MATTER OF M-C- INC.

DATE: NOV. 21, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a clothing retailer and manufacturer, seeks to employ the Beneficiary as a market research 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, Nebraska Service Center, revoked the approval of the petition, finding that the record did not establish that the Beneficiary held the advanced degree required by the labor certification or for classification as an advanced degree professional because the Beneficiary's degree was issued by an unaccredited institution.

The matter is before us on appeal. The Petitioner submits additional evidence in support of the visa petition and asserts that an accredited degree is not required under the statute and that the Beneficiary does have the required educational qualifications for the offered position and for classification as an advanced degree professional.

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

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor 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). Next, U.S. Citizenship and Immigration Services (USCIS) must approve an immigrant visa petition. *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, the foreign national must 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.

As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by DOL, accompanies the instant petition. By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The DOL also certifies that the employment of

a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. Section 212(a)(5)(A)(i)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date is used to calculate when the beneficiary of a visa petition is eligible to adjust his or her status to that of a lawful permanent resident. *See* 8 C.F.R. § 245.1(g). A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(l), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In the present matter, the issue before us is whether the Beneficiary possesses the advanced degree required by the labor certification and for classification as an advanced degree professional under section 203(b)(2) of the Act.

The regulation at 8 C.F.R. § 204.5(k)(2) defines the terms "advanced degree" and "profession." An "advanced degree" is defined as:

> [A]ny 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.

A "profession" is defined as "one of the occupations listed in section 101(a)(32) of the Act, 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." Section 101(a)(32) of the Act lists the following occupations as professions: "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

The instant visa petition was initially approved on September 22, 2015. However, on February 26, 2016, the Director issued a notice of intent to revoke (NOIR) to the Petitioner, informing it, pursuant to the regulation at 8 C.F.R. § 103.2(b)(16)(i), that USCIS had learned that the academic institution

that had awarded the Beneficiary's 2010 master's degree, [redacted] in [redacted] had not been accredited at that time by an agency recognized by the U.S. Department of Education. The Director advised the Petitioner that he intended to revoke the approval of the visa petition on this basis.

In its March 21, 2016, response, the Petitioner asserted that USCIS was statutorily prohibited from revoking the approval of the Beneficiary's visa petition as she was already in the United States, referencing the decision in *Firstland International, Inc. v. United States Immigration and Naturalization Service,* 377 F.3d 127 (2d Cir. 2004) in support of its claim. The Petitioner also questioned the Director's reliance on *Matter of Yau*, 13 I&N Dec. 75 (Reg'l Comm'r 1968) as its analysis predated the current regulations and considered an occupation that did not require a labor certification. It further noted the absence of any accreditation requirement for a master's degree in the current Act. Finally, the Petitioner maintained that, as there was no requirement that accreditation occur prior to the award of a degree, the pre-accreditation award of the Beneficiary's degree satisfied what it described as USIS' "misinterpretation" of 8 C.F.R. § 204.5(k)(2). In support of its claims, the Petitioner submitted a copy of the decision in *Firstland International, Inc.*

On May 2, 2016, the Director revoked the approval of the visa petition. Responding to the Petitioner's assertion that USCIS was prohibited from revoking the petition's approval by virtue of her presence in the United States, the Director noted that the Intelligence Reform Act of 2004 had amended section 205 of the Act, 8 U.S.C. § 1155, effective December 17, 2004, thereby removing the prohibition referenced in the Petitioner's response to the NOIR. The Director also rejected the Petitioner's assertion that he had erred in relying on *Matter of Yau.* Finding the evidence of record to demonstrate that [redacted] had not been accredited at the time it awarded the Beneficiary her master's degree, the Director concluded that she was not eligible for classification as an advanced degree professional under section 203(b)(2) of the Act. He revoked the approval of the visa petition accordingly.

On May 18, 2016, the Petitioner appealed the Director's decision to this office and, on June 13, 2016, submitted an additional letter in support of the visa petition, accompanied by copies of the decision in *James Tat-Wing Yau v. District Director of the United States Immigration and Naturalization Service*, 293 F. Supp. 717 (D.C. Cal. 1968) and a printout of "Accreditation Process" published online by the [redacted] at [redacted]

III. ANALYSIS

A petition for an advanced degree professional must be accompanied by a valid, individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(k)(4)(i). The job offer portion of a labor certification must demonstrate that the job opportunity requires a professional holding an advanced degree or its equivalent. *Id.*

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to 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.

