U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-T-, INC.

DATE: MAR. 10, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software development business, seeks to employ the Beneficiary as a technical architect. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the record did not establish, as required, that the labor certification supported classification of the position in the advanced degree professional category because it stated education and experience requirements that could be read as requiring less than an advanced degree. The Petitioner filed a motion to reconsider this decision and the Director denied the motion.

On appeal, the Petitioner states that the terms of the labor certification meet the minimum requirements for classification of the position in the advanced degree professional category under section 203(b)(2) of the Act.

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

I. LAW

A. Employment-Based Immigrant Petition Process

Employment-based immigration is generally a three-step process. First, an employer must obtain a labor certification from the Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, DOL certifies both that there are insufficient U.S. workers available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of similarly employed domestic workers. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS), which determines 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. 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.[1] *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977). Finally, if USCIS approves the immigrant visa petition, the foreign national may 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.

B. Advanced Degree Professional Classification

Here, the Petitioner has requested classification as an advanced degree professional. *See* section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), *see also* 8 C.F.R. § 204.5(k)(1). A petition for an advanced degree professional must generally be accompanied by a valid, individual labor certification.[2] 8 C.F.R. § 204.5(k)(4)(i).

The regulations state that in order to be eligible for this classification, the beneficiary must possess an advanced degree or its equivalent under 8 C.F.R. § 204.5(k)(3) and the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as:

> [A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

If the labor certification allows for less than an advanced degree, the position will not qualify for advanced degree professional classification.

II. ANALYSIS

In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification. The required education, training, experience, and skills for the proffered position are set forth at Part H of the labor certification. In this case, Part H states that the offered position has the following minimum requirements:

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[1] 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).

[2] A labor certification is not required for an application for Schedule A designation or a shortage occupation designated by DOL. 8 C.F.R. § 204.5(k)(4)(i). Also, the Director may waive the labor certification requirement for petitions sponsoring a beneficiary of exceptional ability in the sciences, arts, or business if the exemption is in the national interest. 8 C.F.R. § 204.5(k)(4)(ii).

H.4.	Education: Master's degree in "Comp. Sci, Comp. Apps, Comp Info Sys, MIS, Eng (any), Math, or related field."
. . .	
H.6.	Experience in the job offered: 24 months.
. . .	
H.8.	Is there an alternate combination of education and experience that is acceptable? Yes.
H.8-A.	If Yes, specify the alternate level of education required: Other.
H.8-B.	If Other is indicated in question 8-A, indicate the alternate level of education required: Bachelor's + 5 years progressive experience.
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: "(Sr) Software Eng, Test Eng, Software Dvlpr, Sys Analyst, Prog, Product."
H.14.	Specific skills or other requirements: One year of the two years of experience must include experience with any one of the following skill sets: SQL and Quality Center; SAP; Java and J2EE; or Eagle Pace. In lieu of a Master's Degree and two years of IT experience, we will accept a Bachelor's Degree (or foreign equivalent) in Computer Science, Computer Applications, Computer Information Systems, Management Information Systems, Engineering (any), Math, or related field, plus five years of progressive experience in the IT field. One year of the five years of progressive experience must include experience with any one of the following skill sets: SQL and Quality Center; SAP; Java and J2EE, or Eagle Pace. All experience may be acquired concurrently. We will accept any suitable combination of education, training, or experience in lieu of the above stated education and experience requirements. Travel and relocation may be required.

As noted above, a petition for an advanced degree professional must establish that, among other things, the job offer portion of the labor certification requires at least a master's degree or foreign equivalent degree or a bachelor's degree or foreign equivalent degree followed by 5 years of progressive experience.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983). USCIS must 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). Our interpretation of the job's requirements must involve reading and applying the plain language of the alien employment certification application form. *Id.* at 834. Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 is a legal document

and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[3]

The Director denied the petition concluding that the language in H.14 which states that "any suitable combination of education, training, or experience in lieu of the above stated education and experience requirements," indicates that the Petitioner would accept less than the minimum requirements for advanced degree classification. On appeal, the Petitioner asserts that the position qualifies for advanced degree professional classification on the basis that the proffered job requires a master's degree or a bachelor's degree plus 5 years of progressive experience. The Petitioner states that the phrase "in lieu of the above stated education and experience requirements" is implicit in the *Kellogg* language contained in 20 C.F.R. § 656.17(h)(4)(ii). However, we disagree.

The Board of Alien Labor Certification Appeals (BALCA) ruled in *Matter of 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 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 and was incorporated into 20 C.F.R. § 656.17(h)(4)(ii). However, the Petitioner's acceptance of any suitable combination of education, training, or experience "in lieu of the above stated education and experience requirements" goes beyond *Kellogg* language to create a different minimum requirement by allowing for a combination of education or experience that could be less than a single master's degree or a single bachelor's degree plus 5 years of progressive experience. As the Petitioner does not define what would constitute a suitable combination that would qualify "in lieu of" the stated requirements, we cannot find that labor certification supports the requested classification. Neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum requirements can be met with anything other than a single academic degree. Therefore, as the minimum requirements for the job opportunity can be satisfied with less than a single U.S. master's degree or foreign equivalent degree, or less than a single U.S. bachelor's degree or foreign equivalent degree followed by 5 years of progressive experience, the labor certification does not support the requested classification of advanced degree professional under section 203(b)(2) of the Act.

The Petitioner further states on appeal that we should examine its "intent" when reviewing the requirements of the labor certification. The Petitioner states that it intended the language "in lieu of the above stated education and experience requirements" to restate the *Kellogg* language without

[3] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals, we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

diluting the education and experience requirements stated on the labor certification. However, even if we were to consider evidence of the Petitioner's intent, the record does not contain sufficient evidence of the recruitment documentation, including advertisements for the position offered to demonstrate the Petitioner's intent with regard to the minimum requirements. Although the Director noted in the denial that the Petitioner had not submitted any of the advertisements for the position offered, the Petitioner did not submit this evidence on appeal.

III. CONCLUSION

In order to be eligible for advanced degree classification, the proffered position, as described on the labor certification, must require at least an advanced degree or its equivalent. Here, the terms of the labor certification do not demonstrate that the position offered qualifies for advanced degree professional classification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-T-, Inc.*, ID# 129914 (AAO Mar. 10, 2017)