U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-, INC.

DATE: MAY 23, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an environmental consulting services business, seeks to employ the Beneficiary as a disaster response engineering manager.[1] 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 immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the position did not qualify for classification as a professional because the job offer did not require a minimum of a bachelor's degree to qualify for the position.

The matter is now before us on appeal. The Petitioner asserts that the job offer conforms to the U.S. Department of Labor (DOL) regulations concerning professional occupations. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL FRAMEWORK

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). *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] We note that the Petitioner indicated that it employs 12 workers. The company's tax returns reflect eight shareholders including two shareholders who are also compensated as company officers. Of the two officers, the highest paid officer appears to be related to the Beneficiary. The Petitioner indicated at line C.9. of the labor certification that there was a familial relationship between the "owners, stockholders, partners, corporate officers, incorporators, and the [Beneficiary]." However, it is not clear from the record whether the U.S. Department of Labor (DOL) audited the labor certification to determine whether a *bona fide* job offer was available to U.S. workers. Given the Beneficiary's relative's high level of compensation, of which DOL may not have been aware, and the relatively small number of employees, this raises a question regarding the *bona fide* nature of the position. Under 20 C.F.R. §§ 626.20(c)(8) and 656.3, the petitioner has the burden when asked to show that a valid employment relationship exists and that a *bona fide* job opportunity is available to U.S. workers. *See Matter of Amger Corp.*, 87-INA-545 (BALCA 1987). This question must be resolved in any further proceedings.

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.

As noted above, it is important to note the respective roles of DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process.

It is significant that to note that none of the duties in Section 212(a)(5)(A)(i)(I)-(II) assigned to DOL involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. It is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine 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.

As required by statute, the I-140 petition filed in this matter is accompanied by an approved labor certification certified by the DOL.[2] The date the labor certification is filed is called the "priority date." *See* 8 C.F.R. § 204.5(d). A beneficiary must be eligible as of that date. The priority date of this petition is October 31, 2014.[3]

II. REQUIREMENTS FOR CLASSIFICATION AS A PROFESSIONAL

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part, "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." Additionally, "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." *Id.*[4]

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[2] *See* Section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

[3] The beneficiary must also 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 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

[4] It is noted that the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) uses a singular description of the degree required for classification as a professional. The regulation also requires the submission of "an official *college or university* record showing the date the baccalaureate degree was awarded and the area of concentration of study." 8 C.F.R. § 204.5(l)(3)(ii)(C) (emphasis added). In another context, Congress has broadly referenced "the possession of a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning." Section 203(b)(2)(C) of the Act (relating to aliens of exceptional ability). However, for the professional category, it is clear that the degree must be from a college or university.

Also, the job offer portion of the labor certification underlying a petition for a professional "must demonstrate that the job requires the minimum of a baccalaureate degree." 8 C.F.R. § 204.5(l)(3)(i).

The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

H.4.	Education: minimum level required: Other.
H.4-A.	If Other is indicated in question 4, specify the education required: Bachelor's equivalent via combination of educ and/or experience.
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. 60.
H.7.	Is there an alternate field of study that is acceptable? No.
. . .	
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 occupation required: 60.
H.10-B.	Identify the job title of the acceptable alternate occupation: any Engineering position involving environmental contaminants.
. . .	
H.14.	Specific skills or other requirements: Frequent travel required in response to disasters, with duration of travel ranging from several days to 3 weeks. Employer will accept a combination of coursework and professional credentials amounting to the Engineering Bachelor's degree equivalent or related degree as determined by a qualified credentials evaluation service.

On the labor certification, at lines J.11., J.12., and J.13., the Beneficiary listed his education as "other," a diploma/certificate in an aviation engineering program at [redacted] Ireland, completed in 2002. The Petitioner submitted copies of ten training certificates issued to the Beneficiary by [redacted] from 2000 through 2002. The Petitioner also submitted copies of certificates issued to the Beneficiary by the Environmental Protection Agency, the state of Florida, [redacted] the [redacted] the [redacted] the State of Louisiana, the [redacted] and the state of Mississippi.

The Beneficiary claimed employment experience as an aviation engineer for [redacted] in [redacted] Ireland, from March 1, 2002, until October 31, 2003; self-employment as an aviation engineering contractor across Europe from November 1, 2003, until November 1, 2009; and employment experience as an environmental engineer for the Petitioner since November 30, 2011.

The Petitioner submitted an employment letter from the human resources office at [redacted] confirming the Beneficiary's employment there from March 1, 2002, when he completed his study program there, until September 5, 2003. The Petitioner also submitted employment letters from representatives of companies where the Beneficiary provided services during the period he claimed to have worked as a self-employed contractor. While these representatives do not describe the Beneficiary's work schedule or indicate that he worked full-time during this time period, the letters do indicate that the Beneficiary provided the following services:

- Work as an aircraft engineer at an unnamed location from February 20, 2004, until May 16, 2004; and from September 27, 2004, until June 7, 2005;
- Work as a mechanic in [redacted] Switzerland, "on a time limited interim contract" from June 1 through June 30, 2005; from September 1, 2005, until December 31, 2005; and from January 11, 2006, until December 31, 2006; and,
- Work "carrying out daily, weekly and full overhaul maintenance checks" as an aircraft mechanic in [redacted] Scotland, from January 2007 until January 2009.

