U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-H-P (U-), INC.

DATE: JAN. 26, 2018

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a petroleum producer, seeks to employ the Beneficiary as a drilling operations engineer. It requests his classification as a skilled worker under the third-preference, immigrant category. *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 Director of the Texas Service Center denied the petition. Interpreting the position's certification by the U.S. Department of Labor (DOL) to require at least a U.S. bachelor's degree or a foreign equivalent degree, the Director concluded that the Petitioner did not establish the Beneficiary's possession of the minimum education required for the job.

On appeal, the Petitioner submits additional evidence and asserts the Beneficiary's qualifications for the position. The Petitioner contends that either the Beneficiary's three-year, foreign bachelor's degree, or a combination of his education and experience equating to a U.S. baccalaureate, satisfies the 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 requires DOL certification. *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 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. USCIS determines, among other things, whether a beneficiary meets the DOL's requirements for a position. 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 a beneficiary's satisfaction of 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, minimum requirements of the offered position of drilling operations engineer as a U.S. master's degree or a foreign equivalent degree in petroleum, mechanical, or chemical engineering, and three years of related experience. The certification also states the Petitioner's acceptance of a bachelor's degree and five years of experience.

In addition, Part H.14 of the labor certification ("Specific skills or other requirements") states: "Employer will accept any suitable combination of education, experience or training." Like the Director and the Petitioner, we will refer to this statement as "*Kellogg* language." In *Matter of Kellogg*, the Board of Alien Labor Certification Appeals (BALCA) held that a certification application must contain the statement where a foreign national already works for the employer, does not meet the position's primary requirements, and only potentially qualifies for the job based on its alternative requirements. 94-INA-465 (BALCA Feb. 2, 1998) (*en banc*).[2]

On the labor certification, the Beneficiary attested that, before the petition's priority date, he earned a bachelor's degree in mechanical engineering from a Scottish university. The Petitioner submitted copies of the Beneficiary's bachelor of engineering degree in mechanical systems and university transcripts, indicating his completion of a three-year program.

The Petitioner also submitted three, independent evaluations of the Beneficiary's foreign educational credentials. The first two evaluations both conclude that the Beneficiary's Scottish degree equates to three years of university studies in the United States. The second evaluation, which the Petitioner submitted in response to the Director's request for additional evidence, also states that the

[1] This petition's priority date is August 28, 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).

[2] The DOL codified *Kellogg*'s holdings at 20 C.F.R. § 656.17(h)(4). The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states: "If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable."

Beneficiary has the equivalent of a U.S. bachelor of science degree in mechanical engineering, based on a combination of his bachelor's degree and three years of his related experience. The Petitioner submitted the third evaluation in response to the Director's notice of intent to deny. It states that the Beneficiary's bachelor's degree equates to four years of U.S. university studies and a U.S. bachelor of science degree in mechanical engineering.

In Part H.4, the labor certification states the primary educational requirement of the offered position as a "Master's" degree. In Part H.8-A, the certification states the position's alternate level of education as a "Bachelor's" degree. In Part H.9, the employer indicated its acceptance of "a foreign educational equivalent." In Part H.14 of the certification, the Petitioner stated all of the position's requirements, including more detailed experience requirements. The educational requirements in Part H.14, however, do not indicate any material changes from those stated in Parts H.4 and H.8-A. The educational requirements in H.14 state "Master of Science or foreign equivalent" and "Bachelor of Science degree . . . or foreign equivalent." The record therefore establishes the minimum educational requirement of the offered position as a U.S. bachelor's degree or a foreign equivalent degree.

The Petitioner has not established the Beneficiary's possession of a U.S. bachelor's degree or a foreign equivalent degree. Two of the three evaluations submitted by the Petitioner state that the Beneficiary's foreign degree equates to only three years of U.S. university studies. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977) (finding that a U.S. bachelor's degree usually requires four years of university studies). The third evaluation finds the Beneficiary's Scottish degree equivalent to a U.S. baccalaureate. But the evaluation does not explain how the Beneficiary's three years of university studies in Scotland equate to four years of university in the United States. *See Matter of Caron Int'l, Inc.*, 19 I&N Dec. 791, 795 (Comm'r 1988) (allowing the immigration service to reject or afford less evidentiary weight to expert testimony that conflicts with other evidence or "is in any way questionable"). The Petitioner also has not explained why the conclusion of the third evaluation differs from those of the other two. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). The record therefore does not establish the Beneficiary's possession of a U.S. bachelor's degree or a foreign equivalent degree as the labor certification specifies.

On appeal, the Petitioner concedes that the Beneficiary lacks a four-year degree equivalent to a U.S. bachelor's degree. But the Petitioner asserts that the Beneficiary's bachelor's degree meets the minimum educational requirement stated on the labor certification. The Petitioner notes that the certification does not specifically require a four-year bachelor's degree and indicates acceptance of a foreign degree. The Petitioner therefore maintains that the Beneficiary's three-year, foreign degree meets the stated minimum educational requirement.

The Petitioner's argument, however, ignores the instructions and structure of the labor certification form. The form at Part H.4 instructed the Petitioner to state the minimum level of education required for the offered position and at Part H.8-A, if applicable, an accepted, alternate level of education. Part H.9 of the form asked "Is a foreign educational equivalent acceptable?" Thus, this question informed

the Petitioner that it had to state educational requirements on the form in terms of U.S., not foreign, academic credentials.

