



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

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

MATTER OF CPM-, INC.

DATE: SEPT. 19, 2016

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a recycling machinery manufacturer, seeks to permanently employ the Beneficiary in the United States as an engineer, "sort systems." The Petitioner initially requested classification of the Beneficiary as a professional under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act), section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director, Texas Service Center, (Director) denied the petition on March 4, 2016. The Director determined that the Beneficiary did not possess a U.S. bachelor's degree or foreign equivalent degree and, therefore, did not satisfy the requirements for classification as a professional. The Director also denied the Petitioner's request to change the classification of the petition from professional to skilled worker. On May 24, 2016, the Director dismissed the Petitioner's motion to reopen and affirmed his previous decision.

The matter is now before us on appeal. The Petitioner asserts that the Beneficiary possesses the equivalent of a bachelor's degree. The Petitioner again requests that the petition be reclassified from professional to skilled worker. Upon *de novo* review, we will remand the case to the Director for consideration as a skilled worker.

I. LAW

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) states, in part:

If the petition is for a professional, the petition must be accompanied by evidence that the alien holds a United States baccalaureate degree or a foreign equivalent degree and by evidence that the alien is a member of the professions. Evidence of a baccalaureate degree shall be in the form of an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.

Section 101(a)(32) of the Act defines the term "profession" to include, but is not limited to, "architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges,

academies, or seminaries.” If the offered position is not statutorily defined as a profession, “the petitioner must submit evidence showing that the minimum of a baccalaureate degree is required for entry into the occupation.” 8 C.F.R. § 204.5(l)(3)(ii)(C).

In addition, the job offer portion of the labor certification underlying a petition for a professional “must demonstrate that the job requires the minimum of a baccalaureate degree.” 8 C.F.R. § 204.5(l)(3)(i).

Therefore, a petition for a professional must establish that the occupation of the offered position is listed as a profession at section 101(a)(32) of the Act or requires a bachelor’s degree as a minimum for entry; the beneficiary possesses a U.S. bachelor’s degree or foreign equivalent degree from a college or university; the job offer portion of the labor certification requires at least a bachelor’s degree or foreign equivalent degree; and the beneficiary meets all of the requirements of the labor certification.

Section 203(b)(3)(A)(i) of the Act provides for the granting of preference classification to qualified immigrants who are capable of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. *See also* 8 C.F.R. § 204.5(l)(2).

The regulation at 8 C.F.R. § 204.5(l)(3)(ii)(B) states:

If the petition is for a skilled worker, the petition must be accompanied by evidence that the alien meets the educational, training or experience, and any other requirements of the [labor certification]. The minimum requirements for this classification are at least two years of training or experience.

The determination of whether a petition may be approved for a skilled worker is based on the requirements of the job offered as set forth on the labor certification. *See* 8 C.F.R. § 204.5(l)(4). The labor certification must require at least two years of training and/or experience. Relevant post-secondary education may be considered as training. *See* 8 C.F.R. § 204.5(l)(2).

Accordingly, a petition for a skilled worker must establish that the job offer portion of the labor certification requires at least two years of training and/or experience, and the beneficiary meets all of the requirements of the offered position set forth on the labor certification.

II. PROCEDURAL HISTORY AND EVIDENCE OF RECORD

As required by statute, the petition is accompanied by an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the DOL.¹ The priority date of the petition is June 25, 2014.²

¹ *See* Section 212(a)(5)(D) of the Act, 8 U.S.C. § 1182(a)(5)(D); *see also* 8 C.F.R. § 204.5(a)(2).

