCA) decision in *Matter of Wissen, Inc.*, which clashed with my analysis by essentially deleting the SVP 8 category from JobZone Four. In an effort to raise awareness concerning the logical errors in the *Wissen* decision, I offer a post-*Wissen* version of my JobZone analysis.

REVIEW:

Before turning to the analysis, however, let's review SVP codes[2] and O*NET JobZones:

Specific Vocational Preparation 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.

This training may be acquired in a school, work, military, instructional, or vocational environment. It does not include the orientation time required of fully qualified worker [sic] to become accustomed to the special conditions of any new job. Specific vocational training includes: vocational education, apprenticeship training, in-plant training, on-the-job training, and essential experience in other jobs.

. . . .

The following is an explanation of the various level of specific vocational preparation:

SVP 1 - Short demonstration only

SVP 2 - Anything beyond short demonstration up to and including 1 month

SVP 3 - Over 1 month up to and including 3 months

SVP 4 - Over 3 months up to and including 6 months

SVP 5 - Over 6 months up to and including 1 year

SVP 6 - Over 1 year up to and including 2 years

SVP 7 - Over 2 years up to and including 4 years

SVP 8 - Over 4 years up to and including 10 years

SVP 9 - Over 10 years

The JobZone categories[3] equate to SVP codes as follows:

JobZone One: Little or No Preparation Needed
SVP Range: Below 4.0

JobZone Two: Some Preparation Needed
SVP Range: 4.0 to < 6.0

[1] 2010 BALCA LEXIS 199 (BALCA Apr. 15, 2010), *en banc review denied*, 2010 BALCA LEXIS 304 (June 1, 2010).

[2] http://www.flcdatacenter.com/svp.aspx (last visited Apr. 27, 2012).

[3] http://www.flcdatacenter.com/JobZone.aspx#4 (last visited Apr. 27, 2012).

JobZone Three: Medium Preparation Needed
SVP Range: 6.0 < 7.0

JobZone Four: Considerable Preparation Needed
SVP Range: 7.0 < 8.0

JobZone Five: Extensive Preparation Needed
SVP Range: 8.0 and above

SUMMARY:

The matter involved an occupation that fell under O*NET JobZone Four, requiring "considerable preparation" and listing "SVP Range: 7.0 < 8.0." The equivalent occupation in the Dictionary of Occupational Titles carried an SVP code of 8, that is, a minimum of four years, up to ten years, of work-related skill, knowledge, or experience. This range includes a master's degree plus up to six years of experience. Based on the "SVP Range: 7.0 < 8.0" designation contained in the new JobZone rating system (literally meaning greater than level 7, up to level 8), this would include a range from a bachelor's degree at the low end of SVP 7 through a master's degree plus *up to, but not including*, six years of experience at the SVP 8 level. The proposed minimum education and experience level of a master's degree and five years of experience for the position in question fell within this zone and was therefore within the job opportunity's requirements *normal for the occupation*. How did I arrive at this conclusion?

ANALYSIS:

First, a few general observations: All five JobZone categories cover multiple SVP codes. Each of these multiple SVP code groups overlaps with its adjacent JobZone groups. This suggests that the JobZone scheme is flexible and overlapping, rather than rigid and monolithic. In fact overlapping education and experience descriptions pervade the JobZone scheme, as will be seen. However, the effect of the *Wissen* holding, if applied to all JobZones, would be to strip them of their flexibility. The *Wissen* world of JobZones appears as follows:

JobZone One: Little or No Preparation Needed
SVP Range: 1-3

JobZone Two: Some Preparation Needed
SVP Range: 4 & 5

JobZone Three: Medium Preparation Needed
SVP Range: 6

JobZone Four: Considerable Preparation Needed
SVP Range: 7

JobZone Five: Extensive Preparation Needed
SVP Range: 8 & 9

No overlap. No flexibility. No mathematical or analytical basis. So let's see what analysis shows.

