U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF L- [redacted]

DATE: OCT. 31, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, [redacted] seeks to employ the Beneficiary as a global enterprise resource planning (ERP) specialist. It requests her immigrant visa classification under the second-preference category as a member of the professions holding an advanced degree. *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 a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring at least a master's degree, or a bachelor's degree followed by five years of experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the requirements of the requested classification and the offered position, the Petitioner did not demonstrate the Beneficiary's possession of at least a bachelor's degree.

On appeal, the Petitioner submits additional evidence. It also argues that the Director lacked the authority and expertise to interpret the minimum job requirements of the position. The Petitioner further contends that, by denying the petition without first issuing a written request for additional evidence (RFE), the Director deprived the company of its right to define the job's requirements.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an advanced degree professional generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS determines whether a beneficiary meets the requirements of a DOL-certified position and a requested visa classification. If USCIS grants a

petition, a foreign national may finally 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.

II. EDUCATIONAL REQUIREMENTS

As previously indicated, an advanced degree professional must hold an "advanced degree." Section 203(b)(2)(A) of the Act. The term "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.

8 C.F.R. § 204.5(k)(2).

If relying on a baccalaureate and at least five years of experience to qualify as an advanced degree professional, a beneficiary must have a U.S. bachelor's degree or a foreign degree that equates to one. A degree equivalency based solely on employment experience, a combination of education and experience, or a combination of lesser educational credentials is unacceptable. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (stating that "both the Act and its legislative history make clear that, in order to . . . have experience equating to an advanced degree under the second [preference category], *an alien must have at least a bachelor's degree*") (emphasis added).

Also, a petitioner must establish that a beneficiary met all 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] In evaluating a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither ignore a certification term, nor impose additional requirements. *See, e.g., Madany v. Smith,* 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of global ERP specialist as a U.S. bachelor's degree, or a foreign equivalent degree, in accounting, finance, or computer science, plus five years of experience in the job offered. The Petitioner indicated on the labor certification that it will not accept an alternate combination of education and experience.

The Beneficiary attested on the labor certification that, by the petition's priority date, a South African university awarded her a bachelor of commerce degree with a specialization in informatics. The Petitioner submitted a copy of the Beneficiary's degree. On appeal, the company also submits an independent evaluation of her qualifications. The evaluation states that the Beneficiary's bachelor's degree equates to three years of U.S. college or university studies. The evaluation

[1] This petition's priority date is May 31, 2018, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

concludes that, based on the combination of the Beneficiary's bachelor's degree and her employment experience, she has the equivalent of a U.S. bachelor of science degree in management information systems (MIS).

As the Director concluded, the Petitioner has not demonstrated the Beneficiary's possession of a U.S. bachelor's degree or a foreign equivalent degree as required by the requested classification and the offered position. The record documents that the Beneficiary earned a foreign bachelor's degree. But the record does not demonstrate that the degree equates to a U.S. baccalaureate degree. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree" to include "[a] United States baccalaureate degree or a foreign *equivalent* degree followed by at least five years of progressive experience in the specialty") (emphasis added). Rather, the evaluation submitted by the Petitioner finds the South African degree equivalent to only three years of U.S. post-secondary studies. A U.S. bachelor's degree usually requires four years of college or university studies. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). The record therefore does not establish the Beneficiary's possession of the minimum degree requirements of the requested visa classification or the offered position.

Also, contrary to the offered position's requirements, the Petitioner has not demonstrated the Beneficiary's possession of a bachelor's degree in a required field of study. On the labor certification, the Petitioner stated the position's need for a baccalaureate degree in "Accounting/Finance/Computer Science." The company also indicated on the labor certification that it will not accept any other fields of study. The evaluation submitted by the Petitioner, however, concludes that the Beneficiary has the equivalent of a bachelor's degree in MIS, a field unspecified on the labor certification. Thus, even if the Beneficiary's degree equated to a U.S. bachelor's degree, the Petitioner would not have demonstrated her studies in a field required by the offered position. The Director's decision stated this additional denial ground. But the Petitioner does not addressed it on appeal.

