



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

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

MATTER OF W- CORP.

DATE: SEPT. 20, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a finished carpentry contracting company, seeks to employ the Beneficiary as a management 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 of the Texas Service Center denied the petition on the ground that the Petitioner did not establish its continuing ability to pay the proffered wage from the priority date onward. We affirmed the Director's decision on appeal, and also found that the labor certification was not valid for the classification of advanced degree professional and that the evidence of record was insufficient to establish that the Beneficiary had the experience required by the labor certification to qualify for the job offered.

The matter is again before us on a motion to reconsider. The Petitioner asserts that the evidence of record establishes its continuing ability to pay the proffered wage, that the labor certification supports the classification of advanced degree professional, and that the Beneficiary has the requisite experience to qualify for the job offered.

Upon review of the record, we will grant the motion in part and deny the motion in part.

I. REGULATORY REQUIREMENTS FOR MOTIONS

The requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider. A motion to reconsider must also be supported by a pertinent precedent or

adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services or Department of Homeland Security policy.

II. LAW AND ANALYSIS

A. Petitioner's Ability to Pay the Proffered Wage

A petitioner must establish that it has the ability to pay the beneficiary the proffered wage from the priority date of the petition up to the date the beneficiary acquires lawful permanent resident status. *See* 8 C.F.R. § 204.5(g)(2). In this case, the filing date of the ETA Form 9089, Application for Permanent Employment Certification (labor certification), is the "priority date." *See* 8 C.F.R. § 204.5(d). The Petitioner filed the labor certification with the U.S. Department of Labor on December 2, 2013.

Our decision dismissing the appeal found that the Petitioner had established its ability to pay the proffered wage of \$58,000 per year in 2013 and 2015, but not in 2014. We found that the Petitioner's federal income tax return for 2014 (Form 1120S) showed net income of \$57,233 and net current assets of \$38,176 that year. Since neither of these figures equaled or exceeded the proffered wage, we found that the Petitioner had not established its ability to pay in 2014.

On motion the Petitioner demonstrated that its 2014 net current assets, as recorded in Schedule L of the Form 1120S, totaled \$186,972. Since the Petitioner's 2014 net current assets exceeded the proffered wage of \$58,000, we find that the Petitioner has established its ability to pay the proffered wage that year.

Therefore, the Petitioner's motion to reconsider on this issue is granted and we find that the Petitioner has established its continuing ability to pay the proffered wage from the priority date.

B. Beneficiary's Qualifying Experience

A beneficiary must meet all of the education, training, experience, and other requirements specified on the labor certification as of the priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977).

Section H of the labor certification specifies the following with respect to the education, training, and experience required to qualify for the job offered:

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| 4. | Education: Minimum level required: | Master's degree |
| 4-B. | Major Field of Study: | Industrial Engineering
or Management |
| 5. | Is training required in the job opportunity? | No |
| 6. | Is experience in the job offered required? | No |
| 7. | Is an alternate field of study acceptable? | No |

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| 8. | Is an alternate combination of education and experience acceptable? | Yes |
| 8-A. | If Yes, what level of education? | Other |
| 8-B. | What alternate level? | “MS dgr. or equiv. accept any suitable comb. of educ. trng. & exp. accep” |
| 8-C. | How many years of experience? | 5 years |
| 9. | Is a foreign educational equivalent acceptable? | Yes |
| 10. | Is experience in an alternate occupation acceptable? | Yes |
| 10-A. | How long? | 6 months |
| 10-B. | Job titles of alternate occupations: | Industrial Engineering,
Management Analyst,
Department’s Chief. |

The educational and experience requirements are summarized at H.14 of the labor certification (“Specific skills or other requirements”) in the following language:

Master’s degree or equivalent and experience. Will accept work experience in lieu of a master’s degree. Will accept any suitable combination of education, training and experience.

Section J of the labor certification states that the Beneficiary’s highest level of education is a bachelor of science in industrial engineering from the [REDACTED] awarded in 1997,¹ and that five years of progressive experience elevate his credentials to the equivalent of a master’s degree. The Beneficiary’s experience is listed in section K of the labor certification and consists of two jobs with companies in [REDACTED] Colombia – as a department’s chief with [REDACTED] from 2002 to 2005, and as an industrial engineer with [REDACTED] from 2005 to 2013.

The regulation at 8 C.F.R. § 204.5(g)(1) requires that letters from employers attesting to a beneficiary’s qualifying experience must include the name, address, and title of the writer and a specific description of the duties performed by the beneficiary.

In our decision dismissing the appeal we found that the letters submitted by the Petitioner from [REDACTED] and [REDACTED] did not meet the substantive requirements of the regulation because the letter from [REDACTED] did not describe the Beneficiary’s job duties and the letter from [REDACTED] was not signed by the writer.