The Petitioner submitted a credentials evaluation performed by [redacted] Ph.D. [redacted] identified the Beneficiary's course of study at [redacted] as consisting of a combination of required academic and technical coursework, as well as passage of required examinations, and indicated that the program was "approved to the requirements of JAR-147 by the Irish Aviation Authority." [redacted] concluded that the Beneficiary's educational record was similar to the completion of two years of study toward a bachelor's degree in aviation engineering from an accredited institution of higher education in the United States. Neither [redacted] nor the school's website[5] describes the requirements for admission into the program, and neither describes the academic program as leading toward the attainment of a bachelor's degree.

The September 15, 2009, evaluation also examined all of the Beneficiary's employment from February 2002 until October 2003 and "from November 2003 to the present." [redacted] summarized the Beneficiary's experience as "approximately seven and one half years of progressively responsible, full-time professional experience in the field of Aviation Engineering" and concluded that the combination of this work experience and his academic record "exceeds the equivalent to training received by obtaining a U.S. bachelor's degree in Aviation Engineering as required by the profession."

[redacted] https://www.[redacted] (last visited May 19, 2017).

III. LAW AND ANALYSIS

As noted above, the Petitioner filed the current petition under section 203(b)(3)(A)(ii) of the Act, under the professional classification, which requires pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(C) that the petition "must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree."

The Director determined that the job offer did not require at least a bachelor's degree as the Petitioner's responses at lines H.4 and H.14 of the labor certification clearly stated that the Petitioner would accept a combination of education, or a combination of education and experience, or even "a combination of coursework and professional credentials amounting to the Engineering Bachelor's degree equivalent." As the labor certification allowed for less than the required bachelor's degree, and the Beneficiary possessed less than the required bachelor's degree, the Director denied the petition as neither the petition nor the Beneficiary would qualify under the professional category. On appeal, the Petitioner asserts that it had followed DOL guidance when completing the application for the labor certification and that DOL regulations allow an employer "to accept work experience in lieu of a baccalaureate or higher degree."

However, as discussed above, in the employment-based immigrant visa process it is DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine 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.

In Part 2 of the Form I-140, the Petitioner indicated that it was petitioning for 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)." While certain employment-based visa classifications allow a beneficiary to qualify based on the possession of an equivalent[6] of a U.S. bachelor's degree, the professional classification does not make such an allowance.[7]

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[6] Where the analysis of the beneficiary's credentials relies on a combination of degrees or a combination of education and experience, the result is the "equivalent" of a bachelor's degree rather than a "foreign equivalent degree." *Compare* 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the "equivalence to completion of a college degree" as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the professional immigrant classification sought in this matter do not contain similar language.

[7] We further note that if refiled under the proper category, the labor certification requires 60 months of experience in the offered job in addition to the required bachelor's equivalent education. In this case, since the credentials evaluation uses all of the Beneficiary's employment experience (up until 2009) to form the equivalent of a bachelor's degree, it is not clear that the Beneficiary would possess the full amount of required employment experience in addition to the equivalent of a bachelor's degree. In addition, we note that the submitted employment letters reflect seven months of employment at the airport where the Beneficiary received his training, and an additional 33 months of experience as a self-employed mechanic. Even if this employment was full-time work (which is not substantiated by the employment letters) it would fall short of the 60 months of employment experience required by the labor certification. Furthermore, the labor certification specifies that the 60 months of employment experience must be in the offered job of "Disaster Response

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(3)(A)(ii) of the Act with anything less than a full baccalaureate degree and the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states that an employment-based immigrant petition for a professional "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." The labor certification requires less than a full bachelor's degree in allowing for an equivalent degree. Further, the Beneficiary does not have a United States baccalaureate degree or a foreign equivalent degree, and, thus, does not qualify for preference visa classification as a professional.

IV. CONCLUSION

The offered job does not require the minimum education required for classification of a beneficiary as a professional. In addition, the Beneficiary does not possess a bachelor's degree, as is required for classification as a professional. Accordingly, the Petitioner has not established the Beneficiary's eligibility for the immigration benefit sought.

ORDER: The appeal is dismissed.

Cite as *Matter of A-, Inc.*, ID# 438780 (AAO May 23, 2017)

Engineering Manager" or "any Engineering position involving environmental contaminants." In this case, the employment letters describing the Beneficiary's work experience as an aviation engineer do not list any duties involving environmental contaminants. The Beneficiary's claimed employment as an environmental engineer since November 3, 2009, did involve duties involving environmental contaminants; however, this work was performed for the Petitioner and 20 C.F.R. § 656.17 states that experience with the petitioner may be used by the beneficiary to qualify for the proffered position only if the position was not substantially comparable to the offered position and the terms of the ETA Form 9089 at line H.10 provide that applicants can qualify through an alternate occupation. Here, the Petitioner indicated at line J.21 of the labor certification that the Beneficiary's work as an environmental engineer was substantially comparable to the offered job of disaster response engineering manager. Therefore, it does not appear that this employment experience can be used to establish the Beneficiary's eligibility for the offered job.