U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-P-US, INC.

DATE: AUG. 24, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a fresh produce wholesale company, seeks to employ the Beneficiary as an office coordinator. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the labor certification requires the minimum of a bachelor's degree.

On appeal, the Petitioner asserts that the primary requirement for the offered position is a bachelor's degree; that the alternative requirement of two years of experience is substantially equivalent to the primary requirement of a bachelor's degree; and that the preference immigrant classification should be based on an employer's primary job requirement instead of the alternate requirement.

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved ETA Form 9089, Application for Permanent Employment Certification (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. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date." *See* 8 C.F.R. § 204.5(d). In this case, the priority date is May 3, 2016.

(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.

B. Professional Classification

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If the offered position is not statutorily defined as a profession, "the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation." 8 C.F.R. § 204.5(l)(3)(ii)(C).

In this case, Section H of the labor certification submitted with the petition states that the offered position has the following minimum requirements:

H.4. Education: Bachelor's degree in any field.
H.5. Training: None required.
H.6. Experience in the job offered: None required.
H.7. Alternate field of study: Any field.
H.8. Alternate combination of education and experience: Two years of experience.
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: 24 months as an office coordinator.
H.14. Specific skills or other requirements: None.

Thus, the labor certification permits an applicant to qualify for the offered job with two years of experience and no education. Since an individual can qualify for the offered position with less than a baccalaureate, the petition does not qualify for the professional classification. Therefore, the petition cannot be approved for a member of the professions under section 203(b)(3)(A)(ii) of the Act.

On appeal, the Petitioner asserts that the primary requirement for the offered position is a bachelor's degree, although it concedes that an applicant may qualify for the job with no education and two years of experience. It asserts that the alternative requirement of two years of experience is

substantially equivalent to the primary requirement of a bachelor's degree,[2] and that the DOL assigned a standard vocational preparation (SVP) of 7 to the offered job. However, the DOL assigned an O*NET occupational code of 43-1011 to the offered job, with an SVP of 6. *See* O*Net Online, https://www.onetonline.org/link/summary/43-1011.00 (last visited August 23, 2017).[3]

The Petitioner cites to *Globalnet Mgmt.*, 2009-PER-00110 (BALCA Aug. 6, 2009), in support of its assertion that the alternative requirement is substantially equivalent to the primary requirement. This Board of Alien Labor Certification Appeals (BALCA) decision addresses DOL labor certification rules but not USCIS minimum requirements for classification as a professional under section 203(b)(3)(A)(ii) of the Act and 8 C.F.R. § 204.5(l)(3)(ii)(C). Further, BALCA precedent is not binding in these proceedings. While 8 C.F.R. § 103.3(c) provides that precedent decisions of USCIS are binding on all its employees in the administration of the Act, BALCA decisions are not similarly binding. Precedent decisions must be designated and published in bound volumes or as interim decisions. 8 C.F.R. § 103.9(a).

On appeal, the Petitioner states that the preference category should be based on an employer's primary job requirement instead of the alternate requirement. We disagree. The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires a Petitioner to show that the *minimum* of a bachelor's degree is required for entry into the occupation. Here, the labor certification permits an applicant to qualify for the offered job with two years of experience and no education and, therefore, a minimum of a bachelor's degree is not required. Thus the Director correctly concluded that this petition cannot be approved under the requested professional classification.

C. Ability to Pay the Proffered Wage

Although not addressed by the Director, the record does not establish that the Petitioner has the continuing ability to pay the proffered wage from the priority date. As noted above, the priority date is May 3, 2016. The proffered wage is $59,176 per year.

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

[2] The regulation at 20 C.F.R. § 656.17(h) requires that an alternative requirement must be substantially equivalent to the primary requirement of the job opportunity in a labor certification application.

[3] The DOL previously used the Dictionary of Occupational Titles (DOT) to classify occupations. The Petitioner submits an excerpt from the DOT on appeal. However, O*NET is the current occupational classification system used by the DOL, and it states that most occupations in this classification "require training in vocational schools, related on-the-job experience, or an associate's degree." *Id.*

> 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 this case, the record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner for 2016 as required by 8 C.F.R. § 204.5(g)(2).[4] Therefore, the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date.

II. CONCLUSION

The Petitioner has not established that the labor certification requires the minimum of a bachelor's degree. The Petitioner also has not established that it had the continuing ability to pay the proffered wage from the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of K-P-US, Inc.*, ID# 457664 (AAO Aug. 24, 2017)

[4] The record contains the Petitioner's federal tax return for 2015.