U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E-M-A-, P.C.

DATE: AUG. 12, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a physicians' office, seeks to employ the Beneficiary as an instructional coordinator. It requests classification of the Beneficiary as an advanced degree professional under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition and subsequent motion. The Director found that the minimum requirements of the labor certification allowed a beneficiary to qualify for the proffered position with less than a bachelor's degree, the minimum educational credential required for classification as an advanced degree professional, and therefore did not support the requested visa classification.

On appeal the Petitioner asserts that the Director misinterpreted its labor certification requirements, that its minimum educational requirement for the job offered is a bachelor's degree, and that the labor certification therefore supports the petition's request for advanced degree professional classification.

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

I. LAW

A. Employment-Based Immigrant Petition 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 U.S. 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

[1] The "priority date" of a petition is the date the underlying labor certification application is filed with the DOL. *See* 8 C.F.R. § 204.5(d). In this case the priority date is November 20, 2017. The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the 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.

B. Advanced Degree Professional Classification

A petition for an advanced degree professional must generally be accompanied by a valid, individual labor certification. 8 C.F.R. § 204.5(k)(4)(1). The regulations state that to be eligible for the requested classification, the job offer portion of the labor certification must demonstrate that the job requires a professional holding an advanced degree or the equivalent. 8 C.F.R. § 204.5(k)(4)(i). The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any 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.

If the labor certification allows for less than an advanced degree, therefore, the position will not qualify for advanced degree professional classification.

II. ANALYSIS

In determining whether the position offered qualifies for advanced degree professional classification, we look to the terms of the labor certification. The education, training, experience, and other requirements for the proffered position are set forth in Part H of the labor certification. In this case Part H states that the proffered position of instructional coordinator has the following requirements:

4.	Education: Minimum level required:	Master's degree
4-B.	Major Field of Study:	Nursing Education
5.	Is training required in the job opportunity?	No
6.	Is experience in the job offered required?	Yes
6-A.	How long?	6 months
7.	Is an alternate field of study acceptable?	Yes
7-A.	What field(s) of study?	M.S. in Nursing or Medicine M.D.
8.	Is an alternate combination of education and experience acceptable?	No
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 title(s) of alternate occupation(s)	Instructional Coordinator

or related

At section H, box 14, of the labor certification the following additional language is provided regarding the "Specific skills and other requirements" for the job:

> Employer will accept any suitable combination of education (US, Foreign, combination of degrees), training, and/or experience (in the job offered or related capacities) equivalent to a US master's degree + 6 month's experience, as per sec. H.

In order to determine what a job opportunity requires, 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 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-10422, 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).[2]

In his decision the Director found that the labor certification did not support the requested classification of advanced degree professional because the language in section H, box 14, stating the employer would accept master's degree equivalency based on a "combination of degrees" allowed a beneficiary to qualify for the proffered position with less than a bachelor's degree.

On appeal the Petitioner asserts that because the Beneficiary only qualified for the job offered based on the labor certification's alternative job requirements, the Petitioner, "as required by *Kellogg*, . . . included a provision in box H.14 of the labor certification stating that the employer would accept any *suitable* combination of education . . . '*equivalent to a U.S. Master's Degree + 6 month's, as per Sec. H*'"

The statement that an employer will accept applicants with "any suitable combination of education, training or experience," commonly referred to as *Kellogg* language, originated in a case before the Board of Alien Labor Certification Appeals, *Matter of Francis Kellogg*, 1994-INA-465 and 544, 1995, INA 68 (Feb. 2, 1998) (*en banc*). The language was later incorporated into the regulation at 20 C.F.R. § 656.17(h)(4)(ii), which states that if a beneficiary is already employed by a petitioner, does not meet the primary job requirements, and potentially qualifies for the job only under the employer's alternative requirements, the labor certification must state "that any suitable combination of education, training, or experience is acceptable."

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

We do not generally read the inclusion of *Kellogg* language in a labor certification as altering the stated minimum requirements. When a petitioner goes beyond the *Kellogg* language, however, we must evaluate the effect of that additional language. In this case the labor certification states in section H. boxes 4 through 10, that the minimum educational requirement is a master's degree in nursing education, a master's degree in nursing, or a doctor of medicine, or a foreign educational equivalent, and that the minimum experience requirement is six months in the job offered or a related position. Thus, the requirements stated in subsections H.4 through H.10 of the labor certification include an educational credential of no less than a master's degree plus six months of qualifying experience. The language in section H, box 14, does not accord with the minimum educational requirements previously stated in section H, boxes 4, 6, and 9, because it states that the "employer will accept any suitable combination of education ([including a] combination of degrees) . . . training, and/or experience . . . equivalent to a US master's degree."

