



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

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

MATTER OF H-P-S-

DATE: JULY 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an operator of public charter schools, seeks to employ the Beneficiary as an instructional coordinator: English language cluster. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, “EB-2” category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master’s degrees, or bachelor’s degrees followed by five years of experience.

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish the Beneficiary’s possession of the minimum education or experience required for the offered position and the requested classification.

On appeal, the Petitioner submits additional evidence and asserts that the Director misunderstood the position’s requirements, “irrationally” rejected evidence of the Beneficiary’s qualifying experience, and “imposed requirements which do not exist in any regulation.”

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If DOL certifies an offered position, the employer must next file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. In visa petition proceedings, USCIS determines, among other things, whether a beneficiary meets DOL-certified requirements of a position. Finally, if USCIS approves a 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.

An advanced degree professional must have at least a master's degree, or a bachelor's degree followed by five years of progressively responsible experience in the specialty. 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree"). In addition, like all beneficiaries, an advanced degree professional must meet the DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).¹

II. ANALYSIS

Here, the labor certification states the primary requirements of the offered position of instructional coordinator as a U.S. master's degree, or a foreign equivalent degree, in education, English language, or English literature, plus 36 months of experience in the job offered or as a middle- or high-school teacher of English language or literature, or English as a Second Language (ESL). In the alternative, the labor certification states the Petitioner's acceptance of a bachelor's degree followed by five years of experience.

For both the offered position and the requested classification, the Petitioner asserts the Beneficiary's possession of a bachelor's degree and at least five years of post-degree experience.

A. The Beneficiary's Possession of a Bachelor's Degree in a Required Field of Study

The Director concluded that the record did not establish the Beneficiary's possession of a bachelor's degree in a field of study required for the offered position. The Petitioner demonstrated the Beneficiary's possession of a bachelor's degree in translation and interpretation studies. The Director, however, interpreted the position's alternative criteria to require a bachelor's degree in education, English language, or English literature - the fields of the position's primary, educational requirements.

On appeal, the Petitioner argues that, if followed by five years of progressive experience in the specialty, a baccalaureate in any field of study meets the position's alternative requirements. The Petitioner notes that the regulatory definition of "advanced degree" does not require the equivalent of a master's degree to include a baccalaureate in the same field(s) as the graduate degree. *See* 8 C.F.R. § 204.5(k)(2) (equating a master's degree to a "United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressively responsible experience").

When evaluating whether a beneficiary qualifies for an offered position, we must examine the job offer portion of the labor certification to determine the position's minimum requirements. We may neither ignore a term of the certification, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

¹ The priority date of a petition accompanied by a labor certification, as in this case, is the date the DOL accepted the labor application for processing. 8 C.F.R. § 204.5(d).

As the Petitioner argues, the labor certification here does not specify a field of study for the alternative bachelor's degree. This is not unusual, however, as the certification form does not ask employers to state particular fields for alternative degrees. In our experience, employers, often require the same field(s) of study for alternative and primary degrees without specifying so on labor certification forms.

The Petitioner, however, contends that it did not specify a field of study for the alternative degree because it intended a baccalaureate in any field to meet the alternative requirements. *See Matter of Wienerschnitzel No. 287*, 2010-PER-01367, 2011 WL 5357645, *2 (BALCA Nov. 2, 2011) (holding that, despite specifying fields of study in primary requirements, a labor certification employer may accept an alternative bachelor's degree in any field of study). Thus, we may not presume that the position's alternative and primary degrees require the same fields.

In response to our notice of derogatory information and intent to dismiss (NOID), the Petitioner supported its argument with documentation from its labor certification proceedings. Consistent with the labor certification, copies of advertisements for the offered position did not specify fields for the alternative bachelor's degree, as they did not state the position's primary or alternative requirements at all. *See* 20 C.F.R. § 656.17(f) (indicating that ads need not state job requirements or duties). The Petitioner's recruitment report also indicates the company's consideration of a U.S. applicant with a bachelor's degree in a field other than the specified, primary fields. Although ultimately rejecting the candidate for lack of qualifying experience, the Petitioner's consideration of the applicant supports its claimed acceptance of a bachelor's degree in any field. A preponderance of evidence therefore establishes that the alternative requirements of the offered position allow a bachelor's degree in any field of study.

The record establishes the Beneficiary's possession of a bachelor's degree in a qualifying field of study. We will therefore withdraw the Director's contrary finding.