Instead, the Petitioner asserts that the Beneficiary meets the minimum educational requirements of the offered position because she has a foreign equivalent of a U.S. bachelor's degree. The Petitioner notes that, on the labor certification application, it indicated its acceptance of a foreign bachelor's degree for the offered position. The company also contends that DOL - rather than USCIS - has the authority and expertise to determine what constitutes a foreign bachelor's degree, as DOL's adjudication of the labor certification "necessarily includes interpretation of the credentials required for the employment it has certified." The Petitioner states that USCIS "cannot invent its own arbitrary definition of an employer's educational requirements and claim that this newly created definition was employed by the Department of Labor when it previously approved the [labor certification application]."

As previously indicated, we agree that "DOL bears the authority for setting the *content* of the labor certification." *Madany*, 696 F.2d at 1015 (emphasis in original). The immigration service, however, "may make a *de novo* determination of whether the alien is in fact qualified to fill the certified job offer." *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984). When making that independent determination, the immigration service "is bound by the DOL's certification." *Id.* The *Madany* court recognized that the immigration service's interpretation of

DOL-approved, job requirements could lead to "some discontinuity." *Madany*, 696 F.2d at 1015. The court stated that the immigration service "will need the sensitivity to coordinate DOL and [service] interpretations and to . . . consult with DOL when correctable discrepancies between the alien's qualifications and the labor certification job requirements appear." *Id.*

Here, however, there are no "correctable discrepancies" between the Beneficiary's qualifications and the job requirements on the labor certification. The plain language of the labor certification supports USCIS' interpretation that the job's minimum educational requirements exclude a U.S. baccalaureate equivalent based on a combination of foreign education and experience. *See Rosedale & Linden Park Co. v. Smith*, 595 F.Supp. 829, 832-33 (D.D.C. 1984) (holding that, to determine a position's minimum educational requirements, the immigration service "must examine the certified job offer exactly as it is completed by the prospective employer"). In part H.4 of the labor certification application, rather than selecting "Associate's" degree or "Other," the Petitioner identified the position's required, minimum level of education as a "Bachelor's" degree. Also, in part H.8, the company indicated that it will accept "No" alternate combination of education and experience. In H.9, the Petitioner indicated its acceptance of "a foreign educational equivalent." Thus, H.9 makes clear that the educational levels in H.4 refer to U.S. educational levels. Therefore, in H.9, the Petitioner specified its acceptance of a foreign equivalent of a U.S. bachelor's degree. H.9 also states that a foreign equivalent must be "a foreign *educational* equivalent." (emphasis added). By definition, a foreign *educational* equivalent of a U.S. bachelor's degree cannot include a combination of education and experience, as the Beneficiary has.

Contrary to the Petitioner's argument, the plain language of the labor certification does not indicate the company's acceptance of a U.S. baccalaureate equivalent based on a combination of foreign education and employment experience. The Petitioner could have indicated acceptance of such an equivalency. For example, in part H.4 of the labor certification application, the company could have selected an "Other" minimum educational level and, in H.4-A, specified the position's minimum educational requirement as a combination of education and experience equating to a bachelor's degree. Or, in H.8, the Petitioner could have indicated its acceptance of an alternate combination of education and experience. Then, in H.8-A and H.8-B, the company could have stated its acceptance of an alternative to a bachelor's degree in the form of a combination of education and experience. Instead, in H.4, the Petitioner chose "Bachelor's" degree; indicated in H.8 "No" acceptable, alternate combination of education and experience; and, in H.9, stated its acceptance of "a foreign educational equivalent." USCIS

> has an independent role in determining whether the alien meets the labor certification requirements, and where the plain language of those requirements does not support the petitioner's asserted intent, the agency does not err in applying the requirements as written.

SnapNames.com, Inc. v. Chertoff, No. CV 06-65-MO, 2006 WL 3491005 *7 (D. Or. Nov. 30, 2006) Thus, as certified by DOL, the offered position requires at least a U.S. bachelor's degree or a foreign educational equivalent. The certified job requirements do not allow a U.S. baccalaureate equivalent based on a combination of foreign education and experience. Contrary to the Petitioner's argument, the job requirements contain no ambiguity requiring USCIS' consultation with DOL.