So informed, the Petitioner at Part H.8-A indicated "Bachelor's" degree as the alternate educational requirement, rather than "Associate's" or some "Other" lesser U.S. educational level. In Part H.9, it indicated its acceptance of "a foreign educational *equivalent*." (emphasis added). Such a response to H.9 simply indicates an employer's willingness to accept a degree that is equivalent to a U.S. degree but is issued by a foreign college or university. It does not express, state, or define an employer's willingness to accept a combination of educational programs and/or experience determined to be equivalent to a degree. Thus, on the labor certification, the Petitioner indicated a minimum requirement of a U.S. bachelor's degree or a foreign equivalent degree.

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).

Moreover, the Petitioner has not established that it intended a three-year, foreign degree to meet the requirements of the offered position. The record does not indicate that the Petitioner notified the DOL or potential U.S. applicants of its acceptance of less than a U.S. bachelor's degree or a foreign equivalent degree. We therefore reject the Petitioner's assertion that the Beneficiary's three-year, foreign degree meets the position's minimum educational requirement.

The Petitioner also contends that, the Beneficiary's combination of education and experience is permissible because of the inclusion of *Kellogg* language in Part H. 14. The Petitioner asserts that the *Kellogg* language in Part H.14 of the labor certification lessens the position's minimum educational requirements and allows the Beneficiary to satisfy the requirement based on "any suitable combination of education, experience or training." We generally do not interpret the standard *Kellogg* language in section H.14 to mean that an employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. On appeal, the Petitioner cites a 2012 case in which we interpreted the *Kellogg* language to mean "any combination [of education, training, or experience] that is at least equal to or greater than the specific requirements on the form."

The 2012 case cited by the Petitioner is not precedential. It therefore does not bind us in this matter. *See* 8 C.F.R. § 103.10(b) (stating that, in proceedings involving the same issues, USCIS employees need only follow precedent decisions). Even if precedential, however, the decision would not support the Petitioner's argument. Under the decision's interpretation of the *Kellogg* language, the

Beneficiary's combination of education and experience would not equal or exceed the requirements stated on the labor certification. As previously discussed, the certification in this case requires at least a U.S. bachelor's degree or a foreign equivalent degree. The record here does not establish the Beneficiary's foreign degree as equivalent to a U.S. bachelor's degree. As such, the Beneficiary does not possess education equal to or greater than the education required by the labor certification. Rather, a preponderance of evidence indicates that his degree equates to only three years of U.S. university studies. Our 2012 decision therefore does not support the Petitioner's argument that the Beneficiary's combination of education and experience satisfies the minimum educational requirement.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the minimum education required for the offered position.

III. THE EXPERIENCE REQUIREMENTS OF THE OFFERED POSITION

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum experience required for the offered position.

As previously indicated, the Petitioner asserts the Beneficiary's satisfaction of the offered position's alternative requirements of a bachelor's degree and five years of related experience. The Petitioner must therefore establish the Beneficiary's possession of at least five years of qualifying experience by the petition's priority date of August 28, 2015. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160.

On the labor certification, the Beneficiary attested that, before starting employment with the Petitioner in the United States in June 2012, he gained more than six years of full-time, qualifying experience in Trinidad and Tobago.[3] He stated the following experience:

- One year as a drilling engineer with an affiliate of the Petitioner's from June 2011 to June 2012;
- About two years and 10 months as a directional driller with another company from August 2008 to May 2011; and
- About two years and eight months as a MWD/LWD[4] engineer with that same company from August 2005 to March 2008.

[3] A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was gained in a substantially different position or the employer can demonstrate the impracticality of training a U.S. worker for the position. 20 C.F.R. § 656.17(i)(3). The Petitioner here has not claimed that the Beneficiary gained qualifying experience with it. Nor does the record establish that the Beneficiary gained experience with the Petitioner in a substantially different position or the impracticality of training a U.S. worker for the offered position.

[4] The acronyms "MWD" and "LWD" appear to stand for "measurements while drilling" and "logging while drilling," respectively. The terms appear to describe measurements regarding oil or gas drilling directions and geologic formations.

The Petitioner submitted letters from the Beneficiary's purported former employers. *See* 8 C.F.R. § 204.5(l)(3)(ii)(A) (requiring a petitioner to support a beneficiary's claimed qualifying experience with letters from employers). Consistent with the information on the labor certification, letters from the Petitioner's affiliate state the Beneficiary's employment as a drilling engineer from June 2011 to June 2012.

Letters from the other, purported former employer, however, do not establish the remainder of the Beneficiary's claimed qualifying experience. An initial letter states his employment only for about two years, from August 2005 to July 2006 and from January 2010 to March 2011. A later letter states the Beneficiary's term of employment as more than five years: from August 2005 to June 2009 and from January 2010 to May 2011, with an assignment in Mexico in between, from August 2009 to January 2010. The record, however, does not explain why the initial letter stated a shorter period of employment. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence). The letters also contain discrepancies in the Beneficiary's purported job titles, casting further doubt on his claimed, qualifying experience.

In addition, Part H.14 of the labor certification states that experience must include "one year in a supervisory role." None of the letters from the Beneficiary's former employers state his employment in a supervisory role. The record therefore does not establish the Beneficiary's possession of the minimum experience required for the offered position.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum education required for the offered position. We will therefore affirm the Director's decision. The record also does not demonstrate that the Beneficiary had the minimum experience required for the position.

ORDER: The appeal is dismissed.

Cite as *Matter of B-H-P-(U-), Inc.*, ID# 907954 (AAO Jan. 26, 2018)