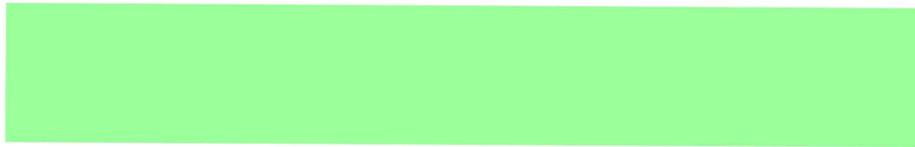


(b)(6)

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



U.S. Citizenship
and Immigration
Services



DATE: **DEC 10 2014** OFFICE: NEBRASKA SERVICE CENTER

FILE: 

IN RE: Petitioner: 
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:


INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements. See also 8 C.F.R. § 103.5. Do not file a motion directly with the AAO.**

Thank you,


Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Nebraska Service Center (the director), and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an IT firm. It seeks to employ the beneficiary permanently in the United States as project manager pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, the petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The director's decision concluded that the proffered position's minimum education and experience requirements did not meet the standard for classification as an advanced degree professional.

The record shows that the appeal is properly filed, timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

The director's December 30, 2013 denial found that the job offer portion of the labor certification is not consistent with the minimum requirements for classification as a professional holding an advanced degree. Specifically, the proffered position's minimum education and experience requirements did not meet the standard for classification as an advanced degree professional because section H.14 of the labor certification indicated that the petitioner would accept "any suitable combination of education, training, and/or experience in lieu of the stated education and experience requirements."

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

Here, the Form I-140 was filed on June 12, 2013. On Part 2.I.d. of the Immigrant Petition for Alien Worker (Form I-140), the petitioner indicated that it was filing the petition for a member of the professions holding an advanced degree or an alien of exceptional ability. The priority date of the petition is September 13, 2012, which is the date the labor certification was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d).

Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "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

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988). On the Form I-290B, Notice of Appeal or Motion, the petitioner indicated that it would not be filing any additional evidence and/or a brief.

degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.* 8 C.F.R. § 204.5(k)(4) states in pertinent part that "[t]he job offer portion of an individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent of an alien of exceptional ability."

In the instant case, the labor certification states that the offered position has the following minimum requirements:

- H.4. Education: Master's degree in computer science, engineering (any) or a related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 12 months of experience.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: Bachelor's degree plus 5 years of experience.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: 12 months as a project lead, module lead, computer systems analyst, consultant, team lead.
- H.14. Specific skills or other requirements: The one year of IT experience must include one year of experience using JCL and DB2. In lieu of the above education and experience requirements, we will accept a Bachelor's degree (or foreign equivalent# in computer science, engineering #any) or related field, plus five years of progressive experience in the IT field. One year of the five years of progressive experience in the IT field must include experience using JCL and DB2. We will accept any suitable combination of education, training, and/or experience in lieu of the stated education and experience requirements. All experience may be acquired concurrently. Travel may be required.

The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg* that "where the alien does not meet the primary job requirements, but only potentially qualifies for the job because the employer has chosen to list alternative job requirements, the employer's alternative requirements are unlawfully tailored to the alien's qualifications . . . unless the employer has indicated that applicants with any suitable combination of education, training or experience are acceptable." *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (en banc). The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

Previously, the DOL was denying labor certification applications containing alternative requirements in Part H, Question 14, if the application did not contain the *Kellogg* language. However, two BALCA decisions significantly weakened this requirement. In *Federal Insurance Co.*, 2008-PER-00037 (Feb. 20, 2009), BALCA held that the ETA Form 9089 failed to provide a reasonable means for an employer to include the *Kellogg* language on the labor certification. Therefore, BALCA concluded that the denial of the labor certification for failure to write the *Kellogg* language on the labor certification application violated due process. Also, in *Matter of Agma Systems LLC*, 2009-PER-00132 (BALCA Aug. 6, 2009), BALCA held that the requirement to include *Kellogg* language did not apply when the alternative requirements were "substantially equivalent" to the primary requirements.

While counsel contends that the language used in section H.14 was identical to *Kellogg* language, the full sentence used by the petitioner is that it would "accept any suitable combination of education, training, and/or experience *in lieu* of the stated education and experience requirements [emphasis added]." In evaluating a beneficiary's qualifications, we must look to the job offer portion of the labor certification to determine the required qualifications for the position and cannot ignore a term of the labor certification or impose additional requirements. See *Madany*, 696 F.2d at 1008; *K.R.K. Irvine, Inc.*, 699 F.2d at 1006; *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981). We interpret the meaning of terms used to describe the requirements of a job in a labor certification by "examin[ing] the certified job offer *exactly* as it is completed by the prospective employer" and our interpretation of the job's requirements must involve "reading and applying *the plain language* of the [labor certification]" even if the employer may have intended different requirements than those stated on the form. *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added).

In the instant case, we find that the language used in section H.14 exceeds *Kellogg* language as the plain language of section H.14 is that the petitioner would accept less than the minimum requirements for the advanced degree professional category in place of an actual Master's or foreign equivalent degree or a Bachelor's or foreign equivalent degree with 5 years of experience.

Given the history of the *Kellogg* language requirement at 20 C.F.R. § 656.17(h)(4)(ii), and the BALCA case law weakening the requirements that it be included on the ETA Form 9089, we find the petitioner's argument that it was required by the DOL to be unpersuasive. Additionally, the petitioner's acceptance of a combination of education, training, or experience "which may also be gained concurrently" exceeds the *Kellogg* language. The holding in *Matter of Kellogg, supra*, does not require employers to accept combinations of *concurrent* education, training, or experience.

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; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The petitioner has not met that burden.

ORDER: The appeal is dismissed.