U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-A-, INC.

DATE: MAR. 27, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a computer consulting company, seeks to employ the Beneficiary as a database administrator. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant category. 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 two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director found that the Beneficiary did not qualify for the job offered because he did not meet the minimum educational requirement of the labor certification.

On appeal, the Petitioner asserts that the Beneficiary meets the minimum educational (and experience) requirements of the labor certification to qualify for the job offered.

Upon *de novo* review, we will dismiss the appeal on the ground that the Beneficiary does not meet the minimum educational requirement of the labor certification, and on the additional ground that the evidence of record does not establish that the Beneficiary meets the minimum experience requirement of the labor certification.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains 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 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. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act,

[1] The date the labor certification is filed is called the "priority date," which in this case was June 29, 2016. A beneficiary must meet all eligibility requirements for the requested classification as of that date.

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.

The Petitioner requests classification of the Beneficiary as a skilled worker. In order to qualify as a skilled worker, the Beneficiary must possess at least two years of training or experience and meet the "educational, training or experience, and any other requirements of the individual labor certification." 8 C.F.R. § 204.5(l)(3)(ii)(B).

II. ANALYSIS

At issue in this case is whether the Beneficiary possesses the minimum educational and experience requirements of the labor certification.

In section H of the labor certification, the Petitioner specified the following with respect to the education, training, and experience required to qualify for the job of database administrator:

4.	Education: Minimum level required:	Bachelor's degree
4-B.	Major Field of Study:	Engineering
5.	Is training required for the job?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	24 months
7.	Is an alternate field of study acceptable?	Yes
7-A.	What field?	Computer Science or related
8.	Is an alternate combination of education and experience acceptable?	No
9.	Is a foreign educational equivalent acceptable?	Yes
10.	Is experience in an alternate occupation acceptable?	Yes
10-A.	How long?	24 months
10-B.	Job titles of alternate occupations	Software designer, developer, tester, or analyst
14.	Specific skills or other requirements	Pursuant to 20 C.F.R. § 656.17(h)(4)(ii), we will accept any suitable combination of education, training, or experience for this position.

Section J of the labor certification states that the Beneficiary's highest level of education relevant to the job opportunity was a bachelor's degree in computer science from [redacted] University in [redacted] India, completed in 2002. The record shows that this was a three-year degree. Section K of the labor certification states that the Beneficiary had 11 years of experience as a software engineer and developer with Indian and U.S. companies between 2003 and 2014, before starting work with the Petitioner. The record includes an employment verification letter from one

Indian company. The record also includes an evaluation of the Beneficiary's education and experience by [redacted] University who asserts that the Beneficiary's three-year bachelor's degree is equivalent to three years of study at a U.S. college or university, that his first three years of experience as a software specialist with [redacted] in [redacted] India, are equivalent to an additional year of college or university study, and that the combination of this education and experience is equivalent to a bachelor of science degree in computer information systems from an accredited college or university in the United States.

A. Beneficiary's Education

The Petitioner does not claim, nor submit evidence to establish, that the Beneficiary's three-year bachelor's degree from India is the foreign equivalent of a U.S. bachelor's degree, which generally requires four years of education. *See Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977). Rather, the Petitioner asserts that the labor certification allows the Beneficiary to qualify for the offered position with a combination of education and experience.

In his decision denying the petition, the Director interpreted the job offer portion (section H) of the labor certification as requiring a bachelor's degree or a foreign educational equivalent and 24 months of qualifying experience, and found that the Beneficiary did not meet the educational requirement because his degree from India was not the foreign equivalent of a U.S. bachelor's degree. In section H.8 of the labor certification, as the Director pointed out, the Petitioner indicated that no alternate combination of education and experience was acceptable. The Director construed the language in section H.14 of the labor certification stating that "any suitable combination of education, training, or experience" was acceptable to be *Kellogg* language that was added to comply with the requirements of 20 C.F.R. § 656.17(h)(4)(ii), which states that:

