U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF A-V-, INC.

DATE: JUNE 14, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, an importer and distributor of plumbing and ventilation products, seeks to employ the Beneficiary as a purchasing, communications, and inventory management director/China. It requests her classification as a professional under the third-preference, immigrant category. *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, "EB-3" category allows a U.S. business to sponsor a foreign national with a bachelor's degree 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 required criminal background check at the time the labor certification was filed.

On appeal, the Petitioner asserts that the Beneficiary need only pass a background check before beginning employment in the offered position. It also argues that the results of a later check show that she would have passed a check by the date of the labor certification's filing.

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

I. LAW

Employment-based immigration usually follows a three-step process. First, an employer files a labor certification application with 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). 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 the DOL approves the labor certification application, the employer then files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. 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.

In order to demonstrate eligibility for the benefit sought, a petitioner must establish a beneficiary's possession of all the requirements specified on a labor certification by a petition's priority date.[1] *See, e.g., Matter of Wing's Tea House,* 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of a labor 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 Required Criminal Background Check

Besides a bachelor's degree in business, two years of related experience, and fluency in the Mandarin Chinese language, the labor certification in this case states that an applicant for the offered position of purchasing, communications, and inventory management director "[m]ust successfully pass [a] criminal background check."

In his request for additional evidence, the Director asked the Petitioner for evidence of the Beneficiary's passage of a criminal background check. In response, the Petitioner submitted results of a background check, indicating that the Beneficiary has no criminal record in North Carolina. Noting the check's completion on October 27, 2016, however, the Director found that the results did not establish the Beneficiary's passage by the petition's priority date of July 30, 2015.

On appeal, the Petitioner notes that the labor certification does not specify a deadline for the background check requirement. The Petitioner therefore asserts that the Beneficiary need only pass a check before beginning employment in the offered position. Because the Petitioner now employs the Beneficiary in another position, it argues that she timely passed a background check.[2]

Although not stated on a labor certification, a beneficiary must meet all of its job requirements by a petition's priority date. *See Matter of Wing's Tea House,* 16 I&N Dec. at 160; *see also* 8 C.F.R. § 103.2(b)(1) (requiring an applicant or petitioner to establish eligibility by the filing of a benefit request). This rule stems from the importance of a petition's priority date, which establishes a beneficiary's place in line for an immigrant visa. If unqualified for a requested classification by a priority date, a beneficiary would unjustly enjoy an earlier place in line. *See Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971) (stating that a "beneficiary cannot expect to . . . claim a priority date as of . . . a date on which he [or she] was not qualified").

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[1] If accompanied by a labor certification, a petition's priority date is the date the DOL received the labor certification application for processing. 8 C.F.R. § 204.5(d).

[2] The Petitioner has authorization to temporarily employ the Beneficiary in H-1B nonimmigrant visa status. *See* section 101(a)(15)(H) of the Act, 8 U.S.C. § 1101(a)(15)(H) (describing the H nonimmigrant visa classification). This petition seeks permission to permanently employ her.

We could not permit the Beneficiary, after the petition's priority date, to meet the offered position's education or experience requirements. *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 her to pass a required criminal background check after the priority date.

Moreover, although the Petitioner claims that the Beneficiary's current employment with the Petitioner (which began in 2010) indicates her passage of a background check, the Petitioner has not submitted evidence that the Beneficiary in fact passed a background check prior to beginning her employment with the Petitioner.

The Petitioner also argues that the results of the Beneficiary's criminal background check show that she would have passed a check by the petition's priority date. The Petitioner asserts that the results of her later check indicate that she has no criminal record since May 11, 2011.[3] Thus, the Petitioner maintains that she would have also passed a background check by the petition's priority date of July 30, 2015.

The plain language of the labor certification, however, required the Beneficiary to "successfully pass [a] criminal background check." *See Madany*, 696 F.2d at 1015 (holding that "the language of the labor certification job requirements . . . set[s] the bounds of the alien's burden of proof"). Thus, the Beneficiary's eligibility to pass a background check by the petition's priority date would not establish, as specified on the labor certification, actual passage of a check by that date.

For the foregoing reasons, the record does not establish the Beneficiary's passage of a criminal background check as specified on the labor certification by the petition's priority date. We will therefore affirm the Director's decision.

B. The Beneficiary's Qualifying Experience

Although unaddressed by the Director, the record also does not establish the Beneficiary's possession of the experience required for the offered position.

As previously indicated, the offered position of purchasing, communications, and inventory management director requires at least two years of experience. The labor certification specifies that this experience must be in a purchasing, sales, or marketing position in the plumbing and "HVAC" [heating, ventilation and air conditioning] industry.

On the labor certification, the Beneficiary attested to her possession, by the petition's priority date of July 30, 2015, of more than four years of full-time, qualifying experience. She stated that she has

[3] The results of the Beneficiary's background check include her North Carolina driving record since May 11, 2011. The Petitioner asserts that the background check searched state criminal records at least as old.

worked in the United States since November 15, 2010, as a purchasing and communications director/China for the Petitioner.

A labor certification employer cannot generally rely on experience that a foreign national gained with it. 20 C.F.R. § 656.17(i)(3). The Petitioner, however, cites an exception to this rule, asserting the Beneficiary's accrual of qualifying experience in a position substantially different than the offered position. *See* 20 C.F.R. § 656.17(i)(3)(i). For these purposes, a substantially different position requires performance of the same job duties less than 50 percent of the time. 20 C.F.R. § 656.17(i)(5)(ii).

Here, the Petitioner asserts that the Beneficiary's current job duties are "56% different" than those of the offered position. A table that the Petitioner submitted, however, indicates that the two positions require performance of the exact same set of job duties 100% of the time. Rather, the table indicates that the specific percentage of time spent on each individual duty varies between the prior position and the position offered. For example, while the Beneficiary now spends 25 percent of her time to coordinate sourcing, purchasing, and inventory control, the table states that this duty will consume 40 percent of her time in the offered position, an increase of 15 percentage points. As such, contrary to 20 C.F.R. § 656.17(i)(5)(ii), the record does not establish that the offered position will require the Beneficiary's performance of the same job duties less than 50 percent of the time. The record therefore does not establish the Beneficiary's claimed, qualifying experience with the Petitioner.

III. CONCLUSION

As the Director concluded, the record does not establish the Beneficiary's passage of a required criminal background check by the petition's priority date. The record also does not demonstrate that the Beneficiary possess the experience required for the offered position.

ORDER: The appeal is dismissed.

Cite as *Matter of A-V-, Inc.*, ID# 378640 (AAO June 14, 2017)