U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-W- LLC

DATE: AUG. 10, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a real estate asset management business, seeks to employ the Beneficiary as a financial analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish that the labor certification supported classification of the position in the advanced degree professional category because it stated education and experience requirements that could be read as requiring less than an advanced degree.

On appeal, the Petitioner claims that the terms of the labor certification meet the minimum requirements for classification of the position in the advanced degree professional category under section 203(b)(2) of the Act.

Upon *de novo* review of the record, we will withdraw the Director's decision and remand this matter for further proceedings consistent with this opinion.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(I)-(II) of the

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." A beneficiary must be eligible as of that date, and so in this case the Beneficiary must have had a master's degree or bachelor's degree and the five years' requisite experience, and otherwise meet the terms of the labor certification, by the date the labor certification was filed.

Act. Second, the employer may file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. *See* section 245 of the Act, 8 U.S.C. § 1255.

For this advanced degree professional position, the labor certification must provide that the job requires an advanced degree or its equivalent. *See* 8 C.F.R. § 204.5(k)(4)(i). In pertinent part, Department of Homeland Security regulations define the term "advanced degree" as: "[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree." 8 C.F.R. § 204.5(k)(2).

II. ANALYSIS

A. Educational Requirements for the Position

The Director concluded that the labor certification allows for less than an advanced degree and, consequently, the Petitioner had not established that the position qualifies for advanced degree professional classification.

In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification. The required education, training, experience, and skills for the proffered position are set forth at Part H of the labor certification. In this case, Part H states that the minimum requirements of the offered position are a master's degree in finance and 12 months of experience in the job offered or in a related occupation as an investment advisor or investment counselor. The Petitioner further specified at Part H.8 that no alternate combination of education and experience is acceptable. However, in response to Part H.14, the Petitioner stated the following:

> H.14. Specific skills or other requirements: "Employer is willing to accept any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position and shows demonstrable ability of the job requirements."

As noted above, a petition for an advanced degree professional must establish that, among other things, the job offer portion of the labor certification requires at least a master's degree or foreign equivalent degree or a bachelor's degree or foreign equivalent degree followed by five years of progressive experience.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). Our

interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "[The] Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[2]

The Director denied the petition, concluding that because the language in H.14 states that the Petitioner will accept "any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position," it would accept less than the minimum requirements for advanced degree classification.

On appeal, the Petitioner asserts that the position qualifies for advanced degree professional classification on the basis that the proffered job requires a master's degree as the primary and alternative job requirements. The Petitioner states that it was required by regulation to include the language "any suitable combination of work experience, education and training that is equivalent to the actual minimum requirements of the position" based on the DOL regulation at 20 C.F.R. § 656.17(h)(4)(ii), and relevant DOL case law. Specifically, the Board of Alien Labor Certification Appeals (BALCA) ruled in *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (*en banc*), that: "[W]here the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable."

The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as *Kellogg* language and was incorporated into the DOL's regulation at 20 C.F.R. § 656.17(h)(4)(ii). The Petitioner asserts that its inclusion of *Kellogg* language on the labor certification does not change the minimum requirements to qualify for the position. We agree; we do not consider the presence of *Kellogg* language on the labor certification to have any material effect on the interpretation of the stated minimum requirements of the job offer. Moreover, the Petitioner asserts on appeal that it would not accept less than a U.S. master's in finance and 12 months of relevant experience and submits internal and external advertisements regarding the proffered position that show that it advertised the position in this manner. Therefore, the Petitioner has provided sufficient evidence to show the actual minimum educational requirement for the job opportunity was a single U.S. master's degree in finance and has demonstrated that the labor certification supports the requested classification.

[2] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

As the Petitioner has demonstrated that the proffered position meets the requirements for the advanced degree professional classification, we will withdraw the Director's decision on this issue.

B. Ability to Pay the Proffered Wage

Although the Petitioner has overcome the Director's decision, the petition remains unapprovable because the Petitioner has not demonstrated in ability to pay the proffered wage from the priority date onward. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage.

The proffered wage for the position of quality control analyst is $68,994 per year, and the priority date is August 7, 2015. With the petition, the Petitioner submitted a balance sheet dated May 31, 2016, the Beneficiary's 2015 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, and pay stubs for the first half of 2016. However, the record does not contain the above regulatory-prescribed evidence of the Petitioner's ability to pay the proffered wage in 2015 or 2016.

Therefore, the Director should instruct the Petitioner to submit complete copies of its 2015 and 2016 federal income tax returns, annual reports, or audited financial statements to establish its continuing ability to pay the proffered wage as of the 2015 priority date onward. The Petitioner should also submit evidence of wages paid to the Beneficiary in 2016, such as the Beneficiary's IRS Forms W-2, Wage and Tax Statement, or his IRS Forms 1099-MISC, Miscellaneous Income.

III. CONCLUSION

For the reasons set forth above, we will withdraw the Director's decision and remand the matter for further consideration of the Petitioner's ability to pay the proffered wage.

ORDER: The decision of the Director is withdrawn. The matter is remanded for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of N-W- LLC*, ID# 604824 (AAO Aug. 10, 2017)