



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

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

MATTER OF H-T- INC.

DATE: FEB. 27, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a software development company, seeks to employ the Beneficiary as a senior project manager (IT). It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This “EB-2” employment-based 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. The Director found that the minimum requirements of the labor certification allowed a beneficiary to qualify for the job offered with less than an advanced degree, and therefore did not support the requested classification of advanced degree professional.

On appeal the Petitioner asserts that the minimum requirements of the labor certification are consistent with the petition’s classification request of advanced degree professional.

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).<sup>1</sup> 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.

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<sup>1</sup> The date the labor certification is filed is called the “priority date.” See 8 C.F.R. § 204.5(d). The Petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward.

Citizenship and Immigration 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 this classification a beneficiary must have an advanced degree under 8 C.F.R. § 204.5(k)(3) and 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:

[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

If the labor certification allows for less than an advanced degree, 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 at Part H of the labor certification. In this case Part H states that the proffered position has the following minimum requirements to qualify for the job of senior project manager (IT):

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|--|---|
| 4. Education: Minimum level required:                                  | Master’s degree   |
| 4-B. Major Field of Study:   | Computer Science, Engineering (any), MIS, Business Administration, or related field |
| 5. Is training required in the job opportunity?                        | No  |
| 6. Is experience in the job offered required?                          | Yes   |
| 6-A. How long?   | 24 months   |
| 7. Is an alternate field of study acceptable?                          | No  |
| 8. Is an alternate combination of education and experience acceptable? | Yes   |
| 8-B. What level of education?  | Bachelor’s degree plus five years of progressive experience in IT                   |

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| 9.    | Is a foreign educational equivalent acceptable?      | Yes  |
| 10.   | Is experience in an alternate occupation acceptable? | Yes  |
| 10-A. | How long?  | 24 months  |
| 10-B. | Job titles of alternate occupations                  | Programmer Analyst, Assistant Consultant, (Senior) Software Engineer, Software Development Senior Analyst, Senior Oracle Developer |

At section H, box 14, of the labor certification the minimum educational and experience requirements for the job as set forth in boxes H.4 to H.10-B were restated and expanded with the following language: “We will accept any suitable combination of education, training, and experience in lieu of the above stated education and experience requirements.”

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).<sup>2</sup>

In his decision the Director found that the labor certification did not support the requested classification of advanced degree professional based on the previously quoted language in section H, box 14, that the employer would accept any suitable combination of education, training, or experience in lieu of the education and training requirements specifically stated in the labor certification. The Director interpreted the language in H.14 as indicating that the Petitioner would accept some combination of education and experience that was less than a master’s degree or a bachelor’s degree with five years of progressive post-baccalaureate experience, the minimum alternative requirements for classification as an advanced degree professional.

On appeal the Petitioner asserts that the language in H.14 of the labor certification was not intended to dilute the minimum requirements for the proffered position in a way that would make it ineligible for advanced degree professional classification. The Petitioner contends that its phraseology in H.14 was meant to accord with the regulatory language of 20 C.F.R. § 656.17(h)(4)(ii), which provides that if a beneficiary is already employed by a petitioner, does not meet the primary job requirements, and

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<sup>2</sup> 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.

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." The statement that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as *Kellogg* language, originating 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).

According to the Petitioner, its addition of the words "in lieu of the above stated education and experience requirements" after the *Kellogg* language quoted above was a redundancy, implicit in the regulatory language itself, and not intended to reduce the minimum requirements for the job as stated in the labor certification – namely, a U.S. master's or foreign equivalent degree, or a U.S. bachelor's or foreign equivalent degree plus five years of progressive experience in the specialty. We do not generally read the inclusion of *Kellogg* language to alter the stated minimum requirements; however, in cases where a petitioner goes beyond the *Kellogg* language, we must evaluate the effect of that additional language. In this case the Petitioner's acceptance of any suitable combination of education, training, or experience "in lieu of the above stated education and experience requirements" went beyond *Kellogg* language to create a different minimum requirement that allows for a combination of education or experience that could be less than a single master's degree or a single bachelor's degree plus five years of progressive experience.

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. 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. The Petitioner's allowance of a suitable combination of education, training or experience "in lieu" of the otherwise stated requirements, without defining what a suitable combination of education, training or experience would be, prohibits us from finding that the labor certification supports a request for advanced degree classification.

On appeal, the Petitioner also submits its recruitment in support of its claim that it intended the additional language as simply a redundancy. However, the submitted materials do not corroborate the Petitioner's claims. All of the job advertisements submitted – including online and print publications, in-house and employee referral program postings, and the posting notice for DOL – used identical language to describe the minimum requirements for the job. This language tracked the requirements of the labor certification and, like the labor certification, stated that "[w]e will accept any suitable combination of education, training, and experience in lieu of the above stated education and experience requirements." Thus, the recruitment provides no more clarification or evidence that the proffered position required, at a minimum, a master's degree or a bachelor's degree and five years of experience.

### 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 (plus five years of qualifying experience), to meet the minimum educational requirement for the job.

**ORDER:** The appeal is dismissed.

Cite as *Matter of H-T- Inc.*, ID# 779743 (AAO Feb. 27, 2018)