



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

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

MATTER OF Q-M-, INC.

DATE: JUNE 13, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a machine shop, seeks to permanently employ the Beneficiary as a tool designer. It requests classification of the Beneficiary as a professional worker under the third preference immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This classification allows a U.S. employer to sponsor a member of the professions holding a bachelor's degree for lawful permanent resident status.

The Director, Texas Service Center, denied the petition on September 11, 2015. The Director concluded that the record did not establish the Beneficiary's qualifications for the offered position or the requested classification.

The matter is now before us on appeal. The Petitioner asserts that the Director incorrectly cited case law and did not follow guidance from the U.S. Department of Labor (DOL). Upon *de novo* review, we will dismiss the appeal.

I. LAW AND ANALYSIS

A. The Roles of DOL and USCIS in the Employment-Based Immigration Process

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved labor certification from the 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.

By approving the accompanying labor certification in the instant case, the DOL certified 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 certified 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).

(b)(6)

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In these visa petition proceedings, we must decide whether the Beneficiary meets the requirements of the offered position certified by the DOL, and whether the Petitioner and the Beneficiary are otherwise qualified for the requested classification. *See* section 203(b)(3)(A)(ii) of the Act; 8 C.F.R. § 204.5.

B. The Beneficiary's Qualifications for the Offered Position

A petitioner must establish a beneficiary's possession of all the education, training, and experience specified on an accompanying labor certification by a petition's priority date. *See* 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 evaluating a beneficiary's qualifications, we must examine the job offer portion of an accompanying labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13; *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, an ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the DOL, accompanies the petition.¹ The petition's priority date is December 30, 2013, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

The accompanying labor certification states the minimum requirements of the offered position of tool designer as a U.S. bachelor's degree or a foreign equivalent degree in mechanical engineering, and 24 months of experience in the job offered. Part H.8 of ETA Form 9089 states that an alternate combination of education and experience is not accepted.

The Beneficiary attested on the accompanying labor certification to his receipt of a bachelor's degree in mechanical engineering in 1997 from [REDACTED] in South Korea. He also stated that he obtained about 27 months of full-time, qualifying experience in South Korea before the petition's priority date.

The record contains copies of documentation from [REDACTED] indicating the school's issuance of an associate's degree in mechanical engineering to the Beneficiary on January 28, 1997. An expert evaluation of the degree concludes that it equates to a U.S. associate of science degree in mechanical engineering.

¹ The accompanying ETA Form 9089 indicates its preparation by counsel. But counsel did not sign the form as the form's instructions require. *See also* 20 C.F.R. § 656.17(a)(1) (stating that the Department of Homeland Security "will not process petitions unless they are supported by an original certified ETA Form 9089 that has been signed by the employer, alien, attorney and/or agent"). In any future proceedings involving the labor certification, we will return the original certified ETA Form 9089 to the Petitioner for counsel's signature.

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The record also contains two August 16, 2011, evaluations from U.S. university professors stating the Beneficiary's possession of more than 11 years of related experience. Both evaluations conclude that a combination of the Beneficiary's education and experience equates to a U.S. bachelor of science degree in mechanical engineering.

The accompanying labor certification clearly indicates that the offered position requires at least a bachelor's degree. In Part H.4 of the ETA Form 9089, the Petitioner stated the minimum level of required education as a bachelor's degree, rather than "None," "High School," "Associate's," "Master's," "Doctorate," or "Other." Part H.8 of the form also states that an alternate combination of education and experience is not accepted.

The record does not establish that the Beneficiary has a bachelor's degree as specified on the accompanying labor certification. The evidence submitted by the Petitioner indicates the Beneficiary's possession of an associate's degree, which in combination with his claimed experience equates to a U.S. bachelor's degree. Because the labor certification did not indicate the acceptance of a combination of education and experience, the record does not establish the Beneficiary's qualifications for the offered position.

The Petitioner notes that the Director's decision incorrectly cited *Wing's Tea House* for the proposition that "[a] beneficiary may not substitute experience in lieu of a required degree unless the labor certification expressly allows this." *Wing's Tea House* held that experience gained after a petition's priority date did not qualify a beneficiary for an offered position. 16 I&N Dec. at 160. As the Petitioner argues, it does not similarly rely on qualifications gained by the Beneficiary after the petition's priority date.

But this citation does not invalidate the Director's decision. Because the Beneficiary lacks a bachelor's degree based solely on education as specified on the accompanying labor certification, the Director correctly found that the record does not establish the Beneficiary's qualifications for the offered position.

The Petitioner also asserts that the Director did not follow DOL guidelines in interpreting the minimum requirements of the offered position stated on the ETA Form 9089. The Director's decision noted that neither Part H.8 nor Part H.14 of the form indicated that a combination of education and experience would satisfy the bachelor's degree requirement. The Petitioner asserts that the form's instructions do not contemplate statements of acceptable combinations of education and experience in those parts of the form.

The instructions to Part H.8 of ETA Form 9089 advise an employer to indicate whether it will accept an alternate combination of education and experience in lieu of the minimum educational requirement indicated in Part H.4 of the form. See U.S. Dep't of Labor, "Instructions to ETA Form 9089," at <https://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf> (accessed May 23, 2016). The instructions further state: "For example, if the requirement is bachelor's + 2 years experience but the

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employer will accept a masters + 1 year experience, an alternate combination of education and experience exists.” *Id.*

The Petitioner states that it will not accept a master’s degree plus 1 year of experience in lieu of its minimum requirements of a bachelor’s degree plus 2 years of experience. as indicated in the instructions to ETA Form 9089. It therefore asserts that it correctly completed Part H.8 by indicating that an alternate combination of education and experience was not accepted.