B. The Beneficiary's Possession of the Required Amount of Experience

As previously discussed, to qualify for both the offered position and the requested classification, the Petitioner must demonstrate the Beneficiary's possession of at least five years of progressive, post-baccalaureate experience. On the labor certification, the Beneficiary attested to his possession, by the petition's priority date, of about 66 months of full-time, qualifying experience. His claimed experience includes: about 31 months as an assistant principal and ESL teacher with the Petitioner in the United States; and about 35 months as an English teacher at two schools in Turkey.

The record establishes the Beneficiary's possession of the qualifying experience with the Petitioner. A labor certification employer generally cannot rely on experience that a foreign national gained with it. But the Petitioner here demonstrated that the Beneficiary gained the experience in positions substantially different than the offered position. *See* 20 C.F.R. §§ 656.17(i)(3), (5)(ii) (allowing an employer to rely on experience that a foreign national gained with it if the experience was in a substantially different position).

As evidence of the Beneficiary's remaining experience, the Petitioner submitted letters from officials at the two Turkish schools. *See* 8 C.F.R. § 204.5(g)(1) (requiring a petitioner to support a beneficiary's claimed experience with letters from current or former employers). The Director found the initial letters from the schools to be unreliable because counsel drafted the documents' contents. On appeal, the Petitioner submitted additional letters drafted by officials at the institutions.

While this appeal was pending, however, an overseas investigation found additional inconsistencies in the schools' letters. The principal of the first school denied writing or signing a letter. The principal also stated that he did not know anyone with the Beneficiary's name who had taught at the school. Another official at the first school could not find a record of the Beneficiary's employment at the school and stated that the signatory of the institution's initial letter left the school before the document's stated date of issuance.

At the second school, an official stated that she had never heard of the principal who purportedly signed one letter. She also said that she did not recognize the Beneficiary's name. A man who purportedly signed the second school's initial letter recalled working with the Beneficiary at the first school. But the man stated that he did not remember writing or signing a letter for the Beneficiary and could not confirm the Beneficiary's dates of employment at the second school.

In response to our NOID, the Petitioner submitted an affidavit from the man at the second school, confirming that he signed a prior letter for the Beneficiary. After telling an investigator that he could not recall the letter or the Beneficiary's employment at the second school, he stated that he found a scanned copy of the document and remembered verifying the Beneficiary's employment at the school before issuing the letter.

The Petitioner also submitted an affidavit from the purported signatory of the initial letter of the first school. The signatory acknowledged telling an investigator that he did not remember the Beneficiary or signing a letter for him. After that conversation, however, the signatory stated that colleagues recalled the Beneficiary, spurring his remembrance of the letter. The Petitioner also submitted copies of Turkish government documents, including "Statements of Services for Private Schools" and "Work Permit Approvals," indicating the Beneficiary's claimed employment at both schools.

Despite the Petitioner's NOID response, the record does not resolve all of the inconsistencies regarding the Beneficiary's claimed, qualifying experience in Turkey. The work permits do not reflect the Beneficiary's full-time employment at the schools. The permit for the second school states his employment for 20 hours a week, while the permit for the first school reflects only 15 hours a week. Thus, the permits cast doubt on the Beneficiary's claims of full-time, qualifying experience abroad. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

In affidavits, the Beneficiary asserted that the permits refer to “contractual minimum” hours. He stated that he worked full-time at both schools, teaching classes for 24 hours a week. When not in class, he stated that he prepared lessons, corrected homework, graded examinations, conducted conferences, tutored students, and underwent training. The record, however, lacks independent, objective evidence to support the Beneficiary’s statements. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring resolution of inconsistencies by independent, objective evidence).

The record also does not explain inconsistencies regarding the names of the schools where the Beneficiary purportedly taught. Later letters from the first school refer to the institution by a different name than stated on the labor certification and in an initial letter. Similarly, a letter regarding the Beneficiary’s employment at the second school is on the stationery of another organization. Because the record does not explain the relationship between the entities, we are unable to determine whether the document meets the requirements of 8 C.F.R. § 204.5(g)(1) as a letter from the Beneficiary’s former employer.

In addition, as previously indicated, the man at the second school told an investigator of his employment with the Beneficiary at the first school. In his later affidavit, however, the man does not mention his purported work with the Beneficiary. Further, the record does not explain how an official reportedly signed a letter on the first school’s stationery after his departure from the institution. *See Matter of Ho*, 19 I&N Dec. at 591 (holding that doubt cast on any aspect of a petitioner’s proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence).

