U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-A-, INC.

DATE: MAY 31, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an information technology consulting company, seeks to employ the Beneficiary as a software quality assurance engineer. It requests classification of the Beneficiary as a skilled worker under the third preference immigrant classification. *See* 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. The Director granted a subsequent motion to reconsider, but again denied the petition on the same ground.

On appeal, the Petitioner submits a brief and additional documentation,[1] and asserts that the Beneficiary meets the minimum requirements of 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).[2] *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

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[1] the entity that filed this appeal, claims to be a successor-in-interest to , the entity that filed the petition. The record contains a copy of a merger agreement stating that was merged into on July 1, 2016, and that took possession of all of assets and property and was vested with all its rights, privileges, immunities, powers, franchises, authorities, and obligations. Applying the requirements for a successor-in-interest set forth in *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), we conclude that the evidence in the record establishes a valid successor relationship for immigration purposes.

[2] The date the labor certification is filed is called the "priority date." A beneficiary must be eligible for the requested classification as of that date.

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 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.

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 education required by the terms of the labor certification.

The Petitioner's Form I-140, Immigrant Petition for Alien Worker, was accompanied by a certified ETA Form 9089, Application for Permanent Employment Certification (labor certification), which was filed with the DOL on July 12, 2015. 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 software quality assurance engineer:

4.	Education: Minimum level required:	Bachelor's degree
4-B.	Major Field of Study:	Engineering
5.	Is training required in the job opportunity?	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 stated that the Beneficiary's highest level of education was an advanced diploma from the in India. It claimed that this diploma plus work experience was equivalent to a U.S. bachelor's degree in computer science and engineering. Section K of the labor certification listed job experience for the Beneficiary in five different software engineering and project manager positions between 2003 and 2015. Most of this experience preceded the Beneficiary's initial position with the Petitioner, which began in January 2013.

The Petitioner has submitted copies of the Beneficiary's academic records from showing that he was awarded a "4 Year Advanced Diploma in Computer Science & Engineering" on October 22, 2002, after completing an eight-semester program of study. The record also includes two letters testifying to the Beneficiary's work experience from 2003 to 2014, most of which was with in India (2003-2009) and in Massachusetts (2009-2012).[4]

The Petitioner asserts that the Beneficiary's advanced diploma in computer science and engineering from together with his work experience in software engineering is equivalent to a U.S. bachelor's degree in computer science and engineering and meets the minimum educational requirements for the offered position as set forth on the labor certification. In support of the educational equivalency claim, the Petitioner has submitted two credential evaluations from (1) of , and (2) from of Both evaluators conclude that the Beneficiary's diploma from is equivalent to two years of study toward a bachelor's degree from a U.S. college or university, and that combining this education with the Beneficiary's employment experience in computer information systems results in the educational equivalent of a bachelor's degree in computer information systems from an accredited college or university in the United States.

The Petitioner does not claim, or submit evidence to establish, that the Beneficiary's advanced diploma is the foreign equivalent of a four-year U.S. bachelor's degree.

In his initial decision denying the petition, the Director found that the minimum educational requirement on the labor certification is a bachelor's degree, and that the Beneficiary did not meet this requirement because his diploma from India was not the foreign equivalent of a U.S. bachelor's degree.

In the motion to reconsider the Petitioner asserted that its minimum educational requirement is not a bachelor's degree, the minimum level indicated in box H.4 of the labor certification, but rather "any

[3] The documents identify as an institution approved by the

[4] Documentation in the record shows that the purchased in May 2011, changed its name to in June 2012, and merged this company with in December 2012.

suitable combination of education, training, or experience" that is equivalent to a bachelor's degree, as indicated in box H.14 of the labor certification.

In his second denial decision the Director reiterated his finding that the minimum educational requirement stated on the labor certification is a bachelor's degree, and that no alternate combination of education and experience was indicated as acceptable in box H.8 of the labor certification. Referring to the language in box H.14 of the labor certification stating that "any suitable combination of education, training, or experience" was acceptable, the Director quoted from a non-precedent decision of this office in 2014 which concluded that the presence of this language in box H.14 of a labor certification will not be interpreted as lowering the qualifications needed for the job and does not alter the primary and alternative requirements stated on the labor certification.

