U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-T- INC.

DATE: MAR. 22, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting firm, seeks to permanently employ the Beneficiary in the United States as a systems analyst. It requests classification of the Beneficiary 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 classification allows a U.S. employer to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition, concluding that the record did not establish that the Beneficiary possessed the education, experience, and training required on the submitted ETA Form 9089, Application for Permanent Employment Certification (labor certification). The Petitioner filed a motion to reconsider, which the Director granted. The Director ultimately reaffirmed the petition's denial, restating that that the Beneficiary did not possess the minimum level of education required by the labor certification.

The matter is now before us on appeal. The Appellant, purported successor-in-interest to the Petitioner, asserts the Director erred in finding that the Beneficiary did not possess the minimum level of education required and contends that the Beneficiary's education can be combined to be equivalent to the minimum level of education that was required on the labor certification. Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain an approved labor certification from the U.S. Department of Labor (DOL).[1] *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 that there are insufficient U.S. workers who are able, willing, qualified, and available for the

[1] The priority date of a petition is the date the DOL accepted 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).

offered position and that employing 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)(I)-(II) of the Act. Second, 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. Third, if USCIS approves the 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.

USCIS determines whether a foreign national meets the job requirements specified on a 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).

II. ANALYSIS

A. The Record Established that the Appellant is a Successor-In-Interest to the Petitioner

As an initial matter, the appellant in this case is the claimed successor to the labor certification and Form I-140 Petitioner. USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986.[2]

Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

Here, the Petitioner fully described and documented its merger and transference of ownership of the Beneficiary's predecessor employer to the claimed successor-in-interest. The Petitioner also demonstrated that the proffered position continues to exist at the successor under the same conditions originally offered in the labor certification and that the successor is eligible for the immigrant visa. Therefore, applying the analysis set forth above to this petition, the Petitioner has established a valid successor relationship for immigration purposes.

[2] The regulation at 8 C.F.R. § 103.3(c) provides that precedent decisions are binding on all immigration officers in the administration of the Act.

B. The Record Does Not Establish the Beneficiary's Qualifying Education for the Offered Position

The Director denied the petition, finding that the record did not establish that the Beneficiary had the minimum education required on the labor certification for the proffered position. Specifically, the Director stated that the Beneficiary did not possess a U.S. bachelor's degree or foreign equivalent degree, as was required by the labor certification.

In order to qualify for consideration as a skilled worker, the beneficiary must possess two years of training or experience, *see* 8 C.F.R. § 204.5(l)(3)(ii)(B), and otherwise 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 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

Here, the priority date of the petition is June 17, 2015. The required education, training, experience, and skills for the proffered position of systems analyst are set forth at Part H of the labor certification, and states that the position has the following minimum requirements:

H.4.	Education: minimum level required: Bachelor's.
. . .	
H.4-B.	Major field of study: Engineering.
. . .	
H.6.	Is experience in the job offered required for the job? Yes.
H.6-A.	If Yes, number of months experience required: 24.
H.7.	Is there an alternate field of study that is acceptable? Yes.
H.7-A.	If Yes, specify the major field of study: Computer Science or related.
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 occupations required? 24.
H-10-B.	Identify the job title of the acceptable alternate occupation: Software designer, developer, tester, or analyst.
. . .	
H.14.	Specific skills or other requirements: Pursuant to 20 CFR § 656.17(h)(4)(ii), we will accept any suitable combination of education, training, or experience for this position.

As noted above, a petition for a skilled worker must establish that, among other things, the beneficiary possesses the education, training, or experience required by the labor certification, as of the priority date. *Id.* Here, the labor certification plainly requires at least a bachelor's degree in engineering, computer science or a related field as the minimum level of education. At issue is whether the Beneficiary possesses the required education for the proffered position.

In the instant case, the labor certification states that the Beneficiary possesses a bachelor's degree in computer applications from [redacted] in India completed in 2011. The labor certification also states that the Beneficiary possesses a diploma in "electrical and electronics."

The record contains a copy of the Beneficiary's bachelor's degree in computer applications and transcripts from [redacted] in India completed in 2011, along with a copy of the Beneficiary's postsecondary diploma in electrical and electronics engineering and transcripts from [redacted] India completed in 1998.

The record also contains a credentials evaluation prepared by [redacted] from [redacted] The evaluation states that the Beneficiary's three-year bachelor's degree in computer applications is equivalent to "three years of academic studies leading to a Bachelor of Science Degree in Information Technology, Computer Science or related field from an accredited institution of higher education in the United States." The evaluation concludes that the Beneficiary's academic study, combined with four years and eight months of professional training and experience, is "the equivalent of a Bachelor of Science Degree in Information Technology from an accredited institution of higher education in the United States."

Professor [redacted] evaluation of the Beneficiary's three-year bachelor's degree accords with the information provided by the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO),[3] which we have reviewed. According to EDGE, a three-year bachelor's degree in computer applications from India is comparable to "three years of university study in the United States." We also note that although not mentioned in the evaluation, the Beneficiary also possesses a postsecondary diploma in electrical and electronics engineering. EDGE discusses postsecondary diplomas, for which the entrance requirement is completion of secondary education. EDGE provides that a postsecondary diploma is comparable to one year of university study in the United States, but does not suggest that, if combined with a three-year degree, it may be deemed a foreign equivalent degree to a U.S. bachelor's degree.