> 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.[2]

The Director found that use of the *Kellogg* language was mandatory in this case because the Beneficiary was employed by the Petitioner and only qualified for the job offered by virtue of the alternative field of study and alternative occupations allowed by the labor certification. The Director also found that the *Kellogg* language was not qualified by the Petitioner in any way so as to lower the educational and experience requirements stated on the labor certification – namely, a bachelor's

[2] This regulation incorporates the Board of Alien Labor Certification Appeals (BALCA) ruling in *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (BALCA Feb. 2, 1998) (*en banc*) (if the Beneficiary only qualifies for the offered position based on the alternative job requirements, the labor certification must state that "applicants with any suitable combination of education, training or experience are acceptable").

or foreign equivalent degree and 24 months of experience – and that the Petitioner advertised for the proffered position utilizing the same unqualified *Kellogg* language.

On appeal the Petitioner contends that the *Kellogg* language was only mandatory on the labor certification, not on its job advertisements, and claims that its discretionary use of *Kellogg* language on its job advertisements was intended to make the job available to a wider spectrum of applicants. The Petitioner asserts that U.S. workers reading the job announcement -- which required a "bachelor's degree or equivalent . . . and two years' experience" and stated that the "[e]mployer will accept any suitable combination of education, training, or experience" – would interpret such language as allowing the educational requirement to be satisfied by a combination of education and experience that was equivalent to a bachelor's degree. The same interpretation should be applied to the labor certification, the Petitioner claims, since the intent expressed in its recruitment was to "accept US workers possessing any US bachelor's equivalency and the requisite experience." Appeal Brief at 2 (emphasis in the original). In the Petitioner's view: "[U]sing the language in recruitment substantively changed the minimum requirements such that the [B]eneficiary, who possesses a US bachelor's equivalency from a reputable credential evaluation service . . . and two years of relevant professional experience qualifies for the instant job offer . . . by the stated terms of the [labor certification]." Appeal Brief at 3.

We do not agree with the Petitioner's position. In order to determine the minimum requirements of a proffered position, we must examine "the language of the labor certification job requirements." *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 labor certification application form. *Id.* at 834.

In this case, the labor certification states that the minimum educational requirement is a bachelor's degree or a foreign educational equivalent in engineering, computer science, or a related field of study (sections H.4, H.4-B, H.7, H.7-A, and H.9) and that the minimum experience requirement is 24 months in qualifying jobs (sections H.6, H.6-A, H.10, H.10-A, and H.10-B). Section H.8 is the proper location on the labor certification to identify any acceptable alternate combinations of education and experience. The labor certification in this case does not permit an alternate combination of education and experience. At section H.14, which states that "we will accept any suitable combination of education, training, or experience," the Petitioner indicates that this *Kellogg* language was included to comply with 20 C.F.R. § 656.17(h)(4)(ii) – the regulation requiring such language when a beneficiary already employed by the petitioning employer would qualify for the proffered position only by virtue of the alternative educational and experience requirements in the labor certification. In this case, the Beneficiary does not meet the primary educational requirement of a bachelor's degree in engineering or the primary experience requirement of 24 months in the job offered, and the Petitioner asserts that he qualifies for the proffered position based on the alternative educational and experience requirements of the labor certification.

The minimum education and experience required by the labor certification, however, is unchanged by the *Kellogg* language in section H.14.[3] The minimum requirements are still a bachelor's degree in an acceptable field of study and 24 months of qualifying experience. Neither in section H.14 nor in any other section of the labor certification did the Petitioner state that it would accept a "US bachelor's equivalency from a reputable credential evaluation service," as asserted on appeal, in lieu of a U.S. bachelor's or foreign equivalent degree. The plain language of the labor certification does not support the Petitioner's claimed intent to accept less than a U.S. bachelor's or foreign equivalent degree to meet the minimum educational requirement for the proffered position.