The meaning of JobZone Four

The O*NET explanation of JobZone Four indicates "SVP Range: 7.0 < 8.0." At first glance, the meaning of the specified SVP Range of "7.0 < 8.0" is unclear. The decimal notation is superfluous; SVP designations appear in whole integers from one to nine. The connecting symbol borrowed from mathematics means *less than*, that is, "seven is *less than* eight." Obviously, this notation was intended to convey something more than simply normal counting order. The word "Range" implies more than a single point; *thus, neither SVP 7 nor SVP 8 alone could be correct.* Without both involved, there would be no *range*. Indeed, if the O*NET drafters intended only one SVP level for JobZone Four, inclusion of the other would serve no purpose, except to cause confusion. Thus a simple "less than symbol" analysis—as relied on in *Wissen*—proves inadequate. However, when restated in algebraic terms, with x equal to the acceptable range of years of specific vocational preparation, the JobZone Four SVP Range formula takes on a plausible meaning:

$$7 < x < 8.$$

That is, x is greater than 7, and x is less than 8. But 7 and 8 are not just single mathematical values. Rather, they are symbols, each of which includes its own range of time values. *So we are dealing with a numerical range of time ranges.*[4] Borrowing further from algebra

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[4] This is where the *Wissen* analysis jumped the tracks. The Board relied on the Certifying Officer for the meaning of the inequality sign without taking into account the nature of the symbols it joined:

> 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.[11] 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).

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[11] 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.

Wissen, slip op. at 6. The Board's logic makes JobZone Four equal to SVP "7.0" only and relegates SVP "8.0" to irrelevant surplusage.

by substituting the SVP time ranges represented by the symbols 7 and 8 into this restated formula, we achieve the following expression:

(over 2 years up to and including 4 years) < x < (over 4 years up to and including 10 years)

In strict mathematical terms, this formula describes a total continuum, where x, if it exists at all, is ever so tightly wedged somewhere between "4 years" and "over 4 years." (4.00000001 years has already gone past x, the putative JobZone Four SVP *value*.) This yields a nonsensical result. But observing that the high end of the first element is continuous with the low end of the second element suggests that the JobZone "range" in question should focus not on the adjacent ends of the two elements, but instead on the remote ends. This yields the following formula:

(over 2 years) < x < (up to and including 10 years)

Refining this expression to give effect to the inequality symbols, the formula for JobZone Four in terms of years of specific vocational preparation may be restated as follows:

2 years < x < 10 years

This means that the acceptable range of specific vocational preparation specified in JobZone Four encompasses from more than two years up to, *but not including*, ten years.

From this specific algebraic inspection we may tentatively conclude that a range of ranges joined by an inequality function should encompass all of the values between the end points. Algebraic analysis shows that the normal value of x (the required level of specific vocational preparation) for any given JobZone Four occupation may fall between the lowest level of SVP 7 and the highest level of SVP 8, like the two ends of a football goalpost. The "ball" (the required preparation for a given position) may pass anywhere between the ends of the goalpost (the low end of 7 and the high end of 8) and still "score." No other explanation of this official governmental notation makes sense. The range includes from more than two years to less than ten years of specific vocational preparation—which encompasses a master's degree and five years, a total of nine years of specific vocational preparation, within the "job opportunity's requirements normal for the occupation." Therefore, the above analysis shows that the requirements for the job opportunity that prompted this inquiry lie within the normal range for this occupation, "SVP Range: 7.0 < 8.0," — or, more precisely, SVP Range = x, where SVP codes 7 < x < 8.

Confirmation by comparing other JobZones

Inspection of other SVP ranges appearing in the JobZones confirms this analysis and shows that the conclusion of the Certifying Officer ratified by the BALCA in *Wissen*, erred in using the low end rather than the high end of SVP 8 as the top of the JobZone range.[5] Analysis of similarly stated SVP ranges for JobZone Two ("SVP Range: 4.0 to < 6.0") and JobZone Three ("SVP Range 6.0 < 7.0") show that both of these descriptions include experience, education, and training requirements that stretch from the lowest level of the lowest SVP number to the highest level of the highest SVP number within the specified range. JobZone Two includes a few months (SVP 4) to one year (SVP 5) of job training, but "in some cases, an associate's or bachelor's degree (SVP 6) could be needed." This verbal description clearly indicates a range that encompasses all three listed SVP codes.

