U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-T-, INC.

DATE: JULY 26, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a maker of semiconductor devices, seeks to employ the Beneficiary as a financial project manager. It requests his classification under the third-preference immigrant category as a skilled worker. 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 for lawful permanent resident status based on a job offer requiring at least two years of training or experience.

The Acting Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the job requirements of the offered position, the Petitioner did not establish the Beneficiary's possession of a baccalaureate equivalency in an acceptable field of study.

On appeal, the Petitioner submits additional evidence and asserts that the Beneficiary's educational qualifications meet the plain language of the job requirements.

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the labor 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. Among other things, USCIS considers whether a Beneficiary meets the DOL-certified job requirements of 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

A petitioner must establish a Beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).[1] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification. USCIS may neither ignore a labor 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") (emphasis in original).

Here, the labor certification states the minimum educational requirements of the offered position of project manager as a U.S. bachelor's degree or a foreign equivalent degree in "Finance Management or Business Administration Management" or "Finance or Economics." The labor certification also states that the position requires five years of experience in an occupation related to "Finance or Economics." In addition, the Petitioner stated its acceptance of an alternate combination of education and experience: an "Other" educational credential; and "Any suitable combo of ed, training, & exp eqiv to BS & 5yrs related exp."

On the labor certification, the Beneficiary attested that, by the petition's priority date, he obtained a master's degree in political science from an Italian university and gained more than 15 years of full-time, qualifying experience. The Petitioner submitted copies of the Beneficiary's *laurea di dottore* degree and letters from former employers confirming his qualifying experience.

To establish the Beneficiary's educational qualifications, the Petitioner primarily relies on an expert opinion from a U.S. business professor. Combining the Beneficiary's degree with his employment experience, the opinion concludes that the Beneficiary has the equivalent of a U.S. bachelor's degree in business administration, "with a concentration in Financial Management."

The Director rejected the expert opinion because it used an equivalency formula that she found inapplicable in immigrant petition proceedings. The opinion equated some of the Beneficiary's employment experience to education, with three years of experience equaling one year of U.S. university studies. *See* 8 C.F.R. § 214.2(h)(4)(iii)(d)(5) (for H-1B nonimmigrant visa purposes, allowing three years of experience to equate to one year of U.S. university studies). While accepted in H-1B petition proceedings, the formula does not apply in immigrant petition proceedings unless specified on a labor certification. At issue here is whether the labor certification states the Petitioner's acceptance of a baccalaureate equivalency based on the H-1B formula.

On appeal, the Petitioner's senior assistant general counsel notes that the labor certification states the company's acceptance of "any" suitable combination of education, training, and experience. He states: "The plain meaning of these terms should be applied and 'any' combination should mean

[1] This petition's priority date is June 16, 2016, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

precisely that." He also states that the Petitioner intended to accept any combination of education, training, or experience equivalent to a bachelor's degree in an acceptable field, including a combination under the H-1B formula.

In certain circumstances, USCIS may consider a petitioner's intent to determine the meaning of an unclear or ambiguous term in the labor certification. However, an employer's later statement of its subjective intent may not be dispositive of the meaning of the actual minimum requirements of the offered position. *See Maramjaya v. USCIS*, Civ. Act. No. 06-2158 (RCL), 2008 WL 9398947 *6 n.7 (D.D.C. Mar. 26, 2008) (stating the Court's hesitancy to focus on an employer's subjective intent because the DOL assesses labor certifications based on the language used on the certification applications). The best evidence of the Petitioner's intent concerning the actual minimum educational requirements of the offered position is evidence of how it expressed those requirements to the DOL during the labor certification process and not afterwards to USCIS. Here, the Petitioner did not specify on the labor certification how an equivalency would be considered and has not submitted evidence to demonstrate that its alleged intent to accept an equivalency based on the H-1B formula was otherwise made known to the DOL or to potential U.S. applicants during the labor certification process.[2]

On appeal, the Petitioner argues that USCIS should defer to its interpretation of the position's requirements because it drafted them with the Beneficiary in mind. *See Grace Korean United Methodist Church v. Chertoff*, 437 F.Supp.2d 1174, 1179 (D. Or. 2005) (finding that "it is the employer, working under the supervision and direction of [state employment officials] and [the] DOL, that establishes the requirements for the employment"). But even if we considered the Petitioner's interpretation of the baccalaureate equivalency, the record does not establish the Beneficiary's possession of an equivalency in an acceptable field of study. The plain language of the labor certification states acceptable major fields of study as "Finance Management or Business Administration Management" or "Finance or Economics." The expert opinion states that the Beneficiary has the equivalent of a U.S. bachelor's degree in business administration, not business administration management. The opinion also states that the Beneficiary's degree has "a concentration in Financial Management." But the record does not establish that the concentration constitutes a major field of study as the labor certification requires. Even if the concentration in financial management constitutes a major field of study, the Petitioner submits another expert opinion on appeal indicating the Beneficiary's possession of a baccalaureate equivalency in business administration without an additional concentration. Thus, the expert opinions do not agree that the Beneficiary's degree has a concentration in financial management. The record therefore does not establish the Beneficiary's possession of a baccalaureate equivalency in an acceptable field of study.

[2] We note that as measured by specific vocational preparation (SVP), the primary and alternative requirements of a labor certification position must substantially equate. 20 C.F.R. § 656.17(h)(4)(i). The Board of Alien Labor Certification Appeals (BALCA) has repeatedly held that the formula's substitution of 12 years of experience for a bachelor's degree results in a substantially inequivalent, alternative requirement. *See, e.g., Matter of B&M Invs.*, 2014-PER-01050, 2018 WL 1411164 *3 (BALCA Mar. 15, 2018) (finding that a bachelor's degree, which equals two years of experience for SVP purposes, does not substantially equate to 12 years of experience).

See Matter of Caron Int'l, Inc., 19 I&N Dec. 791, 795 (Comm'r 1988) (holding that adjudicators may reject or afford lesser evidentiary weight to expert opinions that conflict with evidence of record or are "in any way questionable").

Thus, based on the plain language of the labor certification, the record does not establish the Beneficiary's educational qualifications for the offered position.

III. THE DRUG TEST AND BACKGROUND CHECK

Although unaddressed by the Director, the record also does not establish the Beneficiary's successful completion of a drug test and background check. Part H.14 of the labor certification, "Special skills and other requirements," states: "Upon hire, all applicants will be subject to drug testing/screening and background checks."

Drug tests and background checks for offered positions constitute job requirements. *See, e.g, Matter of Honeywell Int'l, Inc.*, 2016-PER-00434, 2018 WL 3232449 *2 (BALCA June 27, 2018) (citation omitted) (finding contingency on the successful completion of a background check and drug test to constitute a job requirement). The record, however, does not demonstrate the Beneficiary's completion of a drug test and background check. Therefore, in any future filings in this matter, the Petitioner must demonstrate the Beneficiary's satisfaction of these requirements by the petition's priority date.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum educational requirements of the offered position. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of M-T-, Inc.*, ID# 1323016 (AAO July 26, 2018)