



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

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

MATTER OF G-I- LLC

DATE: MAY 9, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of technology consulting services, seeks to permanently employ the Beneficiary as a senior information technology manager. It seeks 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)(ii), 8 U.S.C. § 1153(b)(3)(ii). This classification allows a U.S. employer to sponsor a professional with a bachelor's degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition on October 26, 2015. The Director concluded that the accompanying ETA Form 9089, Application for Permanent Employment Certification (labor certification), approved by the U.S. Department of Labor (DOL), does not demonstrate that the offered position requires a minimum of a bachelor's degree.

The matter is now before us on appeal. The Petitioner asserts that it required at least a bachelor's degree as reflected in its recruitment materials for the offered position. 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).

Following labor certification approval, a Petitioner files Form I-140, Immigrant Petition for Alien Worker, with USCIS within the labor certification validity period. *See* 20 C.F.R. § 656.30(b)(1); 8 C.F.R. § 204.5. USCIS then examines whether: (A) the Petitioner can establish its ability to pay the proffered wage, (B) the degree and/or experience required for the position offered matches the petitioned-for classification, and (C) whether the beneficiary has the required education, training, and experience for the position offered. *See* section 203(b)(3)(A)(ii) of the Act; 8 C.F.R. § 204.5.

B. The Job Requirements of the Offered Position

A petition for a professional worker must be accompanied by an individual labor certification, an application for Schedule A designation, or evidence of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). The job offer portion of an individual labor certification "must demonstrate that the job requires the minimum of a baccalaureate degree." *Id.*

In determining the minimum requirements of an offered position, we examine the job offer portion of the accompanying labor certification. 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); *see also Madany*, 696 F.2d at 1012-13; *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1, 3 (1st Cir. 1981).

In the instant case, the accompanying ETA Form 9089 states the requirements of the offered position of senior information technology manager as follows:

- H.4. Education: Bachelor's degree in computer engineering, engineering, technology, or a related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 60 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: "Other" level of education, specified as "Work experience equivalent to above." "60" years of experience.¹
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: None.

Also, part H.11 of the ETA Form 9089, which contains information about the "Job Duties" of the offered position, states "Basic Requirements." Part H.11 of the form states that the offered position requires a "BS in Computer Engineering, Engineering Technology, or related area," and "60 Months post baccalaureate work experience as a project manager, program lead, IT professional, or related position."

¹ Part H.8-C of the ETA Form 9089 requests the amount of experience in years, and the Petitioner indicated: "60." However, requiring an applicant to possess 60 years of experience would be absurd. We therefore find that the record establishes the amount of acceptable experience as 60 months.

The job requirements on the ETA Form 9089 conflict. Part H.8 of the labor certification requires only 60 months of experience, while Parts H.4 and H.11 require a Bachelor's degree and 60 months of experience. The job offer portion of the accompanying labor certification therefore does not demonstrate that the job requires a minimum of a baccalaureate degree pursuant to 8 C.F.R. § 204.5(i)(3)(i).²

On appeal, the Petitioner asserts that its labor certification recruitment materials demonstrate that the offered position requires at least a bachelor's degree. The Petitioner submitted copies of a notice of filing and advertisements placed on its website, indicating that the offered position requires a Bachelor's degree and 60 months of experience. The Petitioner states that the information indicating the acceptability of only 60 months of experience on the labor certification "was included in error and should be overlooked" pursuant to *Matter of HealthAmerica*, 2006-PER-00001, 2006 WL 5040202 (BALCA 2006) (*en banc*).

However, as previously indicated, we cannot ignore a term of a labor certification. *See Tongatapu*, 736 F.2d at 1309 (holding that the former Immigration and Naturalization Service (INS) "is bound by the DOL's certification"); *see also Madany*, 696 F.2d at 1015 (holding that "DOL bears the authority for setting the content of the labor certification"). USCIS reviews a labor certification in its entirety to determine the minimum requirements of an offered position. *See, e.g.*, Am. Immigration Lawyers Assoc./Serv. Ctr. Ops Directorate Teleconference Agenda, 3 (Jan. 29, 2014) at <https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/AILA-scops-QA-01-29-14.pdf> (accessed Apr. 26, 2016); *see also Matter of Symbioun Techs., Inc.*, 2010-PER-01422, 2011 WL 5126284, *2 (BALCA Oct. 24, 2011) (holding that "Form ETA 9089 is a legal document and as such the document must be considered in its entirety").