Specifically, box H.14 of the labor certification states that the "any suitable combination of education, training, or experience" language is "in compliance with" the regulation at 20 C.F.R. § 656.17(h)(4)(ii), which states:

> 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.

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"). This statement is commonly referred to as "*Kellogg* language."

As noted by the Director, we do not interpret the insertion of *Kellogg* language on the labor certification to mean that the employer would accept lesser qualifications than the stated primary and alternative requirements on the labor certification. To do so would make the actual minimum requirements of the offered position impossible to discern, it would render largely meaningless the stated primary and alternative requirements of the offered position on the labor certification, and it would potentially make any labor certification with alternative requirements ineligible for the requested classification.

On appeal the Petitioner claims that the *Kellogg* language is part of its minimum educational requirement on the labor certification because it indicates that an applicant may qualify for the job offer not only with a bachelor's degree or a foreign equivalent degree in a relevant field of study, but also with a combination of education, training, and experience that amounts to the equivalent of such a degree.

According to the Petitioner, the *Kellogg* language in box H.14 of the labor certification accurately reflected its efforts to attract qualified U.S. workers during its recruitment for the position. As evidence thereof, the Petitioner submits a copy of the job order posted with the in early 2015. The job order stated that applicants should have a bachelor's degree and two years of experience. Under the heading "Special Requirements" the job order stated that:

> 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.

The Petitioner asserts that this recruitment language, consistent with the *Kellogg* language in box H.14 of the labor certification, was designed to draw the broadest pool of qualified applicants.

However, neither in box H.14 of the labor certification nor in the job posting with the did the Petitioner clearly state that "any suitable combination of education, training, or experience" *must be equivalent to a bachelor's degree* to meet the minimum educational requirement stated in box H.4 the labor certification. Furthermore, box 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 box H.8. In addition, the Petitioner explicitly states at H.14 that it inserted the "any suitable combination of education, training, or experience" language in order to comply with the regulatory requirements 20 C.F.R. § 656.17(h)(4)(ii).

According to the Petitioner, articulating alternative combinations of education and experience would have been confusing, limiting, and discouraging to potential applicants. On the other hand, accepting "any suitable combination of education, training, and experience" ensured the widest possible applicant field. We are not persuaded that articulating any permissible combinations of education and experience in the proper location on the labor certification would be confusing, limiting, or discouraging to potential applicants.

The job posting with the is the only documentation the Petitioner has submitted from its recruitment process. While the labor certification indicates that additional job advertisements were published in a newspaper, on a job search website, in a trade or professional journal, and at a campus placement office, no copies of these advertisements have been submitted. Therefore, we cannot determine how the Petitioner described the educational requirement of the job offered in any of its other job advertisements. The Petitioner has not submitted a copy of its labor certification recruitment report. Nor has it submitted copies of the resumes it received in response to the job advertisements and its correspondence with those applicants. Thus, we cannot determine what educational credentials the applicants had, and the reasons that the Petitioner rejected their applications.

As such, the Petitioner has not established that the terms of the labor certification are ambiguous and that it 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 DOL and to U.S. workers.

Therefore, we agree with the Director's determination that the *Kellogg* language in box H.14 does not change the clearly stated requirements in boxes H.4 to H.13 of the labor certification. We find that the labor certification requires a four-year U.S. bachelor's degree (or a foreign equivalent degree) in engineering, computer science, or a related field. The Beneficiary does not possess such a degree. Therefore, the Petitioner has not established that the Beneficiary met the minimum educational requirements for the offered position.

III. CONCLUSION

The Petitioner has not established that the Beneficiary meets the minimum educational requirement of the labor certification. Therefore, we find that the Beneficiary does not qualify for employment-based classification as a skilled worker.

ORDER: The appeal is dismissed.

Cite as *Matter of C-A-, Inc.*, ID# 294031 (AAO May 31, 2017)