U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF K-M-, INC.

DATE: APR. 16, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a seller and servicer of blow-molding machines, seeks to employ the Beneficiary as chief executive. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not demonstrate the Beneficiary's qualifications for the offered position or the prior requested classification of professional. *See* section 203(b)(3)(A)(ii) of the Act (allowing immigration based on job offers requiring at least bachelor's degrees). On appeal, we remanded the matter, finding that the Director did not adequately explain the denial of the Petitioner's request to change the classification sought. *See Matter of K-M-, Inc.*, ID# 917449 (AAO Apr. 13, 2018). On remand, the Director allowed the Petitioner to seek skilled-worker classification. But the Director again denied the petition, concluding that the Petitioner did not establish the Beneficiary's qualifications for the offered position.

Before us again on appeal, the Petitioner asserts the Beneficiary's possession of the minimum education, training, and experience required for the offered position. The Petitioner argues that the skilled-worker classification allows the Beneficiary to meet the position's baccalaureate degree requirement through a combination of education and experience, and that the company did not unfairly reject U.S. workers for the position.

Upon *de novo* review, we will dismiss the appeal.

## I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker generally follows a three-step process. First, to permanently fill a position in the United States with a foreign worker, a prospective employer must obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that the United States lacks sufficient able, willing,

qualified, and available workers for the offered position and that employment of a foreign national in the job will not harm the wages or working conditions of U.S. workers similarly employed. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a foreign national meets the requirements of the DOL-certified position and the requested immigrant classification. If USCIS grants a petition, a foreign national may finally apply abroad for an immigrant visa or, if eligible, for adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

## II. THE REQUIRED EDUCATION

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of chief executive as: a U.S. bachelor's degree, or a foreign equivalent degree, in engineering or business; one year of training in engineering; and 15 years of experience in the job offered. The labor certification specifies "No" acceptable, alternate combination of education and experience.

On the labor certification, the Beneficiary attested that, by the petition's priority date, a technical college in the United Kingdom awarded him a bachelor's degree in engineering. The Petitioner submitted two, independent evaluations of the Beneficiary's credentials. Both evaluations conclude that the Beneficiary has the equivalent of a U.S. bachelor's degree in business administration. The evaluations equate the Beneficiary's foreign college studies to 24 U.S. university credits. Combining the Beneficiary's college studies with his employment experience, the evaluations state his possession of a bachelor's degree in business.

The labor certification, however, does not indicate that the position's minimum requirements allow the equivalent of a baccalaureate degree based on a combination of education and experience. Part H.4 of the labor certification states a U.S. bachelor's degree as a minimum requirement, while part H.9 indicates that the Petitioner will also accept "a foreign educational equivalent" of a U.S. baccalaureate degree. As previously indicated, part H.8 also states that the Petitioner will not accept "an alternate combination of education and experience." In part H.4, the Petitioner could have indicated its acceptance of an educational credential "Other" than a high school diploma or

[1] This petition's priority date is May 13, 2015, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

associate's, bachelor's, master's, or doctorate degree and specified the minimum required education in part H.4-A. Instead, however, the Petitioner checked the box in H.4 identifying a "Bachelor's" degree as the minimum requirement.

Thus, the plain language of the labor certification states the minimum educational requirement of the offered position as a U.S. bachelor's degree, or a foreign equivalent degree, in engineering or business. The Petitioner asserts the Beneficiary's possession of the equivalent of a U.S. baccalaureate degree in business based on a combination education and experience. But the job requirements do not allow such a combination as an equivalency. The Petitioner therefore has not demonstrated the Beneficiary's qualifying education for the offered position.

