U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V- INC.

DATE: OCT. 22, 2019

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an IT and management consulting company, seeks to employ the Beneficiary as a senior application developer. 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 Texas Service Center denied the petition. We withdrew his decision and remanded the matter for further consideration and issuance of a new decision. The Director subsequently issued a new denial decision. The Director found that the Beneficiary did not qualify for the job offered because he did not meet the minimum requirements of the labor certification. On appeal, the Petitioner asserts that the Beneficiary meets the minimum requirements of the labor certification.

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

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

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, 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 domestic 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 applies 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 the DOL accepted the labor certification for processing, which in this case is July 24, 2017. *See* 8 C.F.R. § 204.5(d).

II. THE REQUIREMENTS OF THE OFFERED POSITION

A beneficiary must 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)(1), (12); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Here, the accompanying labor certification states the primary, minimum requirements of the offered position of senior application developer as a U.S. master's degree or a foreign equivalent degree in computer science, information technology, or related, and six months of experience in the job offered or as an application developer or related. At Part H.8., the labor certification indicates that no alternate combination of education and experience is acceptable.

Part H.14 of the labor certification ("Specific skills or other requirements") states: "Any suitable combination of education, training, or experience is acceptable to Employer." Like the Director, we will refer to this statement as "*Kellogg* language." In *Matter of Kellogg*, 94-INA-465 (BALCA Feb. 2, 1998) (*en banc*), the Board of Alien Labor Certification Appeals held that a labor certification application must contain the statement where a foreign national already works for the employer, does not meet the position's primary requirements, and only potentially qualifies for the job based on its alternative requirements.[2]

Part J of the labor certification states that the Beneficiary's highest level of education relevant to the job opportunity is a master's degree in information technology from [redacted] University in India, completed in 2005. The record contains the Beneficiary's master of science degree in information technology from [redacted] University and transcripts.[3] The record also contains the Beneficiary's three-year bachelor of commerce degree issued in 2000, together with transcripts, from [redacted] University in India; his six-month diploma in advanced computing and transcripts from [redacted] in India issued in 2000; and his one-year post-graduate diploma (PGD) in computer applications from the [redacted] Electronics and Computer Technology issued in 2003, together with transcripts.

Part K of the labor certification states that the Beneficiary has over ten years of experience as a senior project manager with [redacted] in [redacted] New Jersey, where he was employed between July 2005 and October 2015. The record includes a letter from [redacted] stating that the Beneficiary was employed as a technical architect from July 1, 2005, to May 31, 2007, and as a senior project engineer from June 1, 2007, to October 8, 2015. The labor certification also states that the Beneficiary began working with the Petitioner as a senior application developer in October 2015.

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[2] The DOL codified *Kellogg*'s holdings at 20 C.F.R. § 656.17(h)(4). The regulation at 20 C.F.R. § 656.17(h)(4)(ii) 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.

[3] The transcripts indicate that the Beneficiary entered the two-year master's degree program in year two as a "lateral entry."

The record also includes two evaluations of the Beneficiary's education and experience. The first evaluation was written by [redacted], of the University of [redacted] He asserts that the Beneficiary's master of science degree from [redacted] University in India is equivalent to a bachelor's degree from a U.S. college or university.[4] He further states that the combination of the Beneficiary's bachelor of commerce degree from [redacted] University in India, his master of science degree, and his over ten years of experience with [redacted], is equivalent to a master's degree in information systems from an accredited college or university in the United States. The evaluation does not address the Beneficiary's diploma in advanced computing from [redacted] or his PGD.

The second evaluation was written by [redacted]., of the University of [redacted] He asserts that the Beneficiary's bachelor of commerce degree from [redacted] University in India, together with his diploma in advanced computing from [redacted] in India, are equivalent to three and one-half years of coursework in a four-year bachelor's degree program from a U.S. college or university,[5] and that the combination of this education and his over ten years of experience with [redacted] is equivalent to a bachelor's degree in information technology from an accredited college or university in the United States. The evaluation does not address the Beneficiary's master of science degree from [redacted] University in India or his PGD.

