U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF I-G-A-M-, INC.

DATE: APR. 25, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a fabricator of granite countertops, seeks to employ the Beneficiary as a tile and marble setter. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires less than two years of training or experience.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary met the requirement of the ETA Form 9089, Application for Permanent Employment Certification (labor certification), to have passed a criminal background check before the priority date of the petition.[1]

On appeal, the Petitioner submits an affidavit attesting to the fact that the Beneficiary did have a background check conducted before the priority date.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer must obtain 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 domestic workers similarly employed. *See* Section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer may file 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.

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

II. ANALYSIS

A. Beneficiary Qualifications

A petitioner must establish the elements for the approval of the petition at the time of the priority date, which in this case is October 16, 2015. *See* 8 C.F.R. § 103.2(b)(l), (12). To establish that a beneficiary is qualified to perform the duties of an offered position, a petitioner must demonstrate that the beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg. Comm. 1977).

USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983). The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to 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) (emphasis added). Our interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *Id.* at 834.

Here, Part H.14 of the labor certification states that the Beneficiary must have his own transportation, a criminal background check, and references. The initial filing did not contain evidence that the Beneficiary met the requirements listed in Part H.14, so the Director issued a request for evidence to the Petitioner, asking for evidence to establish that the Beneficiary had met the requirements of having his own transportation, a criminal background check, and references as of the visa petition's priority date, October 16, 2015.

In response, the Petitioner submitted evidence that the Beneficiary has his own transportation, a copy of the criminal history search conducted by the [redacted] police department on August 1, 2016, and employment references. The Petitioner's owner submitted a letter stating that the Beneficiary did have a background check conducted before the priority date but that he did not keep a copy of the original document provided by the Beneficiary at the time he was hired. The Director denied the petition because the Petitioner had not established that the Beneficiary had a criminal background check conducted before the priority date.

On appeal, the Petitioner asserts that even though the criminal history search by the [redacted] police department occurred after the priority date, the language of this document states that the Beneficiary has no adult record of criminal convictions. The Petitioner states that this relates back to the time when the Beneficiary was hired in 2015 and demonstrates that he did not have any criminal convictions as of that period of time. The Petitioner's owner states in his letter that he routinely asks applicants to bring their local criminal record and asks about their criminal record but that he did not keep a copy of the original background check provided by the Beneficiary at the time of hire. The Petitioner cites *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988),

for the proposition that only the submission of affidavits are necessary to prove that a beneficiary meets the requirements for the job offered. We find that the court's holding in *Lu-Ann Bakery* is based upon a regulatory requirement that a petitioner must establish the beneficiary's employment experience by submitting an affidavit from the employer attesting to the particular experience. Here, the terms of the labor certification specifically require a criminal background check, and the requirements of the labor certification must be established as of the priority date of the petition. *See Matter of Wing's Tea House*, 16 I&N Dec. at 159. A petitioner cannot meet its burden of proof in immigration proceedings simply by claiming a fact to be true.

We note that the DOL's Board of Alien Labor Certification Appeals (BALCA) has identified several cases in which pre-employment screening had been found to be a job requirement. *See Matter of 421 S. 2nd Street Enterprises*, 2012-PER-00696 (BALCA Aug. 28, 2013); *Matter of Vetri 640 Corp.*, 2011-PER-02537 (BALCA Feb. 15. 2013); *Matter of Noll Pallet & Lumber*, 2009-PER-00082 (BALCA Dec. 16, 2009); and *Matter of Yiannis Electric, Inc.*, 2011-PER-00112.

While we are not bound by BALCA decisions, we, nevertheless, may take note of the reasoning in such decisions when, as here, they offer insight into issues that arise in the employment-based immigrant visa process. Accordingly, we conclude that a criminal background check requirement is a job requirement that must be met by the Beneficiary as of the priority date.

As stated above, we must examine "the language of the labor certification job requirements" in order to determine what the job requires. *See Madany*, 696 F.2d at 1012-13. Our interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See Rosedale*, 595 F. Supp. at 834 (emphasis added).