¹ The Petitioner established that the Beneficiary’s degree of industrial engineer (“*El Grado Profesional de Ingeniero Industrial*”) is comparable to a bachelor’s degree in the United States.

On motion the Petitioner submits updated letters from [REDACTED] and [REDACTED]. However, we cannot consider new evidence on a motion to reconsider. Instead, a motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3).

Since the Petitioner has not established that our decision regarding the Beneficiary's qualifications was based on an incorrect application of law or policy, the motion to reconsider is denied on this issue.

C. Advanced Degree Professional Classification

For a petition seeking classification of a beneficiary as an advanced degree professional, the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. *See* 8 C.F.R. § 204.5(k)(4)(i).

An "advanced degree" is defined as "any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate" or "a United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty." 8 C.F.R. § 204.5(k)(2).

A petition for an advanced degree professional must be accompanied by a labor certification which demonstrates that the offered job requires a professional with an advanced degree. *See* 8 C.F.R. § 204.5(k)(4)(i).

In our decision dismissing the appeal we found that the labor certification did not demonstrate that the job offered requires an advanced degree professional. While the labor certification stated that the primary requirements for the job are a master's degree, section H.14 also allowed various combinations of education and experience, or work experience alone, to be considered equivalent to a master's degree.

On motion the Petitioner asserts that its acceptance of "work experience in lieu of a master's degree" at H.14 of the labor certification did not mean that an individual could qualify for the job offered with work experience alone because a master's degree equivalency cannot be attained without the individual having first earned a bachelor's degree. According to the Petitioner, work experience cannot be substituted for the underlying bachelor's degree, and its minimum requirement of a master's or foreign equivalent degree implicitly confirms that a bachelor's degree is required. The Petitioner claims that the labor certification does not allow for work experience to be accepted as equivalent to a bachelor's degree, and there was no need to state that explicitly in the labor certification because a master's degree equivalency that includes work experience "is impossible" absent an underlying bachelor's degree.

In determining the requirements of the offered position, we must look to the language in the job offer portion of the labor certification. We may not ignore a term of the labor certification, nor may we impose additional requirements. See *Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983). Our interpretation of the job requirements must involve reading and applying the plain language of the labor certification. See *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 834 (D.D.C. 1984).

The labor certification states at H.14 that “a master’s degree or equivalent and experience” is required, and then states that the Petitioner “will accept work experience in lieu of a master’s degree.” The language in the second clause does not state that a bachelor’s degree is a required component of a master’s degree equivalency that includes work experience. The plain language used by the Petitioner does not support this claim. Rather, the labor certification indicates that work experience can substitute for a master’s degree and that an individual could qualify for the job without an underlying educational credential.

If the Petitioner meant to require at least a bachelor’s degree and allow an individual to attain master’s degree equivalency based on subsequent work experience substituting for a master’s degree, that intention could have been demonstrated at H.8 and H.8-A of the labor certification. H.8 asked whether an alternate combination of education and experience was acceptable, to which the Petitioner checked the “Yes” box. H.8-A asked for specification as to the alternate level of education required, offering a series of six ascending options from “None” to “Doctorate” including “Bachelor’s” as the fourth option. The Petitioner did not check “Bachelor’s” or any other of these six options, and instead checked a seventh box called “Other.” At H.8-B the Petitioner indicated that “other” means a master of science or the equivalent and that any suitable combination of education, training, and experience would be acceptable, while at H.8-C the Petitioner stated that five years of experience was acceptable as the alternate experience requirement.

In short, the Beneficiary did not select bachelor’s degree at H.8-A of the labor certification as its minimum educational requirement. Furthermore, while indicating at H.8-A and H.8-B that a master of science and five years of experience was acceptable as an alternate combination of education and experience, the Petitioner also stated at H.14 that it would accept work experience in lieu of a master’s degree.

Based on the plain language of the labor certification, therefore, we conclude that there is no minimum educational requirement for the job offered and that an individual could qualify for the job with qualifying experience alone or a combination of qualifying experience and less than baccalaureate level education.

Since the labor certification does not require at least a bachelor’s degree to qualify for the job offered, it does not support the requested classification of advanced degree professional. Accordingly, we will affirm our previous finding that the labor certification does not support the requested advanced degree professional classification. On this issue as well, therefore, the motion to reconsider is denied.

III. CONCLUSION

The Petitioner has established its continuing ability to pay the proffered wage. The Petitioner has not established that our conclusions that the Beneficiary did not meet the experience requirements of the labor certification and that the labor certification does not support the requested advanced degree professional classification were based on incorrect applications of law or policy. Therefore, the motion will be granted in part and denied in part.

ORDER: The motion to reconsider is granted in part and denied in part.

Cite as *Matter of W- Corp.*, ID# 595671 (AAO Sept. 20, 2017)