Likewise, the description of JobZone Three discusses three or four years of apprenticeship (SVP 7) or several years of vocational training (SVP 6), a bachelor's degree (SVP 6), followed by one or two years of job training (SVP 7). Again, both SVP codes are necessary to cover the written description. This shows a pattern of intent on the part of the drafters of the O*Net Job Zones to use the entire specified range of SVP codes for each JobZone.

JobZone Four lists both a "four-year bachelor's degree" and a "minimum of two to four years of work-related experience." *Wissen* held that education and experience should be *combined* when determining the applicable SVP level.[6] If this is so, two years of specific vocational preparation for a bachelor's degree plus four years of work-related experience, a total of six years of specific vocational preparation, falls within SVP code 8. Thus, even the internal logic of *Wissen* in determining the appropriate SVP level— that education and experience must be combined—

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[5] The Board in *Wissen* assumed that SVP 8 represented a single value. Accordingly, it failed to inquire, "Which part of SVP 8 is indicated here?" Instead—following the advice of the CO—it automatically excluded *all* of SVP 8 by treating the low end of its time range as synonymous with its numerical designation. As the analysis shows, the low end of SVP 8 is contiguous with the high end of SVP 7, with no gaps. This continuous property admits no "foothold" for the inequality symbol to function: There is no room for "x." To give the inequality and x room to function, there must be a *gap* for them to operate in. Excluding SVP 8 from JobZone Four eliminates any gap. Only using the "goalpost" end points of SVP 7 and 8 gives meaning to the inequality notation as a range.

[6] *Wissen*, slip op. at 6.

contradicts its own conclusion that JobZone Four does not include SVP code 8. The Board in *Wissen* focused in error on the low end of SVP 8 as the "ceiling" for JobZone Four and came to the erroneous conclusion: "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)." Instead, it should have been looking at the *upper* end of SVP 8.

Therefore, paraphrasing *Wissen*, the proper description of JobZone Four should be: "Stated another way, the top end of the total preparation required must be *less than the top end* of SVP 8 (over 4 years and up to *but not including* 10 years)."[7]

CONCLUSION:

Mathematical logic concludes that the JobZone Four SVP description follows the goalpost model: from, but not including, the low end of SVP 7 to, but not including, the high end of SVP 8. The structure and descriptions of the JobZone system of ranges confirms this conclusion. Finally, the previously assigned SVP code for the equivalent occupation listed in the Dictionary of Occupational Titles supports the conclusion—contrary to *Wissen*—that SVP 8 remains an equal partner with SVP 7 in O*NET JobZone Four.

Therefore, BALCA or the Department of Labor needs to step beyond *Wissen* to return SVP 8 from the limbo of surplusage and to affirm a uniform, coherent application of the JobZone SVP categories that will withstand critical analysis and foster sensible results.

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David Froman has practiced immigration law for twenty-seven years. He is admitted to the State Bars of California, Missouri, and Arizona, and to the bars of various federal courts including the U.S. Supreme Court. He holds a B.A., *magna cum laude*, in mathematics from Southwestern College, Winfield, Kansas. His law studies include a J. D., *cum laude*, from the University of San Diego, a diploma from the USD Institute of International and Comparative Law in Paris, France; an LL.M. in international law from Harvard Law School; and postgraduate study in immigration law under Charles Gordon at Georgetown University Law School. He has taught international law, torts, and legal analysis at law schools in Chicago and San Diego. He joined the American Immigration Lawyers Association in 1986 while serving in the Pentagon as an International Law Specialist and the Navy's immigration attorney. He represented the petitioner in the early

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[7] *Compare* original statement, *supra* note 4.