But the alternate combination of a master’s degree plus 1 year of experience referenced in the DOL’s instructions to ETA Form 9089 was merely an example. The instructions did not state that example as the only possible alternate combination of education and experience. In the instant case, the Beneficiary has a combination of an associate’s degree and experience, another possible alternate combination for a bachelor’s degree. If the Petitioner was willing to accept an associate’s degree and education in lieu of a bachelor’s degree, Part H.8 required the Petitioner to state that alternate combination.

The instructions to ETA Form 9089 also indicate that, in Part H.14, employers should state “[s]pecific skills or other requirements,” such as “shorthand and typing speeds, specific foreign language proficiency, and test results.” *See* U.S. Dep’t of Labor, “Instructions to ETA Form 9089,” at <https://www.foreignlaborcert.doleta.gov/pdf/9089inst.pdf> (accessed May 23, 2016). Because the offered position does not require skills or requirements similar to those stated in the instructions, the Petitioner asserts that Part H.14 was an improper place to indicate its acceptance of a combination of an associate’s degree and education.

But the Board of Alien Labor Certification Appeals (BALCA) has allowed employers to state job requirements beyond the examples stated in the instructions to Part H.14 of ETA Form 9089. For example, BALCA, which administratively reviews the DOL’s labor certification decisions, has found it “appropriate” for an employer “to elaborate its minimum requirements” in Part H.14. *Matter of Symbioun Techs., Inc.*, 2010-PER-001422, 2011 WL 5126284, *2 (BALCA Oct. 24, 2011). The Director therefore correctly considered whether Part H.14 indicated the Petitioner’s acceptance of a combination of an associate’s degree and education.

If the Petitioner would accept a combination of an associate’s degree and education in lieu of a bachelor’s degree, it had to state that acceptance on the accompanying labor certification. *See* 20 C.F.R. § 656.17(i)(1) (requiring an employer to state its “actual minimum requirements” for an offered position on an ETA Form 9089). We cannot consider an alternate combination of education and experience because the plain language of the labor certification states that such a combination is unacceptable. *See, e.g., Madany*, 696 F.2d at 1015 (stating that “DOL bears the authority for setting the content of the labor certification and that [the immigration service] cannot impose job qualifications beyond those contemplated therein”).

For the foregoing reasons, the record does not establish the Beneficiary's qualifications for the offered position as specified on the accompanying labor certification. We will therefore affirm the Director's decision and dismiss the appeal.

C. The Beneficiary's Qualifications for the Requested Classification

A petitioner must also establish a beneficiary's qualifications for the requested classification.

The Act makes visas available to "[q]ualifying immigrants who hold baccalaureate degrees and who are member of the professions." Section 203(b)(3)(A)(ii) of the Act. A petition for a professional "must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree." 8 C.F.R. § 204.5(1)(3)(ii)(C). "Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate was awarded and the area of concentration of study." *Id.*

The Petitioner asserts that the Beneficiary qualifies as a professional because the record demonstrates that the combination of his education and experience equates to a U.S. bachelor of science degree. But the regulations and the legislative history of the Immigration and Nationality Act of 1990, Pub. L. 101-649, indicate that a professional must possess a single U.S. bachelor's degree or foreign equivalent degree, rather than a combination of education and experience, or a combination of lesser degrees.

In response to criticism that its regulations barred professionals from substituting experience for education, the former Immigration and Nationality Service (INS) reviewed the 1990 Act and its history. The INS concluded that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *see also SnapNames.com, Inc. v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, **10-11 (D. Or. Nov. 30, 2006) (holding that USCIS properly requires a professional or an advanced degree professional to hold at least a single, uncombined baccalaureate degree).

As previously discussed, the instant record does not establish the Beneficiary's possession of a bachelor's degree. The evidence submitted by the Petitioner indicates his possession of an associate's degree, which in combination with his claimed experience equates to a U.S. bachelor's degree. Because a professional must hold a single bachelor's degree rather than merely an equivalency based on a combination of education and experience, the record does not establish the Beneficiary's qualifications for the requested classification.

If the Beneficiary is not a professional, the Petitioner asks us to consider his classification as a "skilled worker." *See* section 203(b)(3)(A)(i) of the Act (providing visas to qualified immigrants who can perform skilled labor, requiring at least 2 years of training or experience). The petitioner notes that a federal court found that USCIS abused its discretion in denying a professional petition

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without first considering a beneficiary's qualifications as a skilled worker. See *Grace Korean United Methodist Church v. Chertoff*, 437 F. Supp. 2d 1174, 1178 (D. Or. 2005).

But the facts in *Grace Korean* distinguish it from the instant case. In *Grace Korean*, the petitioner requested a beneficiary's classification as a professional or skilled worker. 437 F. Supp. 2d at 1178. In contrast, the instant Petitioner requested the Beneficiary's classification only as a professional worker. The Petitioner marked Part 1.e of the Form I-140, Immigrant Petition for Alien Worker, indicating the petition's filing for a "professional (at a minimum, possessing a bachelor's degree or a foreign degree equivalent to a U.S. bachelor's degree)."

We cannot consider the Beneficiary's classification for any category but the one indicated on the Form I-140. See *Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988) (holding that a petitioner may not materially change a petition in an effort to make it conform to requirements). We therefore cannot consider the Beneficiary's eligibility as a skilled worker as the Petitioner requests.

The record does not establish the Beneficiary's qualifications for the requested classification of professional worker. For this additional reason, we will affirm the Director's decision and dismiss the appeal.

II. CONCLUSION

The record does not establish the Beneficiary's qualifications for the offered position or the requested classification. We will therefore affirm the Director's decision and dismiss the appeal.

The petition will be denied for the reasons stated above, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for the requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the instant Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of Q-M- Inc.*, ID# 17654 (AAO June 13, 2016)