U.S. Citizenship and Immigration Services

**Non-Precedent Decision of the Administrative Appeals Office**

MATTER OF B-F- INC

DATE: MAY 16, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a food manufacturing business, seeks to employ the Beneficiary as a food development technologist. It requests classification of the Beneficiary as a professional under the third preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based "EB-3" immigrant 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 petition on the ground that the labor certification does not require a bachelor's degree and therefore does not support the requested visa classification of professional.

On appeal the Petitioner asserts that the labor certification supports a professional classification because the alternative requirements of the labor certification are substantially equivalent to the primary requirements, which include the educational minimum of a bachelor's degree. Alternatively, the Petitioner requests approval of the petition for skilled worker classification.

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

## 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). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the 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 U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files 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.

## II. ANALYSIS

At issue here is whether the labor certification supports the requested classification and whether the Beneficiary qualifies for that classification. In its Form I-140, Immigrant Petition for Alien Worker, the Petitioner checked the box at part 2.1.e. which specifies that the petition is being filed for "[a] professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)."

### A. Labor Certification Does Not Support Professional Classification

The regulation at 8 C.F.R. § 204.5(l)(2) defines "professional" as "a qualified alien who holds at least a United States baccalaureate degree or a foreign equivalent degree." A petition seeking professional classification, therefore, must be accompanied by a labor certification that requires a minimum of a baccalaureate degree. 8 C.F.R. § 204.5(l)(3)(i). In this case, section H of the labor certification states the following with respect to the minimum requirements for the proffered position of food development technologist:

| | | |
|---|---|---|
| H.4. | Education: Minimum level required: | Bachelor's Degree |
| H.4-B | Major Field of Study: | Food Science & Technology |
| H.5 | Is training required for the job? | No |
| H.6 | Is experience in the job offered required? | Yes |
| H.6-A | How long? | 24 months |
| H.7 | Is an alternate field of study acceptable? | No |
| H.8 | Is an alternate combination of education and experience acceptable? | Yes |
| H.8-A | What level of education? | None |
| H.8-C | How much experience? | 48 months |
| H.9 | Is a foreign educational equivalent acceptable? | Yes |
| H.10 | Is experience in an alternate occupation acceptable? | No |

The Director found that that because the alternative requirements at H.8 through H.8-C indicated that 48 months of experience could substitute for the primary requirements at H.4 and H.6/H.6-A of a bachelor's degree and 24 months of experience, the proffered position did not qualify as a professional and the labor certification did not support the requested immigrant visa classification of professional.

On appeal the Petitioner asserts that the petition should be approved for professional classification because the alternative requirement of 48 months of experience in the job offered is substantially equivalent to the primary requirements of a bachelor's degree and two years of experience in the job offered. The Petitioner refers to the regulations applicable to petitions for nonimmigrant workers to perform services in a specialty occupation (H-1B visas) which require beneficiaries to have a U.S. baccalaureate or foreign equivalent degree, or a combination of education, training and/or experience equivalent to such a degree, with three years of specialized training or experience considered

equivalent to one year of education. *See* 8 C.F.R. § 214.2(h)(4)(iii)(C) and (D)(*5*). These regulations for nonimmigrant petitions requesting H-1B classification for workers in specialty occupations do not govern the classification requested in this case. The regulations governing the requested classification of professional, in particular 8 C.F.R. § 204.5(l)(3)(i), make clear that an immigrant petition for professional classification must be supported by a labor certification that requires a minimum of a baccalaureate degree for the job offered. Neither training nor experience may be substituted for any part of the degree requirement. As the labor certification in this case allows candidates to qualify for the job based on experience alone, it cannot support the requested classification.

The Petitioner also refers to online resources of the Department of Labor (DOL) indicating that a bachelor's degree is not necessarily required for occupations such as food scientists and technologists, and acknowledges that it did not require a bachelor's degree in its recruitment for the proffered position, submitting a copy of one job advertisement which stated that four years of experience would be acceptable in lieu of a bachelor's degree and two years of experience. This evidence is consistent with the job requirements stated on the labor certification, and confirms that the proffered position does not require a U.S. baccalaureate or foreign equivalent degree, and is therefore not a professional position. For this reason as well, the job offered on the labor certification does not support the requested classification of professional.

B. Beneficiary is Not Eligible for Professional Classification

Though not addressed by the Director, the record also does not demonstrate the Beneficiary's eligibility for professional classification. A petition requesting professional classification "must be accompanied by evidence that the beneficiary holds a United States baccalaureate degree or a foreign equivalent degree." 8 C.F.R. § 204.5(l)(3)(ii)(C). The labor certification indicates that the Beneficiary does not have a baccalaureate degree of any kind. Therefore, the Beneficiary is not eligible for classification as a professional.

C. Skilled Worker Classification Cannot be Considered for this Petition

On appeal, the Petitioner asserts that because the Director mentioned in his decision that the labor certification requirements may have qualified the Beneficiary for skilled worker classification, we should consider the petition for the alternate classification of skilled worker. The Petitioner claims that it is the role of USCIS to determine the correct visa classification in this petition and whether the Beneficiary's qualifications meet the requirements for that classification. The Beneficiary has the requisite experience for skilled worker classification, the Petitioner contends, and the petition should therefore be approved for that classification. We do not agree.

It is not the role of USCIS to determine the correct visa classification for a Beneficiary, but rather whether the Beneficiary qualifies for the visa classification specifically requested in the petition and whether that visa classification is consistent with the requirements of the accompanying labor certification. In part 2 of the Form I-140 the Petitioner checked the box at 1.e. stating that the

petition was being filed for a professional. The Petitioner did not check the box at 1.f. stating that the petition was being filed for a skilled worker. A Petitioner may not make material changes to a petition already filed to make it conform to USCIS requirements for eligibility and approval. *See Matter of Izummi*, 22 I&N Dec. 169 (Assoc. Comm'r 1998). Accordingly, we may not entertain a request to change classification on appeal.

## III. CONCLUSION

The labor certification does not support the classification of professional. The record also indicates that the Beneficiary does not have a bachelor's degree or a foreign equivalent degree, as required to be eligible for classification as a professional. The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. 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 B-F-* Inc, ID# 4250667 (AAO May 16, 2019)