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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF P-P-, LLC

DATE: JAN. 31, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, which describes itself as a Hispanic advertising business, seeks to employ the Beneficiary as an associate creative director. It requests classification of the Beneficiary 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 immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least 2 years of training or experience.

The Director, Texas Service Center, denied the petition. The Director concluded that the Petitioner had not established that the Beneficiary possessed the minimum educational qualifications required by the labor certification and the job offer as of the priority date.

The matter is now before us on appeal. The Petitioner asserts that while it had initially petitioned for classification as a professional, it later amended the petition to request classification as a skilled worker.[1] The Petitioner asserts that labor certification allows for a combination of education and experience and that the Beneficiary possessed all of the requirements stated on the labor certification. Upon *de novo* review, we will dismiss the appeal.

I. PROCEDURAL HISTORY

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 may 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.

[1] The petition requesting classification of the Beneficiary as a professional was filed on July 15, 2014, under receipt number [redacted] and was denied on October 21, 2015. The petition requesting classification of the Beneficiary as a skilled worker (the current petition) was filed on April 22, 2015, under receipt number [redacted], and was denied on May 6, 2016. The Petitioner filed an appeal from the Director's decision on June 6, 2016.

As required by statute, a labor certification, approved by DOL, accompanies the petition. The priority date of the petition is October 29, 2013.[2] 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. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies 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. It is then the responsibility of USCIS to determine 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.

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

H.4.	Education: minimum level required: Bachelor's degree.
. . .	
H.4-B.	Major field of study: Advertising.
. . .	
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 alternate field of study that is acceptable. See Box #14.
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.10.	Is experience in an alternate occupation acceptable? Yes.
H.10-A.	If Yes, number of months experience in alternate occupation required: 24.
H.10-B.	Identify the job title of the acceptable alternate occupation: See Box #14.
. . .	
H.14.	Specific skills or other requirements: Employer will accept any suitable combination of education, experience, and/or training for this position. Requirements: Bachelor's degree or foreign academic equivalent in Advertising, Graphic Design, Art, Visual Communications, Computer Graphics, or closely related field. Experience which may have been obtained concurrently should include a minimum of 2 years of background and experience in the field of advertising and graphic design, and 2 years experience in Illustrator, Photoshop and Indesign. Incumbent must be fluent (oral and writing) in English and Spanish.

[2] The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

On the labor certification, in Part J.11., J.12., and J.13., the Beneficiary listed his education as a bachelor's degree in advertising from [redacted] in [redacted] Argentina, completed in 1995. The Petitioner submitted copies of the Beneficiary's academic transcript with English translation, showing studies at [redacted] from 1993 until 1995. The transcript states that the Beneficiary "graduated on 22/12/95 having obtained the title of Superior Technician in Advertising ([redacted])."

The Petitioner submitted a credentials evaluation performed on October 17, 2011, by [redacted] Ph.D., professor and Chair of the [redacted] of the [redacted] concluded that the Beneficiary's academic record, alone, "satisfied requirements which are substantially similar to those required toward the completion of the first three years of course work in a four-year Bachelor's Degree program at an accredited institution of higher education in the United States." [redacted] further concluded that when the Beneficiary's academic record was combined with his experience of at least 14 years of employment in advertising, it constituted "the equivalent of a Bachelor's Degree in Advertising from an accredited institution of higher education in the United States."

The Director denied the petition on May 6, 2016, after concluding that the Petitioner had not established that the Beneficiary possessed the minimum educational credentials of a bachelor's degree required by the labor certification.

II. LAW AND ANALYSIS

On appeal, the Petitioner notes that it had previously filed a petition for this Beneficiary seeking classification as a professional, but states that it had revised its petition to seek classification as a skilled worker. The Petitioner stresses that it specified at Line H.10-A. that the position required 24 months' employment experience in advertising and graphic design, and states that it had submitted sufficient documentation to establish that the Beneficiary possessed the requisite experience. However, as detailed above, the labor certification also states that the position requires a bachelor's degree in graphic design, art, visual communications, computer graphics, or closely related field or a foreign equivalent degree.

To be eligible for approval, 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)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

The Petitioner relies on the beneficiary's 3 years of study at [redacted] combined with his work experience as being equivalent to a U.S. bachelor's degree, as described in the credentials evaluation performed by [redacted] However, as noted above, the Petitioner specified at Line H.8. of the labor certification that it would not accept a combination of education and experience in place of the required bachelor's degree.

The Petitioner notes on appeal that it indicated at Line H.14. of the labor certification that it would accept "any suitable combination of education, experience and/or training for this position."

By way of background, 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.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that "where 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." The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

The Petitioner now suggests it intended to use the *Kellogg* language as an alternative to its response at Line H.4. that the position requires a bachelor's degree. The Petitioner could have indicated at Line H.4. that "Other" education was acceptable and could have defined "Other" at Line H.4-A.; however, the Petitioner did not do so. The Petitioner could also have indicated an alternate combination of education and experience at Line H.8. and elaborated on a combination there, or at Line H.14. The Petitioner's assertion that it intended to allow job candidates to qualify with less education than the specified bachelor's degree contradicts the Petitioner's response at Line H.8., where the Petitioner specified that an applicant cannot qualify for the offered job through a different combination of education and experience in place of the required bachelor's degree. This claim is also inconsistent with the fact that the Petitioner responded to Lines H.7-A. and H.10-B. by stating "See Box #14" and expanded on the required experience, but did not refer to Line H.14. or expand on any allowed combination in that space when it listed the degree requirement at Line H.4. The Petitioner did, in fact, qualify the educational requirement at Line H.4. in stating, "Bachelor's degree or foreign academic equivalent" at Line H.14. The Petitioner's only evaluation submitted would not establish that the Beneficiary has a foreign equivalent degree based on academics alone. Finally, the Petitioner indicated in Section J of the ETA Form 9089 that the Beneficiary qualified for the position based on the possession of a bachelor's degree, not that the Beneficiary qualified based on a combination of education and experience.

USCIS must read the terms of the labor certification as drafted. *See Matter of Silver Dragon Chinese Restaurant*, 19 I&N Dec. 401 (Comm. 1986). When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must examine "the language of the labor certification job requirements" in order to determine

what the job requires. *Id.* 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) (emphasis added). The language of the labor certification reads that a bachelor's degree is required, and the Petitioner listed that the Beneficiary had a bachelor's degree, despite filing under the skilled worker category.

The Petitioner was free to submit any evidence on appeal to help establish the language on the labor certification. The record does not contain any evidence of how the position was advertised and whether candidates without degrees were considered, which might have further elaborated on how the Petitioner advertised and intended the position's minimum requirements.

After reviewing all of the evidence in the record, it is concluded that the Petitioner did not establish that the Beneficiary has a U.S. baccalaureate degree or a foreign equivalent degree from a college or university as required by the terms of the labor certification. Thus, the Petitioner did not establish that the Beneficiary met the minimum educational requirements of the offered position set forth on the labor certification by the priority date. While the Petitioner may file the petition under the skilled worker category, and the Beneficiary can show that he has 2 years of experience, the Petitioner must still demonstrate that the Beneficiary meets the terms of the certified labor certification, which, here, the Petitioner has not established.

III. CONCLUSION

In summary, the Petitioner did not establish that the Beneficiary possesses the minimum educational credentials required by the labor certification.

In visa petition 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; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of P-P-, LLC*, ID# 79475 (AAO Jan. 31, 2017)