Here, we find the plain language of Part H.14 of the labor certification establishes that the Petitioner requires a criminal background check for the offered position, as those requirements are commonly understood, which must have been met by the Beneficiary as of October 16, 2015, the priority date.

In the present case, the Petitioner has submitted the results of a criminal background check that reports that the Beneficiary had no criminal record in Virginia as of August 1, 2016. However, as this was conducted subsequent to the filing of the labor certification, it does not establish that the Beneficiary met the requirements for the offered position as of the priority date. As such, we will affirm the Director's denial on this ground.

B. The *Bona Fides* of the Job Opportunity

Although unaddressed by the Director, the record also does not establish the *bona fides* of the job opportunity. A petition for an unskilled worker must be accompanied by a valid individual labor certification, an application for Schedule A designation, or documentation of a beneficiary's qualifications for a shortage occupation. 8 C.F.R. § 204.5(l)(3)(i). If an accompanying labor certification does not comply with DOL regulations, we may deny a petition. *See Matter of Sunoco*

Energy Dev. Co., 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming a petition's denial under 20 C.F.R. § 656.30(c)(2) where the labor certification did not authorize the beneficiary to work at the intended jobsite).

In this case, the Petitioner attested on the labor certification that "[t]he job opportunity has been and is clearly open to any U.S. worker." *See* 20 C.F.R. § 656.10(c)(8) (requiring an employer to so attest). The record, however, indicates that the Beneficiary has a special relationship with the Petitioner that casts doubt on the *bona fides* of the job opportunity. *See Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000) (holding that a relationship triggering concerns about the *bona fides* of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship").

In determining the *bona fides* of a job opportunity, we must consider several factors, including whether the foreign national: is in a position to control or influence hiring decisions regarding the offered position; is related to the employer's owners, officers, or employees; incorporated or founded the employer; has an ownership interest in it; is involved in its management; is on its board of directors; is one of a small number of employees; possesses specialized or unusual job requirements of the offered position; or has personal attributes that would likely cause the employer to cease operations in the foreign national's absence. *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *8 (BALCA 1991) (*en banc*). We must also consider the employer's level of compliance and good faith in processing the claim. *Id.*

Here, the Petitioner responded "Yes" to part C.9 of the labor certification, which asks: "Is the employer a closely held corporation, partnership, or sole proprietorship in which the alien has an ownership interest, or is there a familial relationship between the owners, stockholders, partners, corporate officers, or incorporators, and the alien?" The Petitioner's federal income tax return for 2015 does not identify the Beneficiary as an owner of the corporation. The record therefore suggests that the Beneficiary has a familial relationship with the Petitioner's owner, who also shares the Beneficairy's last name.

In addition, the Form I-140 submitted by the Petitioner indicates that it has five employees. The record therefore establishes that the Beneficiary would be one of a small number of employees, another factor indicating a non-*bona fide* job opportunity. Thus, multiple *Modular Container* factors indicate that the offered position may not have been clearly available to U.S. workers, potentially rendering the labor certification invalid.

Pursuant to 20 C.F.R. § 656.17(l), in any future filings in this matter, the Petitioner must demonstrate the existence of a *bona fide* job opportunity and provide copies of the following materials:

- Documentation of the relationship between the Petitioner's owner and the Beneficiary;
- The Petitioner's financial history, including the total investment in it and the amount of investment by each owner and the Beneficiary; and

- The name of the person with primary responsibility for interviewing and hiring applicants, and the names of people with influence or control over hiring decisions for the offered position.

In addition, the Petitioner should provide copies of its labor certification materials, including: the notice of filing; the prevailing wage determination; newspaper advertisements of the offered position; as described in 20 C.F.R. § 656.17(g)(1), the recruitment report; resumes or applications received from applicants; and any correspondence between the Petitioner and the DOL, including information on whether the DOL audited the labor certification.

III. CONCLUSION

We conclude that the record does not establish that the Beneficiary met the requirements of the labor certification for the position offered as of the priority date. Therefore, we will affirm the Director's denial of the visa petition.

ORDER: The appeal is dismissed.

Cite as *Matter of I-G-A-M, Inc.*, ID# 453537 (AAO Apr. 25, 2017)