Nor does the preceding job advertisement submitted by the Petitioner support this claimed intent. The job advertisement describes the educational and experience requirements as follows:

> Applicant must possess bachelor's degree or equivalent in Engineering, Computer Science, or a related field; and two years' experience in the job offered or as a software designer, developer, tester, or analyst. Employer will accept any suitable combination of education, training, or experience.

Nothing in the above language indicates that the Petitioner would accept an equivalent to a U.S. bachelor's degree, based on some combination of lesser academic credentials and/or work experience, in lieu of a full U.S. bachelor's or foreign equivalent degree. Thus, the Petitioner has not established that that it intended to require less than a U.S. bachelor's or foreign equivalent degree, as that intent was expressed to U.S. workers during the recruitment process and to DOL during the labor certification process.

We agree with the Director's determination that the *Kellogg* language in section H.14 of the labor certification does not change the minimum educational and experience requirements stated in sections H.4 to H.10 of the labor certification. We find that the labor certification requires a four-year U.S. bachelor's or foreign equivalent degree in engineering, computer science, or a related field of study. The Beneficiary does not possess such a degree. Therefore, the Beneficiary does not meet the minimum educational requirement of the labor certification.

B. Beneficiary's Experience

The labor certification also requires at least two years of qualifying experience as a database administrator or in an alternate occupation as a software designer, developer, tester, or analyst. The labor certification lists four jobs the Beneficiary allegedly held as a software engineer or developer between March 2003 and March 2014, at which time the Beneficiary began working for the

[3] We generally do not interpret the insertion of *Kellogg* language in part H.14 to mean that an employer would accept lesser qualifications than the primary and alternate requirements stated in the labor certification. If we were to read the *Kellogg* language as an alternate requirement, the actual minimum requirements of the offered position would be impossible to discern, the primary and alternate requirements would be made meaningless, and any labor certification using *Kellogg* language would be potentially ineligible for the requested classification.

Petitioner as a technical specialist. A labor certification employer cannot rely on experience that a foreign national gained with it, unless the experience was in a job substantially different than the offered position or the employer demonstrates the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, a job is substantially different from an offered position if it requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii). On the labor certification, the Beneficiary's duties as a technical specialist overlap with the duties of the offered position, but the Petitioner has not demonstrated that the two positions are substantially different. The record therefore does not support the use of experience that the Beneficiary gained with the Petitioner.

With regard to the four jobs with other employers listed in the labor certification, only one verification letter has been submitted. It is from [redacted] in [redacted] India, dated September 29, 2016, stating that the Beneficiary was employed as a software specialist from November 2006 to March 2014. This information is inconsistent with the labor certification, however, which states that the Beneficiary was employed by [redacted] as a developer-senior software engineer from November 2006 to November 2013. According to the labor certification, the Beneficiary was then employed by another company, [redacted] in New York City as a software specialist from November 2013 to March 2014. Thus, the employment verification letter from [redacted] conflicts with the labor certification as to both the job title and dates of employment for the Beneficiary.

It is incumbent upon a petitioner to resolve any inconsistencies in the record by independent objective evidence. Attempts to explain or reconcile such inconsistencies will not suffice without competent evidence pointing to where the truth lies. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Doubt cast on any aspect of the petitioner's evidence also reflects on the reliability of the petitioner's remaining evidence. *See id.*

Since the letter from [redacted] does not confirm either the job title or the dates of employment alleged in the labor certification, we find that it is not reliable evidence of the Beneficiary's employment with the company and does not establish that the Beneficiary has at least two years of qualifying experience. As there are no letters from the other alleged employers of the Beneficiary, we conclude that the record does not establish that the Beneficiary meets the minimum experience requirement of the labor certification.

III. CONCLUSION

The Petitioner has not established that the Beneficiary meets the minimum educational and experience requirements of the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of C-A-, Inc.*, ID# 1167389 (AAO Mar. 27, 2018)