In *HealthAmerica*, the Board of Alien Labor Certification Appeals (BALCA) ruled that a typographical error on a labor certification application form did not justify the application's denial. *HealthAmerica*, 2006 WL 5040202 at *12. The employer in *HealthAmerica* misstated the date of one of its newspaper advertisements on the ETA Form 9089. *Id.* at *1.

In the instant case, the Petitioner's purported error on the accompanying labor certification goes well beyond an inadvertent, typographical error. As previously indicated, the Petitioner affirmatively stated in part H.8 of the ETA Form 9089 that the offered position could be filled by an applicant who

² The accompanying labor certification also contains other inconsistencies. Part H.4-A of ETA Form 9089 states acceptable fields of study as "Computer Engineering, Engineering, Technology" or a related field. However, there is no comma between the words "Engineering" and "Technology" in Part H.11 of the form, which lists acceptable fields of study as "Computer Engineering, Engineering Technology" or a related field. Part H.6 of the form requires 60 months of experience in the "job offered," and Part H.10 states that experience in an alternate occupation is unacceptable. However, Part H.11 of the form requires 60 months of experience "as a project manager, program lead, IT professional, or related position." In addition, the Petitioner's prevailing wage determination states that travel "throughout the United States" is required. However, its notice of filing states that travel outside Washington State "is not expected," and the ETA Form 9089 does not state any travel requirements.

possesses at least 60 months of experience. *HealthAmerica* is therefore distinguishable on its facts from the instant case.

Also, *HealthAmerica*'s holding has been superseded by regulation. The regulation at 20 C.F.R. § 656.11(b) bars modifications to labor certification applications like the Petitioner's, which were filed on or after July 16, 2007. *See, e.g., Matter of Inteliops, Inc.*, 2012-PER-01099, 2016 WL 1254105, *2 (BALCA Mar. 25, 2016). We therefore reject the Petitioner's assertion that its recruitment materials demonstrate the offered position's requirement of at least a bachelor's degree and decline to overlook the terms of part H.8 of the labor certification.

The Petitioner also submits copies of resumes received from applicants for the offered position and asserts that "ALL applicants who submitted their resumes for consideration had, at minimum, a Bachelor's degree." However, the record does not support that assertion.

The resume of one of the 12 applicants does not state any educational qualifications, other than technical training and certificates. The resumes of two other applicants indicate that they studied at colleges. However, the resumes do not indicate the applicants' receipt of degrees. We therefore also reject the Petitioner's assertions regarding the applicants for the offered position.

The record does not establish that the offered position requires a minimum of a Bachelor's degree pursuant to 8 C.F.R. § 204.5(l)(3)(i). We will therefore affirm the Director's decision and dismiss the appeal.

C. Ability to Pay the Proffered Wage

Although not discussed by the Director, we independently note that the record also does not establish the Petitioner's ability to pay the proffered wage.

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In the instant case, the accompanying labor certification states the proffered wage of the offered position of senior information technology manager as \$176,446 per year. The petition's priority date is December 10, 2014, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

In determining a petitioner's ability to pay a proffered wage, we first examine whether it paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we next examine whether it generated sufficient annual amounts of net income or net current assets to pay the difference between any wages paid and the proffered wage. If a petitioner's net income or net current assets are insufficient to demonstrate its

ability to pay, we may also consider the overall magnitude of its business activities. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).³

The accompanying labor certification states the Petitioner's employment of the Beneficiary since December 16, 2013. However, the record does not document the amount of wages the Petitioner paid him. The record therefore does not establish the Petitioner's ability to pay based on wages paid to the Beneficiary.