The Petitioner also contends that USCIS should defer to its interpretation of a foreign equivalent of a U.S. bachelor's degree. As previously indicated, however, federal courts have required the immigration service to follow the plain language of a labor certification. *See, e.g., Madany*, 696 F.2d at 1015; *Tongatapu*, 736 F.2d at 1309; *Rosedale & Linden Park*, 595 F.Supp. at 832-33. Looking beyond the plain language of a certification would undermine USCIS' independent role in determining a foreign national's qualifications for an offered position. *SnapNames.com*, 2006 WL 3491005 at *7. Also, following a petitioner's asserted interpretation of a job requirement could undermine DOL's certification. For example, "allowing a combination of education and work experience to count for alien workers while at the same time requiring a specific degree from domestic workers puts domestic workers at a disadvantage." *Id.* at *8.

Also, if, as the Petitioner contends, the labor certification indicates the company's acceptance of a U.S. baccalaureate equivalent based on a combination of foreign education and experience, then the labor certification would not support the requested visa classification. A labor certification accompanying a petition for an advanced degree professional "must demonstrate that the job requires a professional holding an advanced degree or the equivalent." 8 C.F.R. § 204.5(k)(4)(i). As previously indicated, a bachelor's degree followed by at least five years of experience equates to an advanced degree. 8 C.F.R. § 204.5(k)(2). But the baccalaureate degree must be a degree that either is, or equates to, a U.S. bachelor's degree. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. at 60900 (stating that "both the Act and its legislative history make clear that, in order to . . . have experience equating to an advanced degree under the second [preference category], *an alien must have at least a bachelor's degree*") (emphasis added). Thus, if this labor certification allows the Beneficiary to meet the position's minimum educational requirements with studies equating to less than a U.S. bachelor's degree, the certification would not support the requested classification, and USCIS would still deny the petition.

In addition, the Petitioner's appellate evidence and arguments do not demonstrate the Beneficiary's educational qualifications for the requested classification. As previously indicated, a foreign national seeking to qualify as an advanced degree professional based on five years of post-baccalaureate experience must have at least "[a] United States baccalaureate degree or a foreign equivalent degree." 8 C.F.R. § 204.5(k)(2). A beneficiary's equivalent degree must also be uncombined with experience. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. at 60900. Contrary to the definition of the term "advanced degree," the Petitioner has not demonstrated the Beneficiary's possession of a U.S. bachelor's degree or a foreign equivalent degree. Thus, even if the Beneficiary met the job requirements of the offered position stated on the labor certification, the record does not demonstrate that she would not meet the requirements of the requested visa classification. For these additional reasons, the Petitioner's arguments do not demonstrate the petition's approvability.

Finally, the Petitioner contends that, before denying the petition, the Director should have issued an RFE asking the company to clarify the position's educational requirements. The Petitioner notes that a USCIS memorandum "strongly recommended" that adjudicators issue RFEs or notices of intent to deny benefit requests in most cases. *See* Memorandum from William R. Yates, Assoc. Dir., Ops., USCIS, HQOPRD 70/2. *Requests for Evidence (RFE) and Notices of Intent to Deny (NOID)*, 3 (Feb. 16, 2005), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_

Memoranda/Archives%201998-2008/2005/rfe021605.pdf (last visited Oct. 24, 2019). The Petitioner states: "By not issuing an RFE in this case, the Service effectively deprived [the company] of the right to define the terms of positions within its organization."

The USCIS memo cited by the Petitioner, however, also notes that adjudicators need not issue RFEs or NOIDs "if there is clear evidence of ineligibility." *Id.* at 2 (citing 8 C.F.R. § 103.2(b)(8)(ii)). Here, the Director's decision stated that, to obtain additional information about the Beneficiary's foreign bachelor's degree, USCIS accessed the Electronic Database of Global Education (EDGE), an online resource that federal courts have to found to be a reliable, peer-reviewed source of foreign educational equivalencies.[2] Like the evaluation the Petitioner submits on appeal, EDGE indicates that South African baccalaureate degrees equate to less than U.S. bachelor's degrees. Thus, even if the Petitioner accepted a combination of education and experience to meet the position's minimum educational requirements, the record contained clear evidence that she did not qualify for the requested classification of advanced degree professional. *See* Final Rule for Employment-Based Immigrant Petitions, 56 Fed. Reg. at 60900 (stating that "both the Act and its legislative history make clear that, in order to . . . have experience equating to an advanced degree under the second [preference category], *an alien must have at least a bachelor's degree*") (emphasis added). Also, the record does not indicate that an RFE's absence prejudiced the Petitioner. The company had the opportunity to submit evidence and argument on appeal regarding the educational requirements of the offered position. Therefore, contrary to the Petitioner's argument, we would not reverse the Director's decision or remand this matter even if the Director erred by not issuing an RFE.

