



**U.S. Citizenship
and Immigration
Services**

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

MATTER OF N-I-S-, INC.

DATE: JAN. 6, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an IT services and software development company, seeks to permanently employ the Beneficiary in the United States as a QA analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. See Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director determined that the job offer did not require a minimum of a bachelor's degree in both the primary and the alternate stated requirements and, therefore, the petition did not meet the requirements for classification as a professional with an advanced degree.

The matter is now before us on appeal.¹ The Petitioner asserts that its "use of Kellogg language" in the alternate requirements field does not disqualify a position from advanced degree consideration. The Petitioner states that the Beneficiary holds a U.S. master's degree, has 5 years of experience, and "clearly meets the statutory requirements for an EB2 position." However, this mischaracterizes the issue as addressed below. Upon *de novo* review, we will dismiss the appeal.

I. LEGAL REQUIREMENTS FOR THE REQUESTED CLASSIFICATION

Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. See also 8 C.F.R. § 204.5(k)(1).

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign

¹ On July 1, 2016, the Director issued a decision, noting that the appeal had inadvertently been administratively closed on January 21, 2015. The Director reopened the appeal and forwarded the matter to us.

equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation." The occupations listed at section 101(a)(32) of the Act are "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The regulation at 8 C.F.R. § 204.5(k)(3)(i) states that a petition for an advanced degree professional must be accompanied by:

- (A) An official academic record showing that the alien has a United States advanced degree or a foreign equivalent degree; or
- (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The regulation at 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

Therefore, an advanced degree professional petition must establish that the beneficiary is a member of the professions holding an advanced degree, and that the offered position requires, at a minimum, a professional holding an advanced degree. The Petitioner must also establish that the Beneficiary qualifies for the position offered based on the terms of the certified labor certification.

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The petition is accompanied by a labor certification, certified by the Department of Labor (DOL). The priority date of the petition is September 8, 2009. 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: Bachelor's degree.
- ...
- H.4-B. Major field of study: Management or related.

- ...
- H.6. Is experience in the job offered required for the job? Yes, 60 months.
- H.7. Is there an alternate field of study that is acceptable? Yes, technology or related.
- H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
- H.8-A. If Yes, specify the alternate level of education required: Other.
- H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: Will accept any suitable combination of education, training, and experience as equivalent to degree requirement.
- H.8-C. If applicable, indicate the number of years experience acceptable in question 8: 5.
- H.9. Is a foreign educational equivalent acceptable? Yes.
- H.10. Is experience in an alternate occupation acceptable? No.

The Director concluded that both the primary and alternate requirements of the job offer described in the labor certification do not require an advanced degree as they allow candidates to qualify in H.8. with an "Other" level of education which might allow for combined education and experience equivalent to a degree, but less than a degree, and, therefore, the petition would not require a minimum of an advanced degree. Accordingly, the Director determined that the petition does not satisfy the minimum requirement for classification as an advanced degree professional and denied the petition.

III. ANALYSIS

A. Requirement for Classification as an Advanced Degree Professional

In the instant case, the Petitioner claims that its stated willingness to accept a combination of education, training, and experience on the labor cert does not disqualify a position from advanced degree consideration.

On appeal, counsel describes the Petitioner's response to Question 8 as "*Kellogg* language," which he asserts should not disqualify the position for the requested classification. Counsel argues that the regulation at 20 C.F.R. § 656.17(h)(4)² compelled the inclusion of this language in the ETA Form 9089. In support, counsel includes a copy of the minutes from a liaison meeting on April 12, 2007 between the Nebraska Service Center and the American Immigration Lawyers Association (AILA). Counsel claims that these minutes show that USCIS will interpret *Kellogg* language in ETA Forms 9089 to mean "any combination that is at least equal to or greater than the specific requirements on

² "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."

the form.” Counsel concludes, therefore, the inclusion of the phrase “will accept any suitable combination of education, training or experience” [as equivalent to degree requirement] in this case should not be interpreted as reducing the minimum requirements below a bachelor’s degree and five years of work experience.

The regulation at 20 C.F.R. § 656.17(h)(4)(ii) was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc), that “where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer’s alternative requirements are unlawfully tailored to the alien’s qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable.” The statement that an employer will accept applicants with “any suitable combination of education, training or experience” is commonly referred to as “*Kellogg* language.”

