U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-H-C-

DATE: DEC. 5, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a hospital, seeks to employ the Beneficiary as a report developer II. It requests his classification as a professional under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This category allows a U.S. business to sponsor a foreign worker with a bachelor's degree or its foreign equivalent for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that record did not establish, as required, that the labor certification supports the requested professional classification, and that the Beneficiary possesses the minimum experience required for the offered position.

On appeal, the Petitioner submits additional evidence and asserts that the proffered position is for a professional and that the Beneficiary has the required experience.

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

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 Act. Second, the employer files 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.

[1] The date the labor certification is filed is called the "priority date." 8 C.F.R. § 204.5(d).

II. ANALYSIS

A. Labor Certification Does Not Support Requested Classification

For professional classification, the Petitioner must establish that the job offer portion of the labor certification requires at least a bachelor's degree or a foreign equivalent degree. 8 C.F.R. § 204.5(l)(3)(i). The regulation uses a singular description of degree. Thus, the plain meaning of the regulatory language concerning the professional classification sets forth the requirement that the position must require one degree that is a U.S. bachelor's degree or determined to be the foreign equivalent of a U.S. baccalaureate degree in order to be qualified as a professional position.

In this case, the labor certification states that the offered position of report developer has the following minimum educational and experience requirements:

H.4.	Education: Bachelor's degree in "Technical" major field of study
. . .	
H.6.	Is experience in the job offered: yes
H.6-A.	Number of months of experience required: 36 months
. . .	
H.8.	Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A.	Alternate level of education required: Other
H.8-B.	If other is indicated in H.8-A, indicate alternate level of education required: "Any suitable combination of education, training, or experience is accep[table]"
H.8-C.	Number of years of experience acceptable: 5
H.9.	Is a foreign educational equivalent acceptable? Yes.
. . .	
H.10	Is experience in an alternate occupation acceptable? Yes
H.10-A	Number of months of experience in alternate occupation required: 36
H.10-B	Job title of alternate occupation: Report Development

USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc v. Landon.*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). USCIS interprets the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS' interpretation of the job's requirements, as stated on the labor certification, must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Id.* at 834 (emphasis added).

Here, the Petitioner's acceptance of "other" as an alternate level of *education* defined as "any suitable combination of education, training, or experience" allows for less than a bachelor's degree. In response to the Director's request for evidence (RFE) regarding the requirements for the position, the Petitioner submitted advertisements regarding the proffered position stating that a bachelor's degree was required but that "[a]pplicable experience may be accepted in lieu of degree." The plain language of the labor certification and the explicit language in the advertisements demonstrate the Petitioner's acceptance of experience alone in lieu of a bachelor's degree. Because the position does not require at least a U.S. bachelor's degree or a foreign equivalent degree, the petition cannot be approved under the professional classification. *See* 8 C.F.R. § 204.5(l)(3)(i) (the labor certification underlying a petition for a professional must require at least a U.S. bachelor's degree or a foreign equivalent degree).

On appeal, the Petitioner states that it was required to include the language "any suitable combination of education, training, or experience which is substantially equivalent to the minimum requirement for a bachelor's degree" based on the DOL regulation at 20 C.F.R. § 656.17(h)(4)(ii), and relevant DOL case law. 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 is a restatement of the bachelor's degree requirement, that its intent was only to accept any suitable combination of education, training, or experience that is substantially equivalent to the minimum requirement of a bachelor's degree, and that the Director erroneously found that the Petitioner would accept less than a bachelor's degree from an applicant for the proffered position.

However, the Petitioner used the *Kellogg* language as the alternative *education* requirement, indicating its acceptance of a combination of education, training, or experience in place of the required degree, rather than its acceptance of either the primary or alternate requirements. The Petitioner also included internal and external advertisements regarding the proffered position that confirm it advertised the position as accepting experience alone "in lieu of [a bachelor's] degree." The Petitioner does not explain how its acceptance of any "combination of education, work experience, or training," or even just experience, in lieu of a bachelor's degree can establish that the proffered position requires a bachelor's degree. Based on the plain language on the labor certification and its recruitment information, the Petitioner has not established that the proffered position requires at least a bachelor's degree

The evidence submitted does not establish that the offered position requires at least a U.S. bachelor's degree or a foreign equivalent degree. As such, the labor certification does not support the requested professional classification and, therefore, the petition cannot be approved under the professional classification.

B. Beneficiary's Experience

The Petitioner also has not established that the Beneficiary has all of the experience required on the labor certification for the proffered position. A petitioner must establish that a beneficiary meets all of

the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

As discussed, the Petitioner stated on the labor certification that the proffered position requires a minimum of 36 months of experience in the job offered or 36 months of experience in report development. The regulation at 8 C.F.R. § 204.5(l)(3) requires evidence that the Beneficiary has the claimed experience, and the evidence must include the name, address, and title of the employer, along with a description of the experience gained. The Petitioner and Beneficiary stated on the labor certification that the Beneficiary has eight months of qualifying experience as a software engineer with [redacted] in [redacted] TX and six months of experience as a reporting analyst with [redacted] in [redacted] CA, and the Petitioner submitted letters from the Beneficiary's prior employers. However, the labor certification and letters show that the Beneficiary has work experience totaling only 14 of the 36 months required on the labor certification.

