U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M- CORP.

DATE: JAN. 18, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software development and support company, seeks to employ the Beneficiary as a software developer – 3. 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 ETA Form 9089, Application for Permanent Employment Certification (labor certification), did not demonstrate that the offered position required a member of the professions with an advanced degree or exceptional ability.

The matter is now before us on appeal. The Petitioner asserts that the Director misinterpreted the language in the labor certification and that it does not reflect that the job opportunity requires less than a U.S. master's degree or its foreign equivalent. However, as discussed below, the language of the labor certification does not support the Petitioner's assertions.

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

I. LAW

Employment-based immigration is generally 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). Next, the U.S. employer files Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. If the Form I-140 is approved, 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 required by statute, a labor certification certified by DOL, must accompany the petition. By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The

DOL also certifies that the employment of 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)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

II. ANALYSIS

The Petitioner seeks to classify the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act. 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 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.

8 C.F.R. § 204.5(k)(2). 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." *Ibid.* Section 101(a)(32) of the Act lists the following occupations as professions: "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

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

Therefore, a petition filed for an advanced degree professional must establish that the beneficiary is a member of the professions holding an advanced degree or its equivalent, and that the offered position, as described on the labor certification, requires, at a minimum, a professional holding an advanced degree or its equivalent.

In order to determine what a job opportunity requires, we must examine "the language of the labor certification job requirements." *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft, supra,* 736 F. 2d at 1309; *Madany, supra,* 696 F.2d at 1012-13. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer exactly as it is completed by the prospective employer. *See Rosedale Linden Park Company 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 alien employment certification application form. *Id.* at 834.

Moreover, we read the labor certification as a whole to determine its requirements. "The Form ETA 9089 is a legal document and as such the document must be considered in its entirety." *Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284 (BALCA Oct. 24, 2011) (finding that a "comprehensive reading of all of Section H" of the labor certification clarified an employer's minimum job requirements).[1]

In this case, Part H of the labor certification states the following requirements:

H.4.	Education: Master's.
H.4-B.	Major field of study: Computer science, computer applications, computer engineering, computer information systems.
H.5.	Training: None required.
H.6.	Experience in the job offered: None required.
H.7.	Alternate field of study: Accepted.
H.7-A.	Major alternate fields of study: Electronic engineering, electrical engineering, engineering, or related field.
H.8.	Alternate combination of education and experience: None accepted.
H.9.	Foreign educational equivalent: Accepted.
H.10.	Experience in an alternate occupation: Not accepted.
H.14.	Specific skills or other requirements: "For H.9: Will accept a Master's degree or foreign degree equivalent to [a] U.S. Master's degree based on any suitable combination of degree as determined by a professional evaluation service. . . ."

[1] Although we are not bound by decisions issued by the Board of Alien Labor Certification Appeals (BALCA), we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

In his decision, the Director found the language in Part H.14. of the labor certification regarding the Petitioner's acceptance of a foreign degree equivalency based on a combination of degrees to demonstrate that the offered position does not, at a minimum, require a professional holding an advanced degree or its equivalent (a bachelor's degree followed by 5 years of progressive experience), as required for classification under section 203(b)(3)(2) of the Act.

On appeal, the Petitioner asserts that the Director misinterpreted its language in Part H.14. of the labor certification and that "[t]he language included on item H.14. was intended to clarify item H.9 and not to contradict the information" it had provided in job offer portion of the labor certification. It contends that, reviewing the labor certification as a whole, "it is clear that the minimal requirement for the labor certification position is an advanced degree." The Petitioner further maintains that its recruitment for the offered position offers proof of its intent to require the minimum of a U.S. master's or a foreign equivalent degree and points to the recruitment materials it submits on appeal as proof. The Petitioner specifically notes that the State Workforce Agency Job Order and its internal posting notice for the offered position both list the educational requirements for the offered position as a "Master or foreign equivalent in Computer Science, Computer Application, Computer Engineering, Computer Information System[s], Electronic Engineering, Electrical Engineering, Engineering . . . or related field." It also maintains that its advertisements for the offered position in [redacted] online and in [redacted] identify the offered position's advanced degree requirement.