However, at Part H.8-A of the labor certification the Petitioner clearly indicated that it would accept an “Other” level of education and went beyond the standard “*Kellogg* language” in including the phrase “as equiv to deg reqt.” Consequently, although the Petitioner states it intended to use the *Kellogg* language in its response to Question 8-B (“will accept any suitable combination of education, training or experience”), this language in its use of “Other” allows one to potentially qualify for the job without a degree, which is less than the minimum requirement for the advanced degree professional category. Additionally, as the Petitioner only listed primary requirements in H.4., it is unclear that *Kellogg* would modify any alternate requirement in H.8., but instead appears to be the alternate requirement.

The Petitioner was free to submit any evidence on appeal to help establish the language on the labor certification. The record does not contain any evidence of how the position was advertised, which might have further elaborated on the “Other” level of education allowed. In the absence of any clarifying evidence, we must read the labor certification as drafted. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984). The possible combination of employment experience and education described in the alternate requirements listed in Part H.8. of the labor certification does not require a professional holding an advanced degree or the equivalent of an alien of exceptional ability, and the appeal must be dismissed. 8 C.F.R. § 204.5(k)(4).

B. The Beneficiary’s Qualification as an Advanced Degree Professional

Beyond the decision of the Director, it is not clear that the Petitioner can establish that the Beneficiary is qualified for classification as an advanced degree professional based on this petition as it is not clear he met the terms of the labor certification as of the priority date as required in 8 C.F.R. § 103.2(b)(1), (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).

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Section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees. *See also* 8 C.F.R. § 204.5(k)(1). As noted above, the regulation at 8 C.F.R. § 204.5(k)(2) defines the term “advanced degree” as:

[A]ny United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

Therefore, an advanced degree professional petition must establish that the beneficiary possesses a U.S. academic or professional degree (or a foreign equivalent degree) above a baccalaureate, *or* a U.S. baccalaureate (or a foreign equivalent degree) followed by at least five years of progressive experience in the specialty. The Beneficiary must also meet the terms of the certified labor certification. Here the labor certification, at lines H.4., and H.7 requires a bachelor’s degree in management, technology, or a related field and five years of experience in the offered job by the September 8, 2009, priority date.

The Beneficiary possesses a “Diploma in Electrical Engineering” issued in 1999 by [REDACTED] (currently known as [REDACTED]). The Beneficiary’s academic transcripts reveal studies there from 1997 through 1999. The Beneficiary also possesses a Bachelor of Information Technology degree, awarded on August 23, 2003, by [REDACTED] after six semesters of study there. The Beneficiary was also awarded a Master of Business Administration degree by [REDACTED] in [REDACTED] India, on July 22, 2005. Finally, the Beneficiary possesses a Master of Business Administration degree from [REDACTED] Illinois, awarded February 24, 2007.

The Petitioner did not submit a foreign equivalency evaluation in this matter to address the beneficiary’s earlier foreign education. We have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, AACRAO is a “non-profit, voluntary, professional association of more than 11,000 higher education professionals who represent approximately 2,600 institutions in more than 40 countries.” *See* <http://www4.aacrao.org/centennial/about.htm> (accessed November 15, 2016). According to the registration page for EDGE, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” <http://edge.aacrao.org/info.php> (accessed November 15, 2016). Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials.³ If placement recommendations are included, the Council Liaison works with the author to give

³ *See An Author's Guide to Creating AACRAO International Publications* available at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx.

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feedback and the publication is subject to final review by the entire Council. *Id.* USCIS considers EDGE to be a reliable, peer-reviewed source of information about foreign credentials equivalencies.⁴ Regarding the Beneficiary's 1999 Diploma in Electrical Engineering from [REDACTED] EDGE states that the Diploma in Engineering in India represents attainment of a level of education comparable to up to one year of university study in the United States.⁵

Regarding the Beneficiary's 2003 Bachelor of Information Technology degree from [REDACTED] it appears that the diploma was awarded after only three years of post-secondary studies. A bachelor's degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244, 245 (Comm'r 1977). Therefore, it is not clear that the Beneficiary's diploma from [REDACTED] can be considered a foreign equivalent degree to a U.S. bachelor's degree.

Regarding the Beneficiary's Master of Business Administration degree from [REDACTED] issued July 22, 2005, EDGE provides that a Master of Business Administration degree in India "represents the attainment of a level of education comparable to a bachelor's degree in the United States."⁶

On the Labor Certification, the Beneficiary claimed the following employment:

- Employment as a QA Analyst/Team Leader for E.I. [REDACTED] in [REDACTED] India, from May 4, 2000, until February 4, 2005;
- Employment as [REDACTED] in [REDACTED] Illinois, as a QA Analyst from May 22, 2006, until February 19, 2007;
- Employment as a QA Analyst/Web/IS Support for [REDACTED] in [REDACTED] Illinois, from May 22, 2006, until February 19, 2007; and,
- Employment in the offered job for the Petitioner since July 9, 2007.

