U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-S-, INC.

DATE: AUG. 25, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a provider of janitorial services, seeks to employ the Beneficiary as a commercial cleaner. It requests his classification as an "other worker" under the third-preference, immigrant category. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a U.S. business to sponsor a foreign national with less than two years of training or experience for lawful permanent resident status.

The Director of the Texas Service Center denied the petition. The Director concluded that the record did not establish the Beneficiary's passage of a drug screening and criminal background check required for the offered position by the petition's priority date.[1]

On appeal, the Petitioner asserts that, by requiring the Beneficiary's successful completion of a screening and check before he begins employment, the Director imposed an additional job requirement and misinterpreted case law and regulations.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with the Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). The DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL certifies an offered position, the employer must next file an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154.

[1] The priority date of this petition is December 30, 2014, the date the U.S. Department of Labor (DOL) received the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

In petition proceedings, USCIS determines, among other things, whether a beneficiary meets the DOL-certified requirements of a position.

Finally, if USCIS approves a 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.

A petitioner must establish a beneficiary's possession of all DOL-certified job requirements by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). When evaluating a beneficiary's qualifications for an offered position, USCIS must examine the job offer portion of a labor certification to determine the position's minimum requirements. USCIS may neither ignore a term of the certification, nor impose additional requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983).

II. ANALYSIS

A. The Drug Screening and Background Check

In this case, the labor certification indicates that the offered position of commercial cleaner does not require any education, training, or experience. Part H.14 of the labor certification, however, states the following "other requirement:" "Initial drug screening and criminal background check."

The Director interpreted the labor certification provision to require passage of a drug screening and criminal background check. Because a beneficiary must meet all labor certification requirements by a petition's priority date, the Director requested evidence of the Beneficiary's passage of a screening and check by December 30, 2014.

In response, the Petitioner confirmed that it requires its employees to pass drug screenings and criminal background checks for insurance purposes and to meet customers' criteria. It submitted evidence of the Beneficiary's passage of a screening and check in his home country of China.[2] The evidence indicates, however, that the Beneficiary did not complete the drug screening until May 2016 and the criminal background check until July 2015. The Director therefore concluded that the record did not establish the Beneficiary's satisfaction of the position's requirement by the petition's priority date.

On appeal, the Petitioner states that its employees need not pass drug screenings and criminal background checks until just before they start work for the company in the United States. By requiring the Beneficiary to undergo a drug screening and background check by the petition's priority date, the Petitioner asserts that the Director imposed a temporal job requirement unstated on the labor certification.

[2] The record does not indicate whether the offered position requires a check of international criminal records or only of those in the United States.

Contrary to the Petitioner's assertion, however, the Act reflects Congress' intention that an "other worker" qualify for an offered position before a petition's approval. The Act makes visas available to "[o]ther qualified immigrants who are capable, *at the time of petitioning for classification under this paragraph*, of performing unskilled labor." Section 203(b)(3)(A)(iii) of the Act (emphasis added).

As previously indicated, case law further requires a beneficiary to meet all job requirements by a petition's priority date. *See Matter of Wing's Tea House*, 16 I&N Dec. at 160; *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). This requirement stems from the importance of a priority date, which establishes a beneficiary's place in line for an immigrant visa. If unqualified for an offered position by a priority date, a beneficiary would unjustly enjoy an earlier place in line. *See Matter of Katigbak*, 14 I&N Dec. at 49 (stating that a "beneficiary cannot expect to . . . claim a priority date as of . . . a date on which he [or she] was not qualified").

We could not permit the Beneficiary to meet an offered position's educational or experience requirements after a petition's priority date. *See Matter of Katigbak*, 14 I&N Dec. at 49 (rejecting a beneficiary's after-acquired education); *Matter of Wing's Tea House*, 16 I&N Dec. at 160 (rejecting a beneficiary's after-acquired experience). For the same reason, we cannot allow him to pass a required drug screening and criminal background check after this petition's priority date.

The Act also indicates that Congress did not want beneficiaries, after immigrating to the United States, to discover that they do not qualify for their offered positions. *See* section 212(a)(4)(A) of the Act, 8 U.S.C. § 1182(a)(4)(A) (barring foreign nationals likely to become "public charges" from immigrating). The Petitioner's refusal to employ the Beneficiary based on results of a post-immigration drug screening or criminal background check would leave him unemployed and possibly unable to financially support himself in an unfamiliar country. Moreover, the Petitioner attested on the labor certification that it "will be able to place the alien on the payroll on or before the date of the alien's proposed entrance into the United States." 20 C.F.R. § 656.10(c)(4) (requiring labor certification employers to so certify). The Director therefore did not err in requiring the Beneficiary to pass a drug screening and criminal background check by the petition's priority date.

