MATTER OF D-, INC.

DATE: JUNE 6, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an information technology services company, seeks to employ the Beneficiary as a senior Peoplesoft database administrator. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish, as required, that the Beneficiary met the terms of the labor certification as of the priority date.

On appeal, the Petitioner asserts that the requirements of drug testing and screening, and background and reference checks, are common requirements for most jobs and are "usually done immediately prior to the employee joining the company."

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

I. LAW AND ANALYSIS

A. Employment-Based Immigration

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).[1] *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. 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

[1] The date the labor certification is filed is called the "priority date." 8 C.F.R. § 204.5(d).

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.

B. Beneficiary's Qualifications

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 on the labor certification as of the priority date, which in this case is April 29, 2015. The labor certification at Part H.14. states, in part, that "Drug Testing/Screening, Background and Reference checks" are required. In evaluating the job offer portion of the labor certification to determine the required qualifications for the position, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements.[2]

With the petition, the Petitioner did not submit evidence that the Beneficiary's drug testing and screening, and background and reference checks, had been completed. In response to the Director's request for evidence, the Petitioner submitted the results of the Beneficiary's drug testing and screening, and background and reference checks, which were conducted after the priority date.

On appeal, the Petitioner asserts that the requirements of drug testing and screening, and background and reference checks, are common requirements for most jobs and are "usually done immediately prior to the employee joining the company." However, a petitioner must establish eligibility at the time of filing; a petition cannot be approved at a future date after the beneficiary becomes eligible under a new set of facts. *See Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

When determining whether a beneficiary is eligible for a preference immigrant visa, we must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Madany*, 696 F.2d at 1012-1013. 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 Co. 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 labor certification application. *Id.* at 834.

The plain language of Part H.14. of the labor certification establishes that the Petitioner's requirements for the job include drug testing and screening, and background and reference checks, which must have been completed as of the April 29, 2015, priority date.

In this case, the Petitioner submitted results of a drug screening, and background and reference checks, conducted after the priority date and only after the Director issued a request for evidence on this issue. Since they were conducted after the priority date, they do not establish the Beneficiary's

[2] *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

qualifications for the offered position. The Petitioner cannot require U.S. workers to satisfy requirements that it did not impose on the Beneficiary.

C. Ability to Pay the Proffered Wage

Although not addressed by the Director, the Petitioner has not established its continuing ability to pay the proffered wage from the priority date. The regulation at 8 C.F.R. § 204.5(g)(2) requires the Petitioner to establish its ability to pay the proffered wage at the time the priority date is established and continuing until the Beneficiary obtains lawful permanent residence. The Petitioner must submit copies of its annual reports, federal tax returns, or audited financial statements or, if it employs 100 or more workers, we may accept a statement from a financial officer which establishes the Petitioner's ability to pay the proffered wage. *Id.*

The proffered wage is $100,000 per year, and the priority date is April 29, 2015. The record contains the Petitioner's 2014 IRS Form 1120, U.S. Corporation Income Tax Return, together with IRS Forms W-2, Wage and Tax Statements, issued by the Petitioner to the Beneficiary in 2014 and 2015. The record also contains several pay statements issued by the Petitioner to the Beneficiary in 2016.[3] The record does not contain the Petitioner's annual reports, federal tax returns, or audited financial statements for 2015 as required by 8 C.F.R. § 204.5(g)(2). If the Petitioner pursues this matter further, it must submit regulatory-prescribed evidence of its ability to pay the proffered wage from 2015 onward.

II. CONCLUSION

The Petitioner has not established that the Beneficiary met the minimum requirements of the offered position as of the priority date. Further, the Petitioner has not established that it had the continuing ability to pay the proffered wage from the priority date.

ORDER: The appeal is dismissed.

Cite as *Matter of D-, Inc.*, ID# 358033 (AAO June 6, 2017)

[3] In 2015, the Petitioner paid the Beneficiary $106,227.32.