U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N-, INC.

DATE: JAN. 27, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a business providing information technology services, seeks to employ the Beneficiary as a programmer analyst. 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, Nebraska Service Center, denied the petition. The Director determined that the record did not establish that the Beneficiary held the baccalaureate degree required for classification as a professional under section 203(b)(3)(A)(ii) of the Act.

The matter is now before us on appeal. The Petitioner asserts that the Beneficiary may qualify for the offered position based on a combination of education and work experience equivalent to a baccalaureate degree. However, as will be discussed, the Beneficiary may not qualify for classification as a professional based on a combination of education and experience equivalent to a baccalaureate 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 an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the employer must file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. 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.

By approving the labor certification in this case, DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the

Act. The DOL also certified that the employment of 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)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *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 Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

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). 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), 103.2(b)(l), (12); *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).

II. ANALYSIS

On appeal, the Petitioner asserts that the Director erred in denying the visa petition and that his decision was based on an incomplete reading of the requirements in the labor certification, which, it asserts, allow the Beneficiary to qualify for the offered position based on a combination of education and work experience. However, the Petitioner's arguments on appeal do not address the basis for the Director's denial of the visa petition. The Director did not deny the visa petition because he found that the Beneficiary did not meet the academic requirements of the labor certification but because the Beneficiary did not hold the single baccalaureate degree required for classification as a professional under section 203(b)(3)(A)(ii) of the Act. For the reasons that follow, we concur with the Director's decision.

A. Classification as a Professional Under Section 203(b)(3)(A)(ii) of the Act

The Petitioner in this matter is requesting classification of the Beneficiary as a professional. Section 203(b)(3)(A)(ii) of the Act grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions. *See also* 8 C.F.R. § 204.5(l)2).

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.

The regulation uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the former Immigration and Naturalization Service (INS), responded to criticism that the regulation required a bachelor's degree and did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, enacted November 29, 1990, and the Joint Explanatory Statement of the Committee of the Conference, the former INS specifically noted that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification . . . , an alien must have at least a bachelor's degree." 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be read under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Therefore, it can be presumed that the congressional requirement for a single "degree" for members of the professions was deliberate.

The regulation also requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, the degree must have been issued by a college or university.

In *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D.Or. Nov. 30, 2006), the court held that, in professional and advanced degree professional cases, where a beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concluded that a single foreign degree or its equivalent is required. *See also Marajaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require a beneficiary to possess a single 4-year U.S. bachelor's degree or a foreign equivalent degree).

Thus the plain meaning of the Act and the regulations is that the beneficiary of a petition filed for a professional must possess a single degree from a college or university that is at least a U.S. baccalaureate or foreign equivalent degree.

Here, the Beneficiary holds a 3-year bachelor of commerce degree from [redacted] However, a 3-year degree is generally not considered to be a "foreign equivalent degree" to a U.S. baccalaureate. *See Matter of Shah*, 17 I&N Dec. 244 (Reg'l Comm'r 1977). The Petitioner submitted a credential evaluation report from [redacted] which finds the Beneficiary's degree to be the equivalent of 3 years of university education toward a U.S.

baccalaureate degree. The report then relies on the Beneficiary's work experience combined with his 3 years of university education to reach a determination that he has the equivalent of a U.S. bachelor of science in computer information systems.[1] However, where the analysis of a beneficiary's credentials relies on a combination of lesser degrees and/or work experience, the result is the "equivalent" level of education of a baccalaureate degree rather than the single U.S. baccalaureate or foreign equivalent degree required for classification as a professional.

Therefore, the record does not establish that the Beneficiary in this matter has a U.S. bachelor's or foreign equivalent degree awarded by a college or university. As such, he is not eligible for classification as a professional under section 203(b)(3)(A)(ii) of the Act, and the visa petition must be denied, regardless of whether or not the Beneficiary meets the educational requirements of the labor certification.

B. Labor Certification Does Not Support the Requested Classification

In addition, although not addressed by the Director, the labor certification does not support the requested classification of professional. Section 101(a)(32) of the Act defines the term "profession" as including, but not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries." If an offered position is not statutorily defined as a profession, a 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 addition, the job offer portion of the labor certification underlying the petition, Part H, "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i).

Here, the offered position of programmer analyst is not included among the professions listed in section 101(a)(32) of the Act, and the Petitioner has submitted no evidence to establish that the minimum of a baccalaureate degree is required for employment as a programmer analyst. Instead, Part H.14 of the labor certification reflects that the Petitioner's requirement for a U.S. bachelor's or foreign equivalent degree found in Parts H.4 and H.9 may be satisfied with a degree equivalency based on a combination of education and work experience.[2] While such an equivalency may satisfy the Petitioner's requirements for the offered position, it is not, as previously discussed, the U.S. bachelor's or foreign equivalent degree from a college or university required for classification as a professional under the Act. Therefore, as the job offer portion of the labor certification does not demonstrate that the offered position requires the minimum of a baccalaureate degree, the labor certification does not support classification as a professional under section 203(b)(3)(A)(ii) of the Act. For this reason as well, the petition must be denied.

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[1] We note that the used the ratio of 3 years of experience to 1 year of education to determine the academic equivalency of the Beneficiary's employment experience. However, this ratio is used in the nonimmigrant H-1B context, not in immigrant visa proceedings. *See* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5).

[2] The Petitioner has submitted copies of its job advertisements for the offered position, advertising the job opportunity as requiring a "[b]achelors (or equivalent combination of education and exp) + 2 years of exp (Comp Sci, Engg, MIS Business Admin, Into Tech or related."

III. CONCLUSION

The petition will remain denied and the appeal dismissed for the above stated reasons, with each considered as an independent and alternative basis for the decision.

In visa proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of N-, Inc.*, ID# 135018 (AAO Jan. 27, 2017)