U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-R- CORP.

DATE: MAY 2, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a restaurant, seeks to employ the Beneficiary as a manager of financial planning and business development. It requests classification of the Beneficiary as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the visa petition, concluding that the underlying labor certification did not support the professional classification requested and, further, that the Beneficiary did not hold the baccalaureate degree required for classification as a professional.

On appeal, the Petitioner submits additional evidence in support of the visa petition and asserts that the Director has misapplied agency policy in denying the petition.

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

I. LAW

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).[1] *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 petitioner, 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 priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

Section 203(b)(3)(A)(ii) of the Act provides for the granting of preference classification to qualified immigrants who are members of the professions holding baccalaureate degrees. To establish a beneficiary's eligibility for classification as a professional, a petitioner must demonstrate both (a) that the offered position requires a professional holding the minimum of a baccalaureate degree, i.e., the underlying labor certification must require no less than a baccalaureate degree, and (b) that the beneficiary is a member of the professions with at least a baccalaureate degree.

In the present case, the Director concluded that the Petitioner had not met either of the above requirements. Specifically, he found that the labor certification did not, at a minimum, require a baccalaureate degree, and, therefore, the labor certification did not support the professional classification requested by the visa petition. The Director further concluded that the record did not establish that the Beneficiary had the required baccalaureate degree, making her ineligible for classification under section 203(b)(3)(A)(ii) of the Act. For the reasons that follow, we will affirm the Director's decision.

A. Labor Certification Does Not Support Professional Classification

Pursuant to 8 C.F.R. § 204.5(l)(3)(i), "the job offer portion of an individual certification . . . for a professional must demonstrate that the job requires the minimum of a baccalaureate degree." Here, the job offer portion of the labor certification, Part H., reflects the following requirements:

H.4.	Education: Bachelor's.
H.4-B.	Major field of study: Business administration.
H.6.	Experience in the job offered: Required.
H.6-A.	Length of required experience: 60 months.
H.8.	Alternate combination of education and experience: Accepted.
H.8-A.	Alternate level of education: High school.
H.8-C.	Length of alternate experience: 10 years.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Accepted.
H.10-A.	Length of experience in alternate occupation: 60 months.
H.10-B.	Title of acceptable alternate occupation: Hospitality management.

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. *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). We 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). 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).[2]

Here, our review of the labor certification does not find it to require the minimum of a baccalaureate degree for the offered position. While the labor certification reflects that the Petitioner's primary requirements for the offered position are a baccalaureate degree and five years of experience in the offered position or hotel management, it alternately allows the Beneficiary to qualify for the job offered on the basis of a high school diploma and 10 years of experience. Accordingly, the minimum academic requirement for the offered position stated by the labor certification is not the baccalaureate degree required by regulation.

On appeal, the Petitioner asserts that the Director's denial of the visa petition in this matter results from his misapplication of a decision, issued by this office on August 13, 2009, which dismissed an appeal in which a petitioner sought to establish a beneficiary's experience as the equivalent of a baccalaureate degree. It maintains that while our dismissal of the appeal served as "the authority" for the Director's decision, he did not recognize that it reflected USCIS' willingness to consider work experience or non-degree coursework as meeting the requirements of a four-year baccalaureate degree "where, as in the instant case, an alternative requirement of experience with a high school diploma was included in the labor certification."

A review of the referenced decision finds it to have been issued at a time when the format of the visa petition required the employer to check the same box whether seeking classification for a professional under section 203(b)(3)(A)(ii) of the Act or for a skilled worker under section 203(b)(3)(A)(i) of the Act, 8 U.S.C. § 1153(b)(3)(A)(i), which does not have a degree requirement. In such cases, we have, as appropriate, taken note of the decision in *Snapnames.com, Inc. v. Michael Chertoff*, 2006 WL 3491005 (D.Or. Nov. 30, 2006), where the court determined that the word "equivalent" in the employer's educational requirements was ambiguous and that in the context of skilled worker petitions, deference must be given to the employer's intent. *Id.* at *14. Accordingly, the discussion of a degree equivalency in our August 13, 2009, decision reflects our consideration of whether the beneficiary in that case, although unqualified for classification as a professional, was, instead, eligible for classification as a skilled worker.

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

In the present case, however, the format of the visa petition submitted by the Petitioner separates the professional and skilled worker categories, and the Petitioner checked box 1.e. in Part 2 of the petition, indicating its desire to classify the Beneficiary as "[a] professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)." As a result, the degree equivalency discussion found in our 2009 decision is not relevant here and does not provide a basis on which the Petitioner may establish the Beneficiary's qualifications for the offered position.

Further, even if our August 13, 2009, decision were open to the Petitioner's interpretation, the Director would not have been required to follow its findings in the present case. Our dismissal of the appeal was issued as a non-precedent decision, binding only the involved parties. It did not create or modify USCIS policy or practice. New interpretations of law or changes in agency policy are not issued through non-precedent decisions. Only precedent decisions are binding on all immigration officers in the administration of the Act. 8 C.F.R. § 103.3(c).

