



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

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

MATTER OF R-S-R-, INC.

DATE: MAR. 4, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an IT consulting company, seeks to employ the Beneficiary as a database administrator. 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 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. The Director found that the minimum educational and experience requirements for the job offered, as described in the labor certification, were unclear. As a result, the Director concluded that the labor certification 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 withdraw the Director’s decision and remand the matter for entry of a new decision.

I. LAW

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). *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 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.

II. ANALYSIS

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:

[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 job offered will not qualify for advanced degree professional classification. In determining whether the proffered position qualifies for advanced degree professional classification, we look to the terms of the labor certification. The education, training, experience, and other requirements for the position are set forth in Part H of the labor certification. In this case Part H states that the proffered position of database administrator has the following requirements:

- | | | |
|-------|---|---|
| 4. | Education: Minimum level required: | Master’s degree |
| 4-B. | Major Field of Study: | Computer Science |
| 5. | Is training required in the job opportunity? | No |
| 6. | Is experience in the job offered required? | Yes |
| 6-A. | How long? | 36 months |
| 7. | Is an alternate field of study acceptable? | Yes |
| 7-A. | What field(s)? | Software Engineering, Computer Engineering, or Computer Science and Engineering |
| 8. | Is an alternate combination of education and experience acceptable? | Yes |
| 8-A. | What level of education? | Bachelor’s degree |
| 8-C. | How much experience? | 5 years |
| 9. | Is a foreign educational equivalent acceptable? | Yes |
| 10. | Is experience in an alternate occupation acceptable? | Yes |
| 10-A. | How long? | 36 months |
| 10-B. | Job title(s) of alternate occupation(s) | Programmer Analyst |

At section H, box 14, of the labor certification (“Specific skills or other requirements”) the following additional language is provided regarding the job requirements:

Requires a Master's in Computer Science, Software Engineering, Computer Engineering or Computer Science and Engineering or its foreign educational equivalent or its equivalent in education and experience plus 36 months experience in the job offered or 36 months experience in an alternate occupation as a Programmer Analyst. Will accept a bachelor's degree, or a foreign equivalent degree, followed by at least 5 years of progressive experience in the specialty, in lieu of the required education and experience. Will also accept any equally suitable combination of education, training and/or experience which would qualify an applicant to perform the duties of the job offered.

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).¹

In his decision the Director found that the labor certification did not support the requested classification of advanced degree professional because of the language in section H, box 14, that the employer "[w]ill also accept **any equally suitable** combination of education, training, or experience which would qualify an applicant to perform the duties of the job offered." The Director interpreted the highlighted language as broadening the requirements in a way that makes the actual minimum job requirements unclear. Accordingly, the Director concluded that the labor certification does not support the petition's request for advanced degree professional classification.

On appeal the Petitioner asserts that the Director's decision was incorrect because the above quoted sentence in box H.14 of the labor certification accords with "Kellogg language" requirements and does not alter the minimum requirements of the labor certification. The Petitioner claims that the highlighted phrase "any equally suitable," which adds the word "equally" to standard Kellogg language, amounts to a distinction without a difference. 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), 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

¹ 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.

certification must state “that any suitable combination of education, training, or experience is acceptable.”

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 we agree with the Petitioner that its use of the phrase “any equally suitable” before “combination of education, training and/or experience” in box H.14 of the labor certification, which adds just one word – “equally” – to the standard *Kellogg* language, does not change the minimum requirements of the labor certification.

However, we find that earlier phraseology in box H.14 is problematic. The first sentence in box H.14 states that the primary requirements for the job of database administrator are a master’s degree in one of the designated fields of study or its foreign educational equivalent “or its equivalent in education and experience” plus 36 months of qualifying experience.² In stating that it would accept the equivalent of a master’s degree in education and experience, instead of master’s degree itself, the Petitioner goes beyond the *Kellogg* language and indicates that a master’s degree is not required to meet the primary educational requirement of the labor certification. Instead, a combination of education and experience, which may not include a complete academic degree of any sort, could also be acceptable. Thus, the language in box H.14 of the labor certification appears to allow the educational component of the primary job requirements to be met with a combination of education and experience that could be less than a single master’s degree and less than a single bachelor’s degree. In fact, as written, the language of H.14 does not appear to require a single degree of any kind.

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 less than a single baccalaureate degree. In this case, since the educational component of the labor certification’s primary requirements may be satisfied with less than a single U.S. bachelor’s degree or foreign equivalent degree, or a single degree of any kind, the labor certification does not appear to support the requested classification of advanced degree professional under section 203(b)(2) of the Act. Because the Director did not discuss this issue and the Petitioner did not receive the opportunity to respond to this deficiency, we will remand the matter.

III. CONCLUSION

The decision of the Director will be withdrawn. The matter is remanded to the Director for additional consideration of whether labor certification supports the requested classification. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

² The quoted language also routinely appeared in the Petitioner’s job advertisements for the database administrator position.

Matter of R-S-R-, Inc.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

Cite as *Matter of R-S-R-, Inc.*, ID# 2906647 (AAO Mar. 4, 2019)