U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-A-, INC.

DATE: FEB. 21, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of computer consulting services, seeks to employ the Beneficiary as a web architect. It requests his classification as a skilled worker under the third-preference, immigrant classification. *See* 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 with at least two years of training or experience for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish the Beneficiary's possession of the minimum education required for the offered position. Based on the accompanying certification from the U.S. Department of Labor (DOL), the Director found that the position requires at least a bachelor's degree.

On appeal, the Petitioner submits additional evidence and asserts that the Director disregarded its alternative job requirements. The Petitioner contends that the labor certification indicates the company's acceptance of a combination of education and experience to meet the baccalaureate requirement.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer applies for certification from the DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must determine whether the United States has able, willing, qualified, and available workers for an offered position, and whether employment of a foreign national would hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL certifies a foreign national to permanently fill an offered position, an employer must next submit the certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If USCIS approves a petition, a foreign national may finally 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.

II. THE EDUCATIONAL REQUIREMENTS OF THE OFFERED POSITION

A petitioner must establish that a beneficiary meets all DOL-certified job requirements by a petition's priority date.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, USCIS must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. 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 the "DOL bears the authority for setting the content of the labor certification").

Here, the accompanying labor certification states the primary requirements of the offered position of web architect as a U.S. bachelor's degree or a foreign equivalent degree, and two years of experience. Instructed in Part H.4 of the certification to indicate the minimum level of education required for the offered position, the Petitioner selected "Bachelor's." In Part H.9, the Petitioner indicated its acceptance of "a foreign educational equivalent." In Part H.8, the Petitioner indicated that "No" alternate combination of education and experience was acceptable. The labor certification therefore states the minimum educational requirement of the position as a U.S. bachelor's degree or a foreign equivalent degree.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he obtained a bachelor of commerce degree in India and more than eight years of full-time, related experience. The Petitioner submitted an independent evaluation of the Beneficiary's foreign educational credentials, indicating that his three-year, foreign degree equates to three years of U.S. university studies. Combining the degree with three years of the Beneficiary's employment experience, the evaluation concludes that he has the equivalent of a U.S. bachelor of science degree in computer information systems. As the Director found, the Beneficiary's three-year, foreign degree does not meet the position's minimum educational requirements of a U.S. bachelor's degree or a foreign equivalent degree. A U.S. bachelor's degree usually requires four years of university studies. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). Thus, as the evaluation indicates, the Beneficiary's three-year, foreign degree does not equate to a U.S. baccalaureate degree.

On appeal, the Petitioner does not dispute that the Beneficiary does not possess a U.S. bachelor's degree or foreign equivalent degree. Rather, the Petitioner asserts that the Director erred in determining the requirements of the labor certification by disregarding its statement in Part H.14 ("Special skills or other requirements") of the labor certification. That section states: "Pursuant to 20 CFR § 656.17(h)(4)(ii), we will accept any suitable combination of education, training, or experience for this position." The DOL regulation at 20 C.F.R. § 656.17(h)(4)(ii) codifies the following holding of the Board of Alien Labor Certification Appeals (BALCA):

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[1] This petition's priority date is June 17, 2015, the date the DOL received the accompanying labor certification for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

> [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 job 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.

Matter of Kellogg, 94-INA-465, *6 (BALCA Feb. 2, 1998) (*en banc*). Like the Director and the Petitioner, we will therefore refer to the Petitioner's statement in Part H.14 as "*Kellogg* language."

The Petitioner argues that its *Kellogg* language constitutes alternative job requirements of the offered position. The Petitioner maintains that the language indicates the company's acceptance of a combination of education and experience, like the Beneficiary's, in lieu of the primary baccalaureate requirement. In support of its argument, the Petitioner submits a 2013 "practice tip" published by the American Immigration Lawyers Association (AILA). The document states that, in a meeting with AILA members, representatives of USCIS service centers "reaffirmed" that "the policy is to review the entire [labor certification form] to determine the employer's intent as to the requirements for the position." It is indeed our policy to review the form as a whole. In this case, an examination of the entire form demonstrates that the Petitioner did not indicate its acceptance of an alternate combination of education and experience. Instructed in Part H.4 of the certification to indicate the minimum level of education required for the offered position, the Petitioner selected "Bachelor's," rather than "Associate's" or some "Other" educational credential. The Petitioner also indicated that "No" alternate combination of education and experience was acceptable in part H.8. We generally do not interpret the insertion of *Kellogg* language in part H.14 to mean that the employer would accept lesser qualifications than the stated primary and alternate requirements. Were we to read the *Kellogg* language as an alternative requirement; the actual minimum requirements of the offered position would impossible to discern, the primary and alternative requirements would be rendered meaningless, and any labor certification with alternative requirements would be potentially ineligible for the requested classification.