For the foregoing reasons, the record does not establish the Beneficiary’s possession of five years of post-baccalaureate experience as required for the offered position and the requested classification. We will therefore affirm the Director’s decision and dismiss the appeal.

C. The Beneficiary’s Experience “in the Specialty”

The record also does not establish the Beneficiary’s possession of post-baccalaureate experience “in the specialty” as required for the requested classification. The Director found that the Beneficiary’s post-baccalaureate experience must be in the offered position of instructional coordinator or as a middle- or high-school teacher of English language or literature, or ESL. On appeal, however, the Petitioner notes that an advance degree requires post-baccalaureate experience “in the specialty.” *See* 8 C.F.R. § 204.5(k)(2) (defining the term “advanced degree”).

The Petitioner asserts the Beneficiary’s possession of post-baccalaureate experience in the specialty of “education.” Because the labor certification states the offered position’s “major field of study” as “education,” the Petitioner maintains that education is the proper specialty. The Petitioner states: “By the term ‘education,’ as it appears on our labor certification in Box H-4-B, we include all subfields of education, such as Education Administration, Education Leadership, and Curriculum & Instruction. This construction opened the job opportunity to the widest array of qualified workers.”

The legislative history of the Act, however, does not support the Petitioner's assertions. In its "joint explanatory statement," Congress' conference committee on the 1990 amendments to the Act stated: "The conferees intend that the equivalent of an advanced degree be defined to mean a bachelor's degree plus at least five years' experience *in the particular profession.*" See H.R. Conf. Rep. No. 101-955 (Oct. 26, 1990) (reprinted in 1990 U.S.C.C.A.N. 6784, 6786) (emphasis added). Thus, contrary to the Petitioner's argument, legislative history indicates that a position's profession, rather than its required major field of study, determines the specialty.

For immigration purposes, the term "profession" means "one of the occupations listed in section 101(a)(32) of the Act, [8 U.S.C. § 1101(a)(32),] 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." 8 C.F.R. § 204.5(k)(2). The Act's specified professions include "teachers in elementary or secondary schools, colleges, academies, or seminaries." Section 101(a)(32) of the Act. Congress' identification of "teachers" as a profession suggests that teaching is separate from other education-related professions, such as school principals or administrators.

Here, the Beneficiary claims about 44 months of teaching experience, including about 35 months as an English language teacher in Turkey and about nine months as an ESL teacher with the Petitioner in the United States. The record indicates that the job duties of the Beneficiary's teaching positions were almost identical. The positions in both Turkey and the United States involved: teaching the English language to students in grades six to eight; reviewing and assigning homework to students; meeting with them to resolve academic problems; and encouraging their participation in English-related extracurricular activities. Therefore, the Beneficiary's teaching experience appears to be in the same specialty.

The record indicates that only a few of the Beneficiary's duties as an assistant principal (counseling, disciplining, and supervising students) match the job duties in his teaching positions. The record indicates that the bulk of the Beneficiary's duties as an assistant principal were administrative in nature, including: formulating student personnel policies; monitoring safety and security on school property; directing and coordinating teacher supervision of non-classroom areas; observing and evaluating teacher performance; maintaining student attendance records; arranging for and overseeing substitute teachers; and working with administrators to coordinate and supervise student teacher programs. The differences in the Beneficiary's job duties as a teacher and as an assistant principal suggest that only part of his claimed post-baccalaureate employment experience is in the same specialty.

The Petitioner claims the Beneficiary's possession of about 66 months of progressive, post-baccalaureate experience in the specialty of education. However, the record indicates the Beneficiary's claimed possession of about 66 months of experience in two, separate specialties: about 44 months in the specialty of teaching; and about 22 months as an assistant principal in another specialty or profession. Because the Act identifies teaching as a separate profession from other educational occupations, the record does not establish the Beneficiary's possession of the required five years of experience in a single specialty. Therefore, even if the Petitioner had established the Beneficiary's

possession of the claimed 66 months of experience, the record would not establish the Beneficiary's possession of at least five years of progressive, post-baccalaureate experience "in the specialty." As such, the record does not establish the Beneficiary's possession of an advanced degree or its equivalent. Therefore, the Beneficiary does not qualify for the requested classification of advanced degree professional.

III. CONCLUSION

Contrary to the Director's decision, the record demonstrates the Beneficiary's possession of a bachelor's degree in a field of study required for the offered position. The record, however, does not establish the Beneficiary's possession of at least five years of post-baccalaureate experience as required for the offered position and the requested classification, or his experience "in the specialty" as required for the classification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-P-S-*, ID# 15943 (AAO July 28, 2017)