The Petitioner has not demonstrated the Beneficiary's possession of the minimum educational requirements of the requested visa classification or the offered position. We will therefore affirm the Director's decision.

III. EXPERIENCE REQUIREMENTS

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the minimum employment experience required for the offered position. As previously indicated, a petitioner must demonstrate a beneficiary's satisfaction of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House,* 16 I&N Dec. at 160.

Here, besides the bachelor's degree, the labor certification states that the offered position of global ERP specialist requires five years of experience in the job offered. On the labor certification, the Beneficiary attested that, by the petition's priority date and before joining the Petitioner in the

[2] EDGE was created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO), "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." AACRAO, "Who We Are," https://www.aacrao.org/who-we-are (last visited Oct. 25, 2019); *see, e.g., Viraj, LLC v. U.S. Att'y Gen.*, 578 Fed. Appx. 907, 910 (11th Cir. 2014) (describing EDGE as "a respected source of information").

offered position, she gained almost 10 years of full-time experience working for the Petitioner's subsidiary in South Africa.[3] She stated that she held the following positions:

- Pacific Rim/Africa ERP project leader/coordinator - January 2014 to July 2015;
- Internal sales & IT [information technology] administrator - April 2009 to December 2013; and
- Internal sales - November 2005 to March 2009.

To support claimed, qualifying experience, a petitioner must submit letters from a beneficiary's former employers. 8 C.F.R. § 204.5(g)(1). The letters must include the writers' names, addresses, and titles, and describe the beneficiary's experience. *Id.*

Although the Beneficiary identified the Petitioner's subsidiary in South Africa as her prior employer, the Petitioner submitted letters from its subsidiaries in Japan and Australia. The letter from the chief operation officer in Japan states that the Beneficiary led a software implementation project at the company from April 2015 to June 2015. The letter from the managing director in Australia states that the Beneficiary led a similar project there from April 2014 to August 2014. The letters, however, do not demonstrate that the Beneficiary gained at least five years of experience as the offered position requires. Moreover, the record does not establish that these subsidiaries employed the Beneficiary. *See* 8 C.F.R. § 204.5(g)(1) (requiring evidence of qualifying experience "in the form of letter(s) from current or former *employer(s)*") (emphasis added). The Petitioner has not demonstrated the Beneficiary's employment by the Japanese subsidiary from April 2015 to June 2015, or by the Australian subsidiary from April 2014 to August 2014. The subsidiaries' letters therefore do not comply with 8 C.F.R. § 204.5(g)(1).

In addition, part H.14 of the labor certification, "Specific skills or other requirements," states additional requirements of the offered position. These requirements include: "Proven experience with mobile application integration/synchronization, SAP Print Layout Designer, and IT Helpdesk experience including technical issue resolution; Proficiency with Microsoft SQL, SQL Management Studio, . . . Outlook, ... Visio, HTML, XML, CSS, [and] PHP." In addition, the offered position's job duties involve implementing "Coresuite Mobility" and migrating "SalesLogix." A copy of the Beneficiary's resume indicates that she has experience or proficiency with many of the listed technologies. But the record lacks independent, objective evidence demonstrating that she met these additional job requirements.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the requisite experience in the offered position. The Director did not notify the Petitioner of this evidentiary deficiency. Thus, in any future filings in this matter, the Petitioner must document, pursuant to 8 C.F.R. § 204.5(g)(1), that, by the petition's priority date, the Beneficiary had at least five years of

[3] A labor certification employer can't rely on experience that a foreign national gained with it, unless the experience occurred in a substantially different position than the offered one or the employer can demonstrate the impracticality of training a U.S. worker for the offered position. 20 C.F.R. § 656.17(i)(3). For these purposes, the term "employer" means an entity with the same federal employer identification number. 20 C.F.R. § 656.17(i)(5)(i). The Petitioner here does not assert that the Beneficiary gained qualifying experience with it.

experience in the offered position, and requisite experience or proficiency with all specified technologies.

IV. CONCLUSION

The record on appeal does not establish the Beneficiary's possession of the minimum educational requirements of the requested visa classification or the offered position. We will therefore affirm the petition's denial. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act; 8 U.S.C. § 1361. The Petitioner here did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of L-* [redacted] ID# 6716500(AAO Oct. 31, 2019)