The Petitioner claims that accepting a "combination of degrees" would not allow anyone with less than a bachelor's degree to qualify for the proffered position, and points out that USCIS, in adjudicating petitions for advanced degree professional classification, sometimes accepts the combination of a three-year bachelor's degree followed by a two-year post-graduate degree from an accredited university as equivalent to a U.S. bachelor's degree. The Petitioner does not specify in subsection H.14, however, that a "combination of degrees" must include at least a bachelor's degree or a bachelor's degree equivalent to be acceptable. Rather, the plain language of subsection H.14 does not exclude the possibility of multiple sub-baccalaureate level degrees, either by themselves or in combination with certain training and/or experience credentials, being deemed equivalent to a U.S. master's degree and thus acceptable for purposes of qualifying for the job of instructional coordinator. We conclude, therefore, that the language in subsection H.14 of the labor certification goes beyond the *Kellogg* language and alters the minimum job requirements stated in subsections H.4 through H.10 of the labor certification. The Petitioner has not met its burden to show that a minimum of a bachelor's degree is required.

The Petitioner mistakenly asserts that the DOL, in its labor certification, certified that a master's degree is the minimum requirement for the proffered position and that the DOL, not USCIS, determines the requirements for the job. As previously discussed, the DOL makes two determinations in its labor certification: (1) that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position, and (2) that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. As part of those determinations, DOL examines the position requirements to determine whether they are normal for the occupation and represent the actual minimum requirements of the position. *See* 20 C.F.R. § 656.17(h)(i) and 656.17(i). But the DOL does not determine whether the minimum requirements are sufficient to qualify for any specific visa classification.

Rather, USCIS determines whether the beneficiary is qualified for the job offered under the terms of the labor certification and whether the beneficiary is eligible for the requested visa classification. *See K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 (9th Cir. 1983); *Tongatapu Woodcraft Hawaii,*

Ltd. v. Feldman, 736 F.2d 1305, 1309 (9th Cir. 1984). In order to determine eligibility for the requested classification, USCIS determines whether the offered position's minimum requirements, as stated in the labor certification, comport with the requirements of the requested classification. Contrary to the Petitioner's assertions, therefore, the DOL did not certify that a master's degree is the minimum educational requirement for the job of instructional coordinator.

Finally, the Petitioner contends that the Director erroneously found that the "combination of degrees" language in section H.14 of the labor certification precludes the proffered position from qualifying as a "profession" as defined in section 101(a)(32) of the Act and 8 C.F.R. § 204.5(k)(2), which includes any occupation requiring a U.S. baccalaureate or foreign equivalent degree. While the Director did not actually make such a finding in his decision, the Petitioner's contention is that the "combination of degrees" language refers to the equivalent of a U.S. master's degree, which must include at least a bachelor's degree consistent with the regulatory definition of profession. As we have already discussed, however, the Petitioner does not specify in subsection H.14 of the labor certification that an acceptable "combination of degrees" must include at least a bachelor's degree. Rather, the plain language of subsection H.14 allows for a combination of sub-baccalaureate level degrees along with some training and/or qualifying experience to be deemed equivalent to a master's degree for purposes of meeting the requirements of the labor certification.

Neither the Act nor USCIS regulations allow a position to be classified as an advanced degree professional position if the minimum educational requirement can be met with anything other than a single academic degree at the baccalaureate level or higher. The definition of "advanced degree" at 8 C.F.R. § 204.5(k)(2) incorporates a single baccalaureate, master's, or doctoral degree. Since the minimum requirements of the labor certification in this case can be satisfied with less than a single U.S. master's degree or foreign equivalent degree, and with less than a single U.S. bachelor's degree or foreign equivalent degree followed by five years of progressive experience, the labor certification does not support the requested classification of advanced degree professional under section 203(b)(2) of the Act. Accordingly, we will affirm the Director's denial of the petition.

III. CONCLUSION

The labor certification does not support the requested classification of advanced degree professional because it does not require at least a master's degree or foreign equivalent degree, or a bachelor's degree or foreign equivalent degree followed by five years of qualifying experience. The appeal will be dismissed for the above stated reason. 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 E-M-A-, P.C.*, ID# 5099868 (AAO Aug. 12, 2019