A copy of the Petitioner's 2014 federal income tax return states net income of \$103,305 and net current assets of \$43,426. Neither of these amounts equals or exceeds the annual proffered wage of \$176,446.

Thus, based on examinations of wages paid to the Beneficiary by the Petitioner and its annual amounts of net income and net current assets, the record does not establish its ability to pay the proffered wage from the petition's priority date onward.

In addition, USCIS records indicate the Petitioner's filing of at least four Forms I-140, Immigrant Petitions for Alien Workers, for other beneficiaries after the instant petition's priority date.⁴

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files. 8 C.F.R. § 204.5(g)(2). The Petitioner must therefore demonstrate its continuing ability to pay the combined proffered wages of the instant Beneficiary and the other beneficiaries whose petitions remained pending after the instant petition's priority date. The Petitioner must demonstrate its ability to pay the combined proffered wages from the instant petition's priority date until the other beneficiaries obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our denial of a petition where the petitioner did not establish its ability to pay the proffered wages of multiple beneficiaries).

The record does not document the priority dates or proffered wages of the Petitioner's other petitions, or whether it paid wages to the other beneficiaries. The record also does not indicate whether any of the other petitions were withdrawn, revoked, or denied, or whether any of the other beneficiaries obtained lawful permanent residence. Thus, the record does not establish the Petitioner's continuing ability to pay the combined proffered wages of the instant Beneficiary and the beneficiaries of its other petitions. The record does not establish the Petitioner's ability to pay the proffered wage from the petition's priority date onward. We will therefore dismiss the appeal for this additional reason.

³ Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. Appx. 292 (5th Cir. 2015).

⁴ USCIS records identify the other petitions by the following receipt numbers: LIN 16 092 50455; LIN 16 903 22324; SRC 15 085 50244; and LIN 15 904 55358.

(b)(6)

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D. The Beneficiary's Qualifying Experience

The record also does not establish the Beneficiary's qualifying experience for the offered position of senior information technology manager.

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 Katighak*, 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. As previously indicated, we may neither ignore a term of the labor certification, nor impose additional requirements. *Irvine*, 699 F.2d at 1009; *see also Madany*, 696 F.2d at 1012-13; *Stewart*, 661 F.2d at 3.

In the instant case, as previously discussed, the accompanying labor certification does not clearly state whether the offered position requires a Bachelor's degree plus 60 months of experience, or just 60 months of experience. However, in either case, the record does not establish the Beneficiary's qualifying experience for the offered position.

The Beneficiary attested on the accompanying labor certification to about 96 months of qualifying experience before joining the Petitioner on December 16, 2013. The Beneficiary stated his employment by [REDACTED] in the United States as a technology lead from December 26, 2005 to December 13, 2013.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the name, address, and title of the employer, and a description of a beneficiary's experience. *Id.*

The record contains a December 16, 2013, letter from a human resources official on the stationery of [REDACTED]. The letter states the company's employment of the Beneficiary from December 26, 2005 through December 13, 2013, consistent with the information on the labor certification.

However, the [REDACTED] letter does not describe the Beneficiary's experience pursuant to 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter therefore does not establish the Beneficiary's qualifying experience.

The [REDACTED] letter also does not confirm the Beneficiary's employment as a technology lead during his entire tenure with the company as stated on the labor certification. The letter states the Beneficiary's position as a technology lead at the time of his separation from the company. The letter does not indicate whether [REDACTED] employed the Beneficiary in any other positions. For this reason also, the record does not establish the Beneficiary's qualifying experience. *See Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

II. CONCLUSION

The accompanying labor certification does not demonstrate that the offered position requires a minimum of a bachelor's degree. We will therefore affirm the Director's decision and dismiss the appeal. The record also does not establish the Petitioner's continuing ability to pay the proffered wage or the Beneficiary's qualifying experience for the offered position. We will therefore dismiss the appeal for these additional reasons.

The petition will be denied for the above stated reasons, 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 G-I- LLC*, ID# 17237 (AAO May 9, 2016)