The Beneficiary's Master of Business Administration degree from [REDACTED] "represents the attainment of a level of education comparable to a bachelor's degree in the United States" and was issued on July 22, 2005. Therefore, the Beneficiary could not have accumulated the required 60 months of post-degree employment experience in the offered job as of the September 8, 2009, priority date.⁷ Thus, it is not clear that the Petitioner can establish that the Beneficiary met the

⁴ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the court determined that we provided a rational explanation for our reliance on information provided by AACRAO to support our decision.

⁵ We note that admission to the Diploma in Engineering program in India requires only ten years of primary/secondary study. <http://edge.aacrao.org/country/credential/diploma-in-engineering?cid=single> (accessed November 15, 2016).

⁶ <http://edge.aacrao.org/country/credential/master-of-arts-or-commerce?cid=single> (accessed November 15, 2016).

⁷ While the Beneficiary seems to possess five years of employment experience in the offered job subsequent to his 2003 Bachelor of Information Technology diploma, the Petitioner did not submit an evaluation of the Beneficiary's foreign diploma to demonstrate that it is equivalent to a U.S. bachelor's degree. Since it appears that the diploma was awarded after only three years of post-secondary studies, it is not clear that it is the foreign equivalent degree to a U.S. bachelor's degree, or whether the beneficiary was accepted in advanced standing for a four year program. It should be noted,

minimum educational and experience requirements of a bachelor's degree and five years of progressive experience for classification as an advanced degree professional as of the priority date, or that the Beneficiary can meet the stated education and experience requirements of the labor certification by the time of the priority date.

While the Beneficiary has a U.S. Master's degree, completed in 2007, it is not clear whether the Petitioner specified to the public in its recruitment that a Master's degree would be accepted as the equivalent to the required bachelor's degree and five years of experience. It should be noted that the H.8 alternate qualifications would still require five years of experience, which the beneficiary would not have subsequent to degree issuance before the priority date. The Petitioner should submit such evidence in any further filings to demonstrate how the minimum requirements were advertised to the public.

C. Ability to Pay the Proffered Wage

Beyond the decision of the Director, the Petitioner has not submitted all the required evidence to establish its continuing ability to pay the beneficiary the proffered wage as of the September 8, 2009 priority date. *See* 8 C.F.R. § 204.5(g)(2). The record contains the Beneficiary's 2009, and 2010 W-2 statements, as well as the Petitioner's 2010 tax. The Petitioner did not, however, submit its tax return for 2009 as required pursuant to 8 C.F.R. § 204.5(g)(2).

Additionally, based on USCIS records, the Petitioner has filed I-140 petitions on behalf of 37 other beneficiaries since the priority date of the current petition. A number of petitions were also filed before the priority date in this matter, but remained pending at the time of filing the instant labor certification as those beneficiaries had not yet adjusted status. Without the Petitioner's 2009 tax return and information related to the Petitioner's additional workers, we cannot fully determine whether the Petitioner has established its ability to pay the Beneficiary's proffered wage. Accordingly, the Petitioner must establish that it has had the continuing ability to pay the combined proffered wages to each beneficiary from the priority date of the instant petition. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg'l Comm'r 1977).

The evidence in the record does not document the priority date, proffered wage or wages paid to each beneficiary, whether any of the other petitions have been withdrawn, revoked, or denied, or whether any of the other beneficiaries have obtained lawful permanent residence. Thus, the record does not contain full documentation to determine whether the Petitioner can establish its continuing ability to pay the proffered wage to the Beneficiary and the proffered wages to the beneficiaries of its other petitions.

however, that the Beneficiary cannot include experience gained with the Petitioner in the position offered in determining whether the Beneficiary has the required five years of experience in H.6. *See* 20 C.F.R. § 656.17.

IV. CONCLUSION

In summary, the Petitioner did not establish that the position qualifies for classification as an advanced degree professional under section 203(b)(2) of the Act. In addition, the Petitioner did not establish that the Beneficiary met the requirements of the certified labor certification. Finally, the record does not contain sufficient information to fully determine whether the Petitioner can establish its ability to pay the proffered wage to this Beneficiary and the beneficiaries of its other petitions.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate 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; *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966); *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of N-I-S-, Inc.*, ID# 21977 (AAO Jan. 6, 2017)