Although we note the Petitioner's claim regarding its intended degree requirement for the job opportunity, we may not ignore the terms of the labor certification in this matter. *See, e.g., Madany, supra*, 696 F.2d at 1015 (stating that "it is the language of the labor certification job requirements that will set the bounds of the . . . burden of proof"). Despite, the Petitioner's assertion to the contrary, the language in Part H.14. of the labor certification, "[w]ill accept a Master's degree or foreign degree equivalent to [a] U.S. Master's degree based on any suitable combination of degree as determined by a professional evaluation service," allows a combination of lesser degrees – such as multiple bachelor's degrees or a combination of bachelor's and associate's degrees – deemed to be equivalent to a U.S. master's degree based on a credentials evaluation. However, neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum requirements for the position can be met with anything other than a single academic degree. Where a combination of lesser degrees is accepted, the result is the "equivalent" level of education of an advanced degree rather than the foreign equivalent degree required for classification as an advanced degree professional.[2] Therefore, as the minimum requirements for the job opportunity can be satisfied with less than a single foreign degree that is equivalent to a U.S. master's degree, the labor certification does not support the classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act.[3]

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[2] 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 immigrant classification in this matter do not contain similar language.

[3] We note that a position requiring a bachelor's degree plus 5 years of post-baccaleaurate progressive experience can

Further, although the Petitioner maintains on appeal that its recruitment materials offer proof of the job opportunity's advanced degree requirement, we do not find this to be the case. The submitted posting notice and job order both state a requirement for a U.S. master's degree or foreign equivalent, but neither specifies the nature of the equivalency or how it is to be met. The multiple job openings listed in the Petitioner's advertisements in [redacted] online and [redacted] do not reflect their specific educational requirements, but rather indicate that a number of positions, including the offered position, require a "Bachelor/equiv and prior rel. exp, Master/equiv, or Master/equiv and prior rel. exp," depending on the "position level/type." It is unclear from these advertisements which requirments relate to which position. Further, the advertisments do not reference the acceptance of foreign degree equivalencies, only equivalencies. As a result, the Petitioner' recruitment materials do not provide evidence of its intent to require the minimum of a U.S. master's or a foreign equivalent degree.

On appeal, the Petitioner also asserts that the visa petition would have been approved had the Director issued a request for evidence (RFE) or notice of intent to deny (NOID) in keeping with the guidance set forth in USCIS Policy Memorandum, PM-602-0085, *Requests for Evidence and Notices of Intent to Deny* (June 3, 2013) https://www.uscis.gov/laws/policy-memoranda allowing it to provide additional evidence. However, in that the language in Part H.14. allows for a foreign educational equivalent based on a combination of lesser degrees, we find the Director to have reasonably concluded that there was "no possibility that additional information or explanation [would] cure the deficiency" and, therefore, that no RFE or NOID needed to be issued. USCIS Policy Memorandum, PM-602-0085, *supra*, at 2. Moreover, the evidence submitted by the Petitioner that it claims would establish eligibility does not, for the reasons just noted, overcome the Director's determination that the labor certification does not support the Beneficiary's classification as an advanced degree professional under section 203(b)(2) of the Act.

For the reasons just discussed, the job offer portion of the labor certification does not demonstrate that the offered position requires, at a minimum, a professional holding a U.S. master's or foreign equivalent degree. Therefore, we will affirm the Director's determination that it does not support the classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act.

III. CONCLUSION

The job offer portion of the labor certification in this matter does not demonstrate that the offered position requires a professional holding an advanced degree or its equivalent. Therefore, it does not

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qualify as an advanced degree professional. However, in this case, the Petitioner did not state that the minimum requirements of the position could be met with this alternate combination of education and experience. When basing the request for classification as an advanced degree professional on a minimum requirement of a master's degree alone, the labor certification must reflect that the position requires a single U.S. master's degree or the foreign degree equivalent, rather than a combination of lesser degrees.

support the classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act.[4]

In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner has not met that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of M- Corp.*, ID# 84158 (AAO Jan. 18, 2017)

[4] We also note that the financial information submitted by the Petitioner pertains to its parent company rather than itself. As the Petitioner and its parent are distinct legal entities, the evidence submitted does not appear to compy with the requirements at 8 C.F.R. § 204.5(g)(2), which requires that the prospective U.S. employer, here the Petitioner and not its parent company, submit evidence of its ability to pay the proffered wage. The Petitioner must resolve this issue in future filings.