In this case, the Petitioner attempts to establish that the Beneficiary is qualified for the proffered position by relying on the Beneficiary's three-year bachelor's degree combined with work experience as being equivalent to a U.S. bachelor's degree. However, a three-year bachelor's degree will generally not be 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). Where the analysis of the beneficiary's credentials relies on a combination of lesser degrees and work experience, the result is the

[3] According to its website, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." *See* http://www.aacrao.org/About-AACRAO.aspx. Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* EDGE is "a web-based resource for the evaluation of foreign educational credentials." *See* http://edge.aacrao.org/info.php. USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.

"equivalent" of a bachelor's degree rather than a full U.S. baccalaureate or foreign equivalent degree.

As noted above, the labor certification's primary requirements in H.4. do not permit a lesser degree, a combination of lesser degrees, or a quantifiable amount of work experience, such as that possessed by the Beneficiary.[4] Rather, the labor certification requires a bachelor's degree in engineering, computer science or a related field. Further, the labor certification does not state in H.8. that any alternate combination of education and experience is acceptable.

On appeal, the Petitioner asserts that the inclusion of "*Kellogg* language" in H.14. is sufficient to establish that the minimum requirements of the position are actually any suitable combination of education, training, and experience, and that as such, the Beneficiary would qualify for the position based on his work experience combined with his three-year bachelor's degree. The Petitioner goes on to state:

> [I]t is clear that the Service does not acknowledge or understand that the *Kellogg* language and the petitioner's minimum requirements are one in the same. The Petitioner does not seek to use *Kellogg* to "change" it requirements because *Kellogg* language is the minimum requirement of the labor certification.

However, the regulation at 20 C.F.R. § 656.17(h)(4)(ii) discusses the inclusion of *Kellogg* language, providing:

> 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.

The above regulation was intended to incorporate the ruling in *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995-INA-68 (BALCA 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

[4] The DOL has provided the following field guidance: "When an equivalent degree or alternative work experience is acceptable, the employer must specifically state on the [labor certification] as well as throughout all phases of recruitment exactly what will be considered equivalent or alternative in order to qualify for the job." *See* Memo. from Anna C. Hall, Acting Regl. Adminstr., U.S. Dep't. of Labor's Empl. & Training Administration, to SESA and JTPA Adminstrs., U.S. Dep't. of Labor's Empl. & Training Administration, Interpretation of "Equivalent Degree," 2 (June 13, 1994). The DOL's certification of job requirements stating that "a certain amount and kind of experience is the equivalent of a college degree does in no way bind [USCIS] to accept the employer's definition." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Lynda Won-Chung, Esq., Jackson & Hertogs (March 9, 1993). The DOL has also stated that "[w]hen the term equivalent is used in conjunction with a degree, we understand to mean the employer is willing to accept an equivalent foreign degree." *See* Ltr. From Paul R. Nelson, Certifying Officer, U.S. Dept. of Labor's Empl. & Training Administration, to Joseph Thomas, INS (October 27, 1992). To our knowledge, these field guidance memoranda have not been rescinded.

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."

We do not consider the presence of *Kellogg* language in Part H.14. of a labor certification to have any material effect on the interpretation of the minimum requirements of the job opportunity. Additionally, the Petitioner did not state any acceptable alternate combination of education and experience in part H.8. of the labor certification, and indicated in part J. that the Beneficiary met the primary requirements of the position and claimed that the Beneficiary had a bachelor's degree.

On appeal, the Petitioner also urges the consideration of its intent as shown throughout the labor certification process, stating, "[A]s drafted, H.14 accurately portrays the petitioner's actual efforts to attract qualified U.S. workers during its recruitment for the job offer." The Petitioner continues, "Thus it would have been erroneous for the petitioner to exclude Kellogg language – the very language used in its recruitment – from H.14; and it is erroneous for the Service not to consider it in assessing the beneficiary's eligibility for the job offer."

Although the Petitioner focuses on its intent on appeal, the Petitioner did not submit its recruitment materials to potentially establish that it intended, and expressed to U.S. workers, that it would accept less than a four-year bachelor's degree as the minimum requirements for the proffered position. The Petitioner could have submitted such documentation in response to the Director's RFE, with its motion or on appeal, but it did not. As such, the Petitioner has not established that that the terms of the labor certification are ambiguous and that the Petitioner intended the labor certification to require less than a four-year U.S. bachelor's or foreign equivalent degree, as that intent was expressed during the labor certification process to the DOL and potentially qualified U.S. workers.

Therefore, we find that the terms of the labor certification require a four-year U.S. bachelor's degree in engineering, computer science or related or a foreign equivalent degree. The Beneficiary does not possess such a degree. As such, the Petitioner has not established that the Beneficiary met the labor certification's minimum educational requirements of the offered position by the priority date.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above stated reason. 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. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of I-T- Inc.*, ID# 134856 (AAO Mar. 22, 2017)