In response to the Director's RFE, the Petitioner noted that the Beneficiary received a master's degree in computer engineering from [redacted] in [redacted] CA in 2010, and claimed that the degree from [redacted] is equal to two years of qualifying experience under relevant DOL guidance and regulations. *See* DOL Field Memorandum No. 48-94, *Policy Guidance on Alien Labor Certification Issues (FM)* 2 (May 16, 1994); *see also* 69 Fed. Reg. 77326, 77332 (Dec. 27, 2004). The Petitioner also stated that in some circumstances, DOL and USCIS have used set calculations to allow experience to substitute for education. The Petitioner contends that education should also be allowed to substitute for experience using the same calculations, thereby allowing the Beneficiary to use his education to meet experience requirements. However, in this case the issue is not how DOL and USCIS have calculated equivalency between education and experience, but rather whether or not the labor certification allows such an equivalency. The Petitioner explicitly required a minimum of 36 months of experience on the labor certification and did not indicate that education could be used to substitute for that required experience.[2] Moreover, the Petitioner submitted its advertisements regarding the proffered position, which state that applicants must have a "[m]inimum [of] 3-5 years clinical and/or IT experience," or a "[m]inimum [of] 3 years' experience in a report developer role." Because the Petitioner did not describe the offered position on the labor certification or its own advertisements as one for which a master's degree or any other amount of education was acceptable in lieu of the required experience, we find that the terms of the labor certification require at a minimum, 36 months of experience. As the Beneficiary does not have the required experience, he does not meet the terms of the labor certification.

As an additional matter, the Director noted even if we were to consider the Beneficiary's master's degree toward experience, the school from which he earned the degree was not accredited at the time

[2] As noted earlier, the Petitioner stated its acceptance of a combination of education, experience, and training as the alternate *education* requirement, but did not indicate its acceptance of education in place of the required minimum three years of experience.

the degree was conferred in 2010. Consequently, the Director advised that the Beneficiary could not be credited with an additional two years of the required work experience based on this degree.

On appeal, the Petitioner contends that the accreditation status of [redacted] at the time the Beneficiary gained his degree is immaterial to the requested classification. We do not agree. While the regulatory language of 8 C.F.R. § 204.5(l)(3) does not specifically state that a degree must come from an accredited college or university, that requirement is implicit in the regulations. For purposes of this classification, "professional" is defined in 8 C.F.R. § 204.5(l)(2) as "a qualified alien who holds at least a *United States baccalaureate degree*" (or a foreign equivalent degree). (Emphasis added.) Similarly, as defined in 8 C.F.R. § 204.5(k)(2), an "advanced degree" includes "any *United States academic or professional degree* . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] *United States baccalaureate degree*" (or a foreign equivalent degree) and five years of specialized experience (considered equivalent to a master's degree), and "a *United States doctorate*" (or a foreign equivalent degree). (Emphases added.) The repeated usage of the modifier "United States" to describe the different levels of (non-foreign) degrees makes clear that the regulations apply to degrees issued by U.S. educational institutions that are recognized and honored on a nationwide basis. However, the U.S. Department of Education (DoEd) cautions that degrees from unaccredited state institutions are not always recognized outside the degree-granting state. *See* DoEd, *Diploma Mills and Accreditation*, https://www2.ed.gov/students/landing.jhtml?src=ln (last visited on Sept. 28, 2017) (advising that in certain circumstances it may be illegal to use a degree from an institution not accredited by a nationally recognized accrediting agency). Thus, the only way to assure nationwide recognition for its degrees is for the educational institution to secure accreditation by a regional accrediting agency recognized by the DoEd and the Council for Higher Education Accreditation, the two entities responsible for the recognition of accrediting bodies in the United States.

Although the Beneficiary has separately met the educational requirements of the labor certification based on his bachelor's degree, the Petitioner does not establish a statutory or regulatory provision that permits us to credit the Beneficiary with experience based on a master's degree that could not otherwise qualify as a professional degree for this classification.

On appeal, the Petitioner cites to a district court decision to support its claim that the Director took a mechanical approach to adjudication of the petition and failed to consider whether all of the Beneficiary's education, training, and experience is substantially equivalent to the employer's minimum requirements. *Denver Tofu Company v. District Director*, 525 F.Supp. 254 (D.Colo. 1981). In *Denver Tofu*, the court found that the Director acted arbitrarily and capriciously in focusing on a technical requirement of "management training" for the position of product development manager where the labor certification required two years of "on-the-job training" and the job involved the supervision of only three employees. However, in this case, the Director properly considered all of the Beneficiary's relevant education and experience before concluding that he does not possess the minimum three years of experience required on the labor certification. Consequently, the Petitioner has not established that the Beneficiary has the minimum experience required by the terms of the labor certification.

III. CONCLUSION

The record does not establish that the labor certification supports the requested classification, and that the Beneficiary possesses the minimum experience required on the labor certification for the offered position.

ORDER: The appeal is dismissed.

Cite as *Matter of C-H-C-*, ID# 705669 (AAO Dec. 5, 2017)