In the present matter, the labor certification reflects the following requirements for the offered position of market research analyst: a U.S. master's degree or a foreign equivalent degree in business administration or a related field (Parts H.4., H.4-B., and H.9.). No training or experience is required (Parts H.5., and H.6.). Therefore, to establish that the Beneficiary is qualified for the offered position and overcome the Director's revocation of the visa petition's approval, the Petitioner must demonstrate that she possessed the degree stated on the labor certification as of May 9, 2013, the visa petition's priority date. 8 C.F.R. §§ 103.2(b)(1), (12); *see also Matter of Wing's Tea House,* 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

In Part J. of the labor certification, the Beneficiary claims to hold a master's degree in business administration from [redacted] in [redacted] In support of this claim, the record contains the Beneficiary's [redacted] academic transcript, which reflects that she was awarded a master of business administration on March 6, 2010. The record, however, also demonstrates that the award of the Beneficiary's degree occurred prior to [redacted] 2010 accreditation by the [redacted] which the Director has found to preclude classification of the Beneficiary as an advanced degree professional under section 203(b)(2) of the Act.

On appeal, the Petitioner renews the arguments it made in response to the Director's NOIR. It again asserts that the plain language of the regulation at 8 C.F.R. § 204.5(k) does not require the Beneficiary to hold an advanced degree from an accredited U.S. institution and that the absence of this requirement from the regulation at 8 C.F.R. § 204.5(k)(2) "indicates that the legislature clearly intended for applicants to possess advanced degrees, with no additional requirements." The Petitioner also restates its contention that the accreditation requirement in *Matter of Yau* should not be applied to the Beneficiary as it is based on an outdated regulation relating to Schedule A immigration where a degree from an accredited institution was required, and that current Schedule A regulations do not require a degree from an accredited institution. The Petitioner also points to the fact that the occupation at issue in *Matter of Yau*, that of engineer, is statutorily prescribed as a

[1] The Director's decision reflects that, in response to a USCIS query, [redacted] Chancellor, indicated that the university was not accredited prior to [redacted] 2010. We also note that [redacted] announced its accreditation in an [redacted] 2010, press release [redacted]

professional occupation in section 101(a)(32) of the Act, 8 U.S.C. § 1101(a)(32), and may be distinguished from that of market research analyst in the present case. Finally, the Petitioner reasserts that there is no requirement that have been accredited at the time it awarded the Beneficiary her master's degree. It, therefore, contends that as is now accredited, the Beneficiary's master's degree does come from an accredited educational institution and, therefore, meets the requirements of the labor certification. Alternately, the Petitioner asserts that most accredited universities accept graduate transfer work from unaccredited educational institutions and that this policy should be considered in the present matter.

A. Requirement that an advanced degree be awarded by an accredited institution

The Petitioner contends on appeal that there is no regulatory authority that requires the Beneficiary to have an advanced degree awarded by an accredited college or university. While we agree that the definition of advanced degree at 8 C.F.R. § 204.5(k)(2) does not specifically state that such a degree must come from an accredited educational institution, we find an accreditation requirement to be implicit in the language of the regulation.

The U.S. Constitution empowers the Executive Branch to create the regulations that govern the implementation of statute and the Congress has delegated the authority to promulgate regulations implementing immigration law to the Department of Homeland Security (DHS).[2] The regulatory definition of advanced degree, which USCIS has interpreted as a degree issued by an accredited U.S. university or college, was published by the former Immigration and Naturalization Service (INS, now USCIS) on November 29, 1991, following the enactment of the Immigration Act of 1990 on November 29, 1990. Although the Petitioner questions USCIS' reading of 8 C.F.R. § 204.5(k)(2), an agency's interpretation of its regulations has been found to be controlling unless "'plainly erroneous or inconsistent with the regulation.'" *See Auer v. Robbins*, 519 U.S. 452, 461-463 (1997)(citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359, 109 S.Ct. 1835, 1850, 104 L.Ed.2d 351 (1989)(quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414, 65 S.Ct. 1215, 1217 89 L.Ed. 1700 (1945)). For the reasons that follow, we do not find the Petitioner's assertion that the regulation at 8 C.F.R. § 204.5(k)(2) does not require a degree from an accredited educational institution to be persuasive.