On appeal, the Petitioner cites a federal court decision and argues that the skilled-worker classification allows a combination of education and experience to equate to a bachelor's degree. *See Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174 (D. Or. 2005). In *Grace Korean*, the court reversed USCIS's denial of a skilled-worker petition where a beneficiary had the equivalent of a bachelor's degree based on a combination of education and experience. The labor certification stated the offered position's requirement of a bachelor's degree "or equivalent." *Id.* at 1176. The Petitioner argued that "or equivalent" allowed education and experience to equate to a baccalaureate degree. *Id.* at 1177. The court found that neither the Act nor Department of Homeland Security regulations require a skilled worker to have a bachelor's degree and that the petitioner drafted the position's job requirements on the labor certification "with the beneficiary in mind." *Id.* at 1179. The court therefore rejected USCIS' interpretation of the educational requirement and ordered the petition's approval.

The *Grace Korean* decision, however, does not bind us in this matter. Federal agencies need not follow published decisions of U.S. district courts in other matters, even within the courts' districts. *Matter of K-S-*, 20 I&N Dec. 715, 718-720 (BIA 1993). Moreover, the decision's facts are distinguishable from this case. As previously indicated, the labor certification (then Form ETA 750, Application for Alien Employment Certification) in *Grace Korean* stated a minimum, educational requirement of a bachelor's degree "or equivalent." *Grace Korean*, 437 F. Supp. 2d at 1176. Here, parts H.4 and H.9 of the labor certification (now ETA Form 9089, Application for Permanent Employment Certification) state the minimum, educational requirement as a U.S. bachelor's degree or "a foreign *educational* equivalent." (emphasis added). In part H.8, this labor certification also specifies "No" alternate, acceptable combination of education and experience. Thus, unlike in *Grace Korean*, the plain language of this labor certification clearly indicates that the offered position requires a U.S. bachelor's degree or a foreign equivalent degree, excluding combinations of education and experience. We therefore decline to follow *Grace Korean* in this matter.

The Petitioner also argues that it reasonably relied on USCIS' determinations in H-1B nonimmigrant proceedings that the Beneficiary's education and experience equated to a bachelor's degree. The Petitioner states:

> It is impossible for the government to argue the Beneficiary has a bachelor's degree qualifying him for an H-1[B] but not for the I-140. This inconsistency is purely the result of the government's interpretations of its own policies and not due to any change in the Beneficiary's experience and education.

Requirements for H-1B nonimmigrants and skilled-worker immigrants, however, differ. To qualify for H-1B status in a "specialty occupation," a petitioner may demonstrate that a beneficiary has the equivalent of at least a U.S. baccalaureate degree based on education, training, experience, or a combination of all three. 8 C.F.R. § 214.2(h)(4)(iii)(C)(*4*). In contrast, job requirements on labor certifications, rather than regulations, determine any degree criteria for skilled workers. *See* 8 C.F.R. § 204.5(l)(3)(ii)(B) (requiring skilled-worker petitions to demonstrate beneficiaries' possessions of job requirements stated on accompanying labor certifications). Thus, the Petitioner's reliance on determinations in H-1B proceedings to establish the Beneficiary's qualifications for the offered position in immigrant proceedings was not reasonable.

The Petitioner also asserts that, in labor certification proceedings, its advertisements for the offered position could omit its acceptance of a baccalaureate equivalent based on a combination of education and experience. It argues that "therefore no U.S. citizen candidates were unfairly denied a position." The record is insufficient to demonstrate the propriety of the Petitioner's recruitment efforts in labor certification proceedings. Regardless of the nature of those efforts, however, the company has not demonstrated the Beneficiary's possession of the educational requirement stated on the labor certification, which "must represent the employer's actual minimum requirements for the job opportunity." *See* 20 C.F.R. § 656.17(i)(1).

For the foregoing reasons, the record does not establish the Beneficiary's educational qualifications for the offered position. We will therefore affirm the petition's denial on this ground.

## III. CONCLUSION

The Petitioner has not demonstrated the Beneficiary's qualifying education for the offered position. The petition is denied for the reason stated above. In petition proceedings, a petitioner bears the burden of establishing eligibility. Section 291 of the Act, 8 U.S.C. § 1361. The Petitioner here has not met that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of K-M-, Inc.*, ID# 3396097 (AAO Apr. 16, 2019)