In his decision denying the petition, the Director interpreted the job offer portion of the labor certification as requiring a master's degree and six months of experience and found that the Beneficiary did not meet the educational requirement because he did not have the foreign equivalent of a U.S. master's degree. As noted by the Director in his decision, the Petitioner indicated that no alternate combination of education and experience was acceptable at Part H.8 of the labor certification. The Director determined that the *Kellogg* language in Part H.14 of the labor certification did not alter the minimum requirements stated on the labor certification, specifically, a master's degree and six months of experience.

On appeal, the Petitioner asserts that the language at Part. H.14. indicated that it was "willing to accept a U.S. master's degree equivalent from multiple educational sources" and that the petition should have been approved because the Petitioner was "willing to accept the equivalent of a master's degree plus six months for the position through a combination of education, training, and experience." The Petitioner does not claim that the Beneficiary's education alone is the foreign equivalent of a U.S. master's degree, and the evaluations submitted do not establish that the Beneficiary has the foreign equivalent of a U.S. master's degree based solely on his education. Rather, the Petitioner asserts that

[4] This evaluation of the Beneficiary's master of science degree is in accord with the Educational Database for Global Education (EDGE), created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), which states that a master of science degree in India "represents attainment of a level of education comparable to a bachelor's degree in the United States." AACRAO EDGE, http://edge.aacrao.org/country/credential/master-of-arts-or-commerce?cid=single (last visited Oct. 18, 2019). We consider EDGE to be a reliable, peer-reviewed source of information about foreign degree equivalencies.

[5] We note that EDGE states that a three-year bachelor of commerce degree in India "represents attainment of a level of education comparable to 3 years of university study in the United States." AACRAO EDGE, http://edge.aacrao.org/country/credential/bachelor-of-arts-ba-bachelor-of-commerce-bcom-bachelor-of-science-bsc?cid=single (last visited Oct. 18, 2019).

the labor certification allows the Beneficiary to qualify for the offered position with a combination of education and experience.

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 Co. 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 U.S. master's degree or a foreign equivalent degree in computer science, information technology, or related field of study (Parts H.4, H.4-B, H.7, H.7-A, and H.9) and that the minimum experience requirement is six months in the job offered or as an application developer or related (Parts H.6, H.6-A, H.10, H.10-A, and H.10-B). Part 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. Here, the Beneficiary does not meet the primary educational requirement of a master's degree and six months of experience, and the Petitioner asserts that he qualifies for the proffered position based on the alternative educational and experience requirements of the labor certification located at Part H.14.

The minimum education and experience required by the labor certification, however, is unchanged by the *Kellogg* language in Part H.14.[6] The minimum requirements are still a master's degree and six months of experience. The plain language of the labor certification does not support the Petitioner's claimed intent to accept less than a U.S. master's or foreign equivalent degree to meet the minimum educational requirement for the proffered position.

We agree with the Director's determination that the *Kellogg* language in Part H.14 of the labor certification does not change the minimum educational and experience requirements stated in Parts H.4 to H.10 of the labor certification. We find that the labor certification requires a U.S. master's or foreign equivalent degree in computer science, information technology, or related. The Beneficiary does not possess such a degree. Thus, the Beneficiary does not qualify for the job offered because he does not meet the minimum requirements of the labor certification.

III. ABILITY TO PAY

Although not addressed by the Director in his decision, the record does not contain regulatory-required evidence of the Petitioner's ability to pay the proffered wage from the priority date on July 24, 2017, and continuing until the Beneficiary obtains lawful permanent residence.[7] The regulation at 8 C.F.R. § 204.5(g)(2) requires that "[e]vidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements."

[6] We generally do not interpret the insertion of *Kellogg* language in part H.14 as altering the minimum requirements stated in the labor certification.

[7] The annual proffered wage is $72,000.

The Petitioner submitted its federal tax return for 2016 and a paycheck issued to the Beneficiary on November 1, 2017. However, the record does not contain an annual report, federal tax return, or audited financial statements for the Petitioner for 2017 as required by 8 C.F.R. § 204.5(g)(2). Without this regulatory-required evidence, we cannot affirmatively find that the Petitioner has the continuing ability to pay the proffered wage from the priority date.

IV. CONCLUSION

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 V- Inc.*, ID# 6716190 (AAO Oct. 22, 2019)