The Act is a federal statute with nationwide application. The regulations implementing the Act – including 8 C.F.R. § 204.5(k)(2) defining "advanced degree" for the purposes of section 203(b)(2) of the Act – also have nationwide application. As defined in 8 C.F.R. § 204.5(k)(2), an "advanced

---

[2] The Administrative Procedure Act (APA), Pub.L. 79-404, 60 Stat. 237, enacted June 11, 1946 governs the way in which Executive Branch agencies propose and establish regulations.

degree" includes "any United States academic or professional degree . . . above that of baccalaureate" (or a foreign equivalent degree), "[a] United States baccalaureate degree" (or a foreign equivalent degree) and 5 years of specialized experience (considered equivalent to a master's degree), and "a United States doctorate" (or a foreign equivalent degree). Similarly, a "professional" as defined by 8 C.F.R. § 204.5(l)(2) is "a qualified alien who holds at least a United States baccalaureate degree" (or a foreign equivalent degree). We find this repeated use of the modifier "United States" in the describing the different levels of (non-foreign) degrees to indicate that to satisfy these regulations, a degree must be recognized nationally, i.e., it must be a degree issued by nationally-recognized U.S. educational institution. The mechanism through which U.S. educational institutions achieve such national recognition is accreditation.

Although the U.S. Department of Education (DEd) does not accredit educational institutions and/or programs, the Secretary of Education is required by law to publish a list of nationally recognized accrediting agencies that the Secretary determines to be reliable authorities as to the quality of education or training provided by the institutions of higher education and the higher education programs they accredit. The purpose served by these accrediting organizations is discussed on DEd's website:

> In the United States, institutions of higher education are permitted to operate with considerable independence and autonomy. The United States has no . . . centralized federal authority exercising control over the quality of postsecondary educational institutions . . . . As a consequence, American educational institutions can vary widely in the character and quality of their programs. To ensure a basic level of quality, the practice of accreditation arose in the United States as a means of conducting nongovernmental, peer evaluation of educational institutions and programs . . . . Private educational associations of regional or national scope have adopted criteria reflecting the qualities of a sound educational program and have developed procedures for evaluating institutions or programs to determine whether or not they are operating at basic levels of quality . . . .

U.S. Department of Education, http://www2.ed.gov/print/admins/finaid/accred/accreditation.html (accessed November 18, 2016).

Outside the federal sphere, the Council for Higher Education Accreditation (CHEA), an association of 3,000 degree-granting colleges and universities, plays a similar oversight role. As stated on its website:

> 1. [P]residents of American universities and colleges established CHEA [in 1996] to strengthen higher education through strengthened accreditation of higher education institutions . . . .
>
> 2. CHEA carries forward a long tradition that recognition of accrediting organizations should be a key strategy to assure quality, accountability, and improvement in higher education. Recognition by CHEA affirms that standards and processes of accrediting organizations are consistent with quality, improvement, and

> accountability expectations that CHEA has established. CHEA will recognize regional, specialized, national, and professional accrediting organizations.
>
> 3. Accreditation, as distinct from recognition of accrediting organizations, focuses on higher education institutions. Accreditation aims to assure academic quality and accountability, and to encourage improvement. Accreditation is a voluntary, non-governmental peer review process by the higher education community . . . . The work of accrediting organizations involves hundreds of self-evaluations and site visits each year, attracts thousands of higher education volunteer professionals, and calls for substantial investment of institutional, accrediting organization, and volunteer time and effort . . . .

Council for Higher Education Accreditation, Recognition of Accrediting Organizations Policy and Procedures, http://www.chea.org/pdf/Recognition_Policy-June_28_2010-FINAL.pdf (accessed November 18, 2016).

To be recognized nationally a U.S. college or university must be accredited by an organization recognized by DEd and CHEA, which, in turn, ensures that the institution's degrees will be given nationwide recognition. Therefore, in light of the emphasis that the regulations at 8 C.F.R. §§ 204.5(k)(2), (l)(2) place on nationally-recognized degrees, we find them to require degrees issued by accredited colleges or universities.

This interpretation is supported by federal case law in *James Tat-Wing Yau v. District Director of the United States Immigration and Naturalization Service*, 293 F. Supp. 717 (D.C. Cal. 1968) and *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service*, 298 F.Supp. 413 (D.C. Cal. 1969). In both cases, the district court agreed with the former INS that Mr. Yau's and Mr. Tang's electronic engineering degrees from Pacific States University in California, an institution that was not accredited, did not entitle them to third preference professional classification immigrant visas as the degrees were not equivalent to bachelor's degrees from an accredited U.S. college or university. In *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service*, the district court's decision was subsequently affirmed, without further discussion by the U.S. Court of Appeals for the Ninth Circuit in a *per curiam* ruling. *Id.* at 413.

