U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M- CORP.

DATE: FEB. 14, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software development and support firm, seeks to employ the Beneficiary as an information systems analyst - 3. 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, Nebraska Service Center, denied the petition, concluding that the submitted ETA Form 9089, Application for Permanent Employment Certification (labor certification) did not support the requested classification of advanced degree professional.

The matter is now before us on appeal. The Petitioner asserts the Director erred in finding that the minimum requirements listed on the labor certification did not require a member of the professions holding an advanced degree.

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

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain a labor certification from the Department of Labor (DOL). *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 both that there are insufficient U.S. workers available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of similarly employed domestic workers. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS), which determines if the beneficiary qualifies for the offered position, and whether the offered position and the beneficiary are eligible for the requested employment-based immigrant visa classification. A beneficiary must meet 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)(1),

(12).[1] Finally, if USCIS approves the immigrant visa petition, the foreign national must 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.

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). The job offer portion of a labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. *Id.*

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "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. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

In addition, a petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. § 204.5(g)(2); *see also* 8 C.F.R. §103.2(b)(l).[2] The beneficiary must possess an advanced degree pursuant to 8 C.F.R. § 204.5(k)(3). The beneficiary must also meet 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); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Therefore, an advanced degree professional petition must establish that the offered position requires, at a minimum, a professional holding an advanced degree, that the Beneficiary is a member of the professions holding an advanced degree, and that the Beneficiary otherwise meets the requirements of the labor certification by the time of the priority date.

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[1] The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

[2] *See also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to 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).[3]

II. ANALYSIS

As noted above, the Petitioner here requests classification of the Beneficiary as an advanced degree professional. As required by statute, the petition is accompanied by an approved labor certification, certified by the Department of Labor (DOL). *See* 8 C.F.R. § 204.5(a)(2). The priority date of the petition is January 6, 2015.

The required education, training, experience, and skills for the proffered position are set forth at Part H of the labor certification. The labor certification states that the position has the following minimum requirements:

H.4.	Education: minimum level required: Master's degree.
. . .	
H.4-B.	Major field of study: "Comp. sci., Comp. Appl'n, Comp. Eng., Comp. Info. Sys."
. . .	
H.6.	Is experience in the job offered required for the job? No.
. . .	
H.7.	Is there an alternate field of study that is acceptable? Yes.
H.7-A.	If Yes, specify the major field of study: "Electronic Eng, Electrical Eng, Engineering, or related field."

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

H.8. Is there an alternate combination of education and experience that is acceptable? No.

. . .

H.9. Is a foreign educational equivalent acceptable? Yes.

. . .

H.14. Specific skills or other requirements: "For H.9: Will accept a Master's degree or foreign degree equivalent to an U.S. Master's degree based on any suitable combination of degree as determined by a professional evaluation service."

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 5 years of progressive experience. Here, the Petitioner asserts that the position qualifies for advanced degree professional classification on the basis that the proffered job requires a master's degree or foreign equivalent degree. The Petitioner did not state an alternate combination of education and experience in H.8.

The Director found, however, that because the Petitioner states in H.14 that it will accept a combination of degrees deemed equivalent to a master's degree by an evaluator, in reading the labor certification as a whole, the minimum requirements for the position are less than an advanced degree; and therefore, the labor certification did not support a petition for advanced degree professional classification.

On appeal, the Petitioner states that the Director "misinterpreted the 'language' used on ETA 9089," stating:

> There is no indication on the [F]orm ETA 9089 that the petitioner will accept an education less than a Master's degree or foreign equivalency. The language at issue used on H.14 . . . should be read as a whole and was used to reiterate the H.9 foreign educational equivalency and was never intended to deviate or reduce the primary job requirements, here a Master's degree with no experience is required for the labor certification petition.

USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1008; *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). Here, the Petitioner explicitly stated that it would accept, "any suitable combination of degree as determined by a professional evaluation service." Therefore, in stating a combination of education would be accepted, the proffered position did not, at a minimum, require a master's degree or foreign equivalent degree.