On appeal, the Petitioner also maintains that the salary for the offered position, its responsibilities, and its classification by the DOL all support a finding that the job opportunity is that of a professional and that it would be "ludicrous" to find otherwise simply because the labor certification allows for alternate qualifications. It contends that in light of the varied qualifications of managers who work in such an "elevated sphere of employment," its willingness to accept experience in lieu of a formal education should not be a basis for finding the offered position to be other than that of a professional.

In support of its claim, the Petitioner notes that the DOL assigned a Wage Level IV to the offered position, which, it asserts, establishes that "the position involve[s] duties with the highest level of independent and responsibility" in the agency's system. It further submits a printout of the entry for "Top Executive" in the DOL's *Occupational Outlook Handbook* (Handbook), which states that "[a]lthough education and training requirements vary widely by position and industry, many top executives have at least a bachelor's degree and a considerable amount of work experience." It also submits a copy of the Summary Report for: 11-1021.00 – General and Operations Managers from DOL's *O*Net Online* (O*Net), the occupational title that the DOL assigned to the offered position during the labor certification process. However, nothing from the Handbook or O*Net changes the minimum educational requirement as reflected on the labor certification, which allows for less than a bachelor's degree. As such, the position offered cannot be considered for professional classification.

As the labor certification does not reflect that the minimum requirement for the offered position is a baccalaureate degree, it does not satisfy the requirement at 8 C.F.R. § 204.5(l)(3)(i). Neither does it support the professional classification requested by the Petitioner in the visa petition. Therefore, we will affirm the Director's denial of the petition.

B. Record Does Not Establish Beneficiary Holds a Baccalaureate Degree

Where a petitioner is requesting classification of a beneficiary as a professional under section 203(b)(3)(A)(ii) of the Act, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states the following requirements:

> If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

The above regulation uses a singular description of the degree required for classification as a professional. In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the former Immigration and Naturalization Service (INS now USCIS), responded to criticism that the regulation required a bachelor's degree and did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978, enacted November 29, 1990, and the Joint Explanatory Statement of the Committee of the Conference, the agency specifically noted that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification . . . , an alien must have at least a bachelor's degree." 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991).

It is significant that both section 203(b)(3)(A)(ii) of the Act and the relevant regulations use the word "degree" in relation to professionals. A statute should be read under the assumption that Congress intended it to have purpose and meaningful effect. *Mountain States Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Sutton v. United States*, 819 F.2d 1289, 1295 (5th Cir. 1987). Therefore, it can be presumed that the congressional requirement for a single "degree" for members of the professions was deliberate.

We also note that in the previously discussed *Snapnames* decision, the court held that, in professional and advanced degree professional cases, where a beneficiary is statutorily required to hold a baccalaureate degree, USCIS properly concludes that a single foreign degree or its equivalent is required. *See also Marajaya v. USCIS*, Civ. Act No. 06-2158 (D.D.C. Mar. 26, 2008) (for professional classification, USCIS regulations require a beneficiary to possess a single four-year U.S. bachelor's degree or a foreign equivalent degree).

Therefore, based on the requirements of the Act and relevant regulations, we find that the beneficiary of a petition filed for a professional must possess a single degree from a college or university that is at least a U.S. baccalaureate or foreign equivalent degree.

In the present case, however, the labor certification reflects that the Beneficiary has only a high school diploma from the [redacted] in [redacted] She does not claim any education beyond high school. To establish that the Beneficiary is qualified for the offered position, the Petitioner submits a November 9, 2009, Evaluation of Training and Experience, prepared by [redacted] which finds the Beneficiary's "advanced professional experience in the field of business" to provide her with the equivalent of a U.S. bachelor of business administration degree, with a concentration in management. However, as noted above, the beneficiary of a petition filed for a professional must possess a single degree from a college or university that is at least a U.S. baccalaureate or foreign equivalent degree.

Accordingly, the record does not demonstrate the Beneficiary's eligibility for classification as a professional under section 203(b)(3)(A)(ii) of the Act. For this reason as well, we concur with the Director's denial of the visa petition.

III. CONCLUSION

The labor certification in this case does not support the professional classification requested by the visa petition as it does not reflect that the minimum academic requirement for the offered position is a baccalaureate degree. Further, the record does not demonstrate that the Beneficiary has the baccalaureate degree required for classification as a professional. Therefore, we will affirm the Director's denial of the visa petition.[4]

ORDER: The appeal is dismissed.

Matter of E-R- Corp., ID# 398277 (AAO May 2, 2017)

[3] The record does not contain documentary evidence to establish that the Beneficiary has been awarded a high school diploma.

[4] In any future proceedings, the Petitioner will need to establish its ability to pay as of the visa petition's April 9, 2015, priority date, i.e., the date it filed the labor certification with DOL. We note that the Petitioner previously submitted its 2014 Form 1120S, U.S. Income Tax Return for an S Corporation, the most recent available at the time of the Director's decision. However, without evidence regarding the priority date year and later, we cannot find that the Petitioner has the ability to pay in this matter. 8 C.F.R. § 204.5(g)(2).