The Petitioner also asserts that a beneficiary need only meet a position's requirements by a petition's filing date, not by its priority date. The Petitioner notes that *Katigbak* required proof of a beneficiary's qualifications by a petition's filing date. The Petitioner also notes that the only regulation expressly mandating compliance by a petition's priority date concerns a petitioner's ability to pay a proffered wage. *See* 8 C.F.R. § 204.5(g)(2) (requiring a petitioner to establish ability to pay "at the time a priority date is established"); *cf.* 8 C.F.R. § 103.2(b)(1) (requiring a petitioner to demonstrate eligibility "at the time of filing the benefit request").

As of the *Katigbak* decision, however, a petition's filing date was its priority date. *See* 8 C.F.R. § 204.1(c)(2) (1971); *see also* Proposed Rule on Petitions for Preference Immigrants, 52 Fed. Reg. 18236, 18236 (May 14, 1987) (discussing the regulatory history of petition priority dates). After *Katigbak*, the former Immigration and Naturalization Service (INS) determined that disparities in

labor certification processing times resulted in unfair awards of petition priority dates. 52 Fed. Reg. at 18236. Thus, in 1977, the INS began issuing priority dates based on the filing dates of accompanying labor certifications. Final Rule for Immigrant and Nonimmigrant Status; Petitions and Waivers, 41 Fed. Reg. 55847, 55848 (Dec. 23, 1976). Therefore, contrary to the Petitioner's assertion, *Wing's Tea House* did not "confuse" a petition's priority and filing dates. Rather, the decision correctly applied the current regulatory scheme, basing the petition's priority date on the filing date of its labor application.

In *Katigbak* and *Wing's Tea House*, the regulatory basis for determining priority dates differed. But both decisions consistently held that a beneficiary must meet a position's qualifications by a petition's priority date. The absence of a corresponding regulation does not invalidate the precedential natures of the decisions. *See* 8 C.F.R. § 103.10(b), (e) (requiring USCIS to follow precedent decisions in all proceedings involving the same issues). We therefore reject the Petitioner's assertion that it need only establish the Beneficiary's qualifications as of the petition's filing date. Even if we accepted the Petitioner's argument, the record does not establish the Beneficiary's passage of the drug screening by the petition's December 3, 2015, filing date.

The Petitioner further asserts that a beneficiary need not meet a position's "other requirements" by a petition's priority date. Rather, the petitioner states that, by the priority date, a beneficiary need only possess the educational, training, and experience requirements of a job. The Petitioner cites a precedent decision of ours, which states: "To be eligible for approval, a beneficiary must possess all the education, training, and experience specified on the labor certification." *Matter of Christo's Inc.*, 26 I&N Dec. 537, 539 (AAO 2015). The Petitioner, however, cites *dictum*. The beneficiary's qualifications for the offered position were not at issue. *Christo's* holding therefore does not support the Petitioner's assertion.

Wing's Tea House and *Katigbak* also do not support the Petitioner's argument. Although those cases involved experience and educational requirements, their reasoning applies to all job requirements, including training and "other requirements." Further, regulations clearly require an "other worker" to meet labor certification requirements beyond education, training, and experience. *See* 8 C.F.R. § 204.5(l)(3)(D) (stating that a petition for an unskilled worker "must be accompanied by evidence that the alien meets any educational, training and experience, *and other requirements of the labor certification*") (emphasis added). We therefore reject the Petitioner's assertion that it need only establish the Beneficiary's education, training, and experience qualifications by the petition's priority date.

Citing *Madany*, the Petitioner urges us to engage in a "common sense" review of its requirement for a drug screening and criminal background check. Because the Petitioner does not require its employees to successfully complete screenings and checks until just before they start work, it asserts that USCIS should not require the Beneficiary's passage of the drug screening and background check years before his proposed start date.

In *Madany*, a labor certification for a nurse included the requirement: "must be able to obtain Virginia nursing license or have Virginia nursing license." *Madany*, 596 F.2d at 1013. The petitioner asserted that the provision required only the beneficiary's eligibility to take a licensing examination, while INS demanded additional evidence of her likelihood of passing the exam. *Id.* Noting that Virginia law barred the employment of unlicensed nurses, the court ruled that "INS's common-sense interpretation that the prospective employee must have an actual ability to obtain the license within a reasonable time better comports with DOL's statement of purpose." *Id.* at 1013-14. *Madany*, however, was decided before Congress' 1990 amendment of the Act, requiring the capability of an "other worker" to perform unskilled labor "at the time of petitioning for classification." Section 203(b)(3)(A)(iii) of the Act. Therefore, the case's allowance of a beneficiary to meet a licensing requirement after a petition's approval conflicts with current law.

Madany is also distinguishable from this case. In *Madany*, the offered position required either a license or the ability to obtain one. Here, the Petitioner states that the offered position requires passage of a drug screening and criminal background check, not merely an ability to pass them. The Petitioner's citation to *Madany* therefore is unpersuasive. For the foregoing reasons, the record does not establish the Beneficiary's passage of a drug screening and criminal background check as required for the offered position by the petition's priority date.

III. CONCLUSION

The record does not establish the Beneficiary's passage of a drug screening and criminal background check as required for the offered position by the petition's priority date. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

Cite as *Matter of D-S-, Inc.*, ID# 561429 (AAO Aug. 25, 2017)