On appeal, the Petitioner contends that a "combination of degree[s]" in Part H.14 does not mean a combination of lesser degrees. Rather, the Petitioner states that the language was used to convey

acceptance of a combination of foreign degrees – such as a 4-year bachelor's degree and a 2-year master's degree, or a 3-year bachelor's degree and a 3-year master's degree – as the equivalent of a U.S. master's degree. However, the examples cited by the Petitioner do not represent a combination of lesser degrees used to create an equivalency to the required degree. Rather when a 3-year bachelor's degree is followed by a 3-year master's degree, the resulting master's degree is what is deemed to be the foreign degree equivalent of a U.S. master's degree. The master's degree built upon the bachelor's degree, but it is the master's degree alone that is the foreign degree equivalent. In other words, the 3-year foreign master's degree is not a "combination of degree[s] deemed to be equivalent," but is rather a single source foreign degree equivalent of a U.S. master's degree.

In contrast, the statement in Part H.14 of the labor certification in this case suggests the Petitioner's acceptance of a combination of lesser degrees - such as multiple bachelor's degrees or a combination of bachelor's and associate's degrees – which could be deemed, by a credential evaluator, to be the equivalent level of education of a master's degree.

The Petitioner also contends on appeal that we must examine its "intent" when reviewing the requirements of the labor certification. As noted above, however, it is the terms of the labor certification that are controlling. Here, the Petitioner provided documentation of its recruitment efforts during labor certification proceedings, including copies of its notice of filing, job order with a state workforce agency, and newspaper advertisements. It asserts that the materials demonstrate that the offered position requires at least a master's degree. The recruitment documentation, however, is inconsistent and, therefore, inconclusive regarding the position's minimum job requirements. Some of the materials state the Petitioner's acceptance of a master's degree or its foreign equivalent. However, three other recruitment pieces list multiple job openings in the same ad. advertisements and the do not reflect each position's specific educational requirements, but rather indicate that a number of positions, including the offered position, require a "Bachelor/equiv and prior rel. exp, Master/equiv, or Master/equiv and prior rel. exp," depending on the "position level/type." It is unclear from these advertisements which requirements relate to which position. Further, the advertisements for multiple positions do not reference the acceptance of foreign degree equivalencies, only equivalencies. The recruitment materials, therefore, do not establish a U.S. master's degree or a foreign equivalent degree as a minimum job requirement of the offered position.

Although we note the Petitioner's claim regarding its "intended" degree requirement for the job opportunity, we may not ignore the terms of the labor certification in this matter. *See, e.g., Madany, supra*, 696 F.2d at 1015 (stating that "it is the language of the labor certification job requirements that will set the bounds of the . . . burden of proof"). Despite, the Petitioner's assertion to the contrary, that it intended one degree, the language in Part H.14. of the labor certification, "[w]ill accept a Master's degree or foreign degree equivalent to [a] U.S. Master's degree based on any suitable combination of degree as determined by a professional evaluation service," would potentially allow for a combination of lesser degrees. However, neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum requirements for the position can be met with anything other than a single academic degree. Where a combination

of lesser degrees is accepted, the result is the "equivalent" level of education of an advanced degree rather than the foreign equivalent degree required for classification as an advanced degree professional.[4] Therefore, as the minimum requirements for the job opportunity can be satisfied with less than a single foreign degree that is equivalent to a U.S. master's degree, the labor certification does not support the classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act.[5]

The Petitioner also asserts on appeal that the Director, before denying its petition, should have issued a request for evidence or notice of intent to deny. The Petitioner asserts that it could have submitted evidence demonstrating that the offered position requires at least a master's degree. However, the regulation at 8 C.F.R. § 103.2(b)(8) clearly states that a petition shall be denied "[i]f there is evidence of ineligibility in the record." The regulation does not state that the evidence of ineligibility must be irrefutable. Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the director to deny the petition without a request for evidence. If the petitioner has rebuttal evidence, the administrative process provides for a motion to reopen, motion to reconsider, or an appeal as a forum for that new evidence. Here, the Petitioner had an opportunity for rebuttal on appeal and submitted additional evidence, which we have considered and found insufficient to establish eligibility.

For the reasons noted above, we find that the Petitioner has not established that the job offer portion of the labor certification requires a professional holding an advanced degree or its equivalent, and as such, the labor certification does not support the requested classification.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above-stated reason. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M- Corp.*, ID# 86167 (AAO Feb. 14, 2017)

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[4] Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(*5*) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant classification in this matter do not contain similar language.

[5] We note that a position requiring a bachelor's degree plus 5 years of post-baccaleaurate progressive experience can qualify as an advanced degree professional. However, in this case, the Petitioner did not state that the minimum requirements of the position could be met with this alternate combination of education and experience.