Accordingly, the Beneficiary's degree, as it was not awarded by an accredited U.S. educational institution, is not an "advanced degree" under the regulation at 8 C.F.R. § 204.5(k)(2).

B. *Matter of Yau*

On appeal, the Petitioner asserts that the Director erred in relying on *Matter of Yau*, 13 I&N Dec. 75 (Reg'l Comm'r 1968) in the present matter, since it was decided before the current regulation at 8 C.F.R. § 204.5(k)(*2*) was written and involved an occupation that did not require a labor certification. It further contends that *Matter of Yau* was applied in the context of Schedule A, Group II cases, where a degree from an accredited institution was required and that current regulations "exclude all accreditation language." The Petitioner further contends that *Matter of Yau* dealt

specifically with the occupation of engineer, and should be distinguished from the present case for this reason as well.

However, a review of the Director's decision and the NOIR he issued on February 26, 2016, finds that he referenced *Matter of Yau*, and the decisions in *James Tat-Wing Yau v. District Director of the United States Immigration and Naturalization Service* and *Philip Tang v. District Director of the U.S. Immigration and Naturalization Service* not because he found any parallels or similarities between the facts in these cases and the present matter, but solely for what these decisions had to say regarding USCIS' discretionary authority, in immigration matters, to require that academic degrees be issued by accredited colleges and universities. As a result, we do not find the Director to have matter, since it was decided bein addressing the question of whether the Beneficiary's degree qualifies her for classification as an advanced degree professional under section 203(b)(2) of the Act.

C. Academic accreditation following the award of a degree

On appeal, the Petitioner also maintains that the Beneficiary may establish eligibility for the offered position even under what it terms as USCIS' "misinterpretation" of 8 C.F.R. § 204.5(k)(2) requirements. It asserts that, as is now accredited and no statute or regulation stipulates when accreditation must occur, the Beneficiary meets the requirements of the labor certification as she possesses an advanced degree from an accredited educational institution. It further states that nothing fundamentally changed at in the months before its accreditation, and that the university provided the same classes and maintained the same level of "academic rigor" before and after accreditation. The Petitioner also contends that the Beneficiary should not be punished because of the slow accreditation process and the speed with which she completed her studies, when taking a "more leisurely route to studying," would have resulted in her graduation after accreditation. The Petitioner further asserts that most accredited universities accept graduate transfer work from unaccredited educational institutions and this transfer accreditation policy is common in the United States and should be considered in this matter.

The Beneficiary earned her degree on March 6, 2010, approximately prior to the university's accreditation. While, as counsel asserts, no statute or regulation addresses the point by which accreditation must occur, a master's degree issued by an unaccredited educational institution is not the nationally-recognized degree required to satisfy the regulation at 8 C.F.R. § 204.5(k)(2). That the Beneficiary may have faced the same level of academic rigor as students who received their master's degrees from following its accreditation and might have graduated after accreditation had she proceeded more slowly with her studies also do not demonstrate that her degree should be viewed as nationally-recognized. Moreover, while we note the Petitioner's assertion that most accredited universities accept graduate transfer work from unaccredited educational institutions, we do not find this academic practice, even were it established, to offer a basis on which the Beneficiary's unaccredited degree could be found to satisfy the requirements at 8 C.F.R. § 204.5(k)(*2*).

For the reasons discussed above, the record does not establish that the Beneficiary holds an "advanced degree" within the meaning of 8 C.F.R. § 204.5(k)(2). Thus, the Petitioner has not

demonstrated that the Beneficiary qualifies for classification under section 203(b)(2) of the Act or that she meets the job requirements set forth in the labor certification.

IV. CONCLUSION

The record does not establish that the Beneficiary holds an "advanced degree" within the meaning of 8 C.F.R. § 204.5(k)(2). Therefore, the Petitioner has not demonstrated that the Beneficiary meets the requirements set forth in the labor certification or that she qualifies for classification as an advanced degree professional under section 203(b)(2) of the Act. Therefore, the petition may not be approved.

In visa 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). Here, that burden has not been met. Accordingly, we will affirm the Director's denial of the visa petition and dismiss the appeal.

ORDER: The appeal is dismissed.

Cite as *Matter of M-C- Inc.*, ID# 45674 (AAO Nov. 21, 2016)