² The priority date is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

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The required education, training, experience and skills for the offered position are set forth at Part H of the labor certification. In the instant case, the labor certification states that the position has the following minimum requirements:

- H.4. Education: minimum level required: Bachelor's degree.
- ...
- H.4-B. Major field of study: Mechanical engineering or industrial design or equivalent.
- ...
- H.6. Is experience in the job offered required for the job? Yes.
- H.6-A. If Yes, number of months experience required: 24.
- H.7. Is there an alternate field of study that is acceptable? Yes.
- H.7-A. If Yes, specify the major field of study: Industrial design.
- H.8. Is there an alternate combination of education and experience that is acceptable? Yes.
- H.8-A. If Yes, specify the alternate level of education required: Other.
- H.8-B. If Other is indicated in question 8-A, indicate the alternate level of education required: Any suitable combination of education, training or experience is acceptable.
- H.9. Is a foreign educational equivalent acceptable? Yes.
- H.10. Is experience in an alternate occupation acceptable? Yes.
- H.10-A. If Yes, number of months experience in alternate occupation required: 24.
- H.10-B. Identify the job title of the acceptable alternate occupation: Sales engineer/project manager.
- ...
- H.14. Specific skills or other requirements: None.

On the labor certification, in Part J.11., J.12., and J.13., the Beneficiary listed his education as "other" and listed that he completed two years of college coursework in aerotechnical fabrication in 1992 at the [REDACTED] in Canada. The Petitioner submitted a copy of the Beneficiary's academic transcript from [REDACTED] which shows that the Beneficiary was enrolled in courses there from Fall 1990 through Winter 1992.

The Petitioner submitted a credentials evaluation and sought to rely on a combination of the Beneficiary's education and employment experience to form the equivalent of a bachelor's degree. The evaluation, dated February 17, 2009, was issued by [REDACTED] for [REDACTED]. [REDACTED] concluded that "[b]ased on the entire academic coursework taken by [the Beneficiary], combined with his employment experience in the Industrial Engineering field (3 years employment = 1 year university level credit), (INS 3:1 rule), [REDACTED] has come to the conclusion [the Beneficiary] holds the equivalent of an individual with a Bachelor of Science Degree in Industrial Design from an accredited college or university in the United States."

III. ANALYSIS

In the Director's September 8, 2015, request for evidence (RFE), the Director requested additional documentation to establish that the Beneficiary satisfied the requirements for classification as a professional, as the petition was initially filed. Specifically, the Director requested that the Petitioner send evidence that the Beneficiary is a professional holding a bachelor's degree in mechanical engineering or industrial design. However, the Director also stated that the Petitioner should submit a statement if they wished "to change the category from an E32, professional . . . to an E31, skilled worker." In response to the RFE, the Petitioner submitted a statement requesting that the Director accept and "change the Beneficiary's category from E32 (professional) to E31 (skilled worker)."

In his March 4, 2016, decision, the Director rejected the Petitioner's request to change categories, noting that "[a] petitioner may not make material changes to a petition." *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

USCIS guidance for filing I-140 petitions states, "Although you may request a change of classification prior to adjudication to correct a clerical error in Part 2 of the form, the determination regarding whether to change the visa preference classification will be made by USCIS, based on the totality of the record. . . . Requests for a change in visa preference category cannot be granted in petitions that have already been adjudicated."³ As the Petitioner requested to change classification to a skilled worker based on the Director's invitation to do so in the RFE and prior to adjudication of the petition, we remand for the Director to consider the petition under the skilled worker category.

IV. CONCLUSION

In view of the foregoing, the previous decision of the Director will be withdrawn. The petition is remanded to the Director. The Director may request any additional evidence considered pertinent.⁴ 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.

ORDER: The decision of the Director is withdrawn. The matter is remanded to the Director for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

³ Petition Filing and Processing Procedures for Form I-140, Immigrant Petition for Alien Worker, available at <https://www.uscis.gov/forms/petition-filing-and-processing-procedures-form-i-140-immigrant-petition-alien-worker> (accessed September 15, 2016).

⁴ It is noted that while the Petitioner submitted evidence of wages paid to the Beneficiary in 2014 and affirmed its ability to pay the proffered wage to the Beneficiary, the Petitioner has not submitted copies of its annual reports, federal tax returns, or audited financial statements, as is expressly required by the regulation at 8 C.F.R. § 204.5(g)(2).

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