The AILA practice tip cites a case where BALCA found a statement on a labor certification similar to the Petitioner's to clarify rather than conflict with the alternate requirements stated elsewhere on the form. *See Matter of Gen. Elec. Co.*, 2011-PER-02696 (BALCA Jan. 22, 2013) (interpreting an employer's stated acceptance of a combination of education and experience in lieu of a bachelor's degree). BALCA decisions do not bind us. *See* 8 C.F.R. § 103.10(b) (stating that USCIS employees must follow the precedent decisions of the Board of Immigration Appeals and the Attorney General in proceedings involving the same issues). Also, unlike here, the employer in *General Electric* indicated its acceptance of an alternate combination of education and experience. *Matter of Gen. Elec.*, 2011-PER-02696 at *3.

In a more recent and more factually similar case, BALCA held that the inclusion of *Kellogg* language did not create an alternative requirement. There, like here, the employer stated no acceptable, alternative combination of education and experience in Part H.8 of a certification, but indicated its acceptance of "any suitable combination of education, training and experience" in Part

H.14. *See Matter of IT & EBusiness Consulting Servs., Inc.*, 2012-PER-01901 (BALCA Sept. 8, 2016). BALCA ruled that the *Kellogg* language did not alter the offered position's minimum job requirements, in part, because "the Employer did not list any alternative requirements on the [certification]." *Id.* at *3.[2] Like the employer in *IT & EBusiness Services*, the Petitioner indicated in Part H.8 of the certification that "No" alternate combination of education and experience was acceptable. Therefore, the Petitioner's *Kellogg* language in Part H.14 is ineffective. If the Petitioner intended the *Kellogg* language as an alternative requirement, it has not explained why it indicated "No" alternative combination of education and experience in Part H.8. *See Matter of Ho*, 19 I&N Dec. 582, 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

We acknowledge that the requested classification of skilled worker does not require a bachelor's degree and that the Petitioner prepared the labor certification application with the Beneficiary's qualifications in mind. But USCIS:

> has an independent role in determining whether the alien meets the labor certification requirements, and where the plain language of those requirements does not support the petitioner's asserted intent, the agency does not err in applying the requirements as written.

SnapNames.com, Inc. v. Chertoff, No. CV 06-65-MO, 2006 WL 3491005, *7 (D. Or. Nov. 30, 2006). As evidence that it intended the *Kellogg* language as an alternative requirement, the Petitioner submitted a copy of its job order for the offered position. The job order, which advertised the position through a state workforce agency, indicates that any applicant "must possess a bachelor's degree or equivalent in Engineering, Computer Science, or a related field; and two years of experience in the job offered or as a software designer, developer, tester, or analyst. Employer will accept any suitable combination of education, training, or experience." The Petitioner, however, did not submit evidence that the *Kellogg* language appeared in any other of its advertisements for the position during the labor certification process, including: the notice of filing; and ads in a newspaper, with a professional organization, and at a campus placement office. The Petitioner also did not submit evidence that it considered U.S. workers for the offered position who potentially qualified based on a combination of education and experience. The Petitioner's job order therefore does not establish that it recruited for the offered position with the intention to accept a combination of education and experience in lieu of the baccalaureate requirement.

For the foregoing reasons, the record does not establish the Petitioner's *Kellogg* language in Part H.14 of the labor certification as an alternative job requirement. Rather, the labor certification indicates the offered position's minimum educational requirement as a U.S. bachelor's degree or a foreign equivalent degree.

[2] While we are not bound by BALCA decisions, we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

III. CONCLUSION

The Petitioner has not established the Beneficiary's possession of the minimum education required for the offered position. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of C-A-, Inc.*, ID# 938493 (AAO Feb. 21, 2018)