U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-S-, INC.

DATE: MAR. 28, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a maintenance and operations services business, seeks to employ the Beneficiary as a commercial cleaner. 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. § 1152(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 2 years of training or experience.

The Director of the Texas Service Center denied the visa petition, finding the record did not establish that the Beneficiary had met the requirements of the labor certification, a drug screening and criminal background check as of the date that the Petitioner filed it with the U.S. Department of Labor (DOL), and, therefore, that she was not qualified for the offered position.

The matter is now before us on appeal. The Petitioner contends that the Director erred in finding the Beneficiary had not met labor certification requirements, as the drug screening and background check reflected in the labor certification are not job requirements, but common personal procedures that need not be met prior to the filing of the labor certification.

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

I. LAW

Employment-based immigration is generally a three-step process. First, an employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification) from DOL. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, 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. Finally, if USCIS approves the immigrant visa petitioner, the foreign national must 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.

As required by statute, a labor certification, approved by DOL, accompanies the petition. By approving the labor certification, DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5)(A)(i)(I) of the Act. The

DOL also certifies that the employment of 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)(II) of the Act.

In visa petition proceedings, USCIS determines whether a foreign national meets the job requirements specified in the underlying labor certification and the requirements of the requested immigrant classification. *See* section 204(b) of the Act (stating that USCIS must approve a petition if the facts stated in it are true and the foreign national is eligible for the requested preference classification); *see also, e.g., Tongatapu Woodcraft Haw., Ltd. v. Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983) (both holding that USCIS has authority to make preference classification decisions).

A petitioner must establish the elements for the approval of the petition at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. *See* 8 C.F.R. §§ 204.5(g)(2), 103.2(b)(1), (12); *see also Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Acting Reg'l Comm'r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971). The priority date of a petition is the date that DOL accepts the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

II. ANALYSIS

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, which in this case is January 28, 2015.[1] 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]

In the present matter, the job offer portion of the labor certification, Part H, reflects no education, training, or experience requirements for the offered position. The only qualifications stated for the position are set forth in Part H.14, as follows: "[i]nitial drug screening and criminal background check."

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 (RFE) to the Petitioner, asking for evidence establishing that the Beneficiary had met the requirements of a drug screening and a criminal background check, as of the visa petition's priority date, January 28, 2015.

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[1] 8 C.F.R. § 103.2(b)(1), (12); 8 C.F.R. § 204.5(l)(3)(ii)(A); *see Matter of Wing's Tea House*, 16 I&N Dec. at 159; *Matter of Katigbak*, 14 I&N Dec. at 49.

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

In response, the Petitioner submitted the results of a May 11, 2016, drug screening and a May 5, 2016, criminal background check of the Beneficiary. In its brief, the Petitioner asserted that, as the employer in this matter, it had "the absolute right and complete discretion" to define these requirements and, further, that neither check needed to be conducted prior to the labor certification's filing. It also contended that as its drug testing and background checks needed to be conducted immediately prior to the start of employment, "a pre-9089-filing drug screen and criminal record check [were] immaterial, and [could not] in [its] circumstances be a requirement for I-140 approval." The Petitioner's response to the RFE also included two statements from its vice president for operations, dated February 5 and February 26, 2016, explaining the Petitioner's need to conduct drug and criminal record checks of its employees, a memorandum from its counsel explaining the nature of its drug screening requirement, and a copy of *Matter of Erik Sussman*, 2012-PER-01339 (BALCA Apr. 28, 2016), a Board of Alien Labor Certification Appeals (BALCA) decision. The Director denied the visa petition, finding that the record did not establish that the Beneficiary had met the drug screening and criminal background check requirements in Part H.14 of the labor certification as of the visa petition's priority date.

On appeal, the Petitioner contends that USCIS misconstrued its language in Part H.14 of the labor certification. It asserts that the drug screening and criminal background check, are not job requirements, as the Director found, but are instead, a notification to prospective job applicants of the pre-employment drug screening and criminal background checks that are part of its employment application process, which DOL has mandated be disclosed on the labor certification. It also maintains, as it did in in its response to the Director's RFE, that, as the drug screening and background checks listed in the labor certification are its internal procedures, it, not USCIS, has the right to determine what they actually mean.

However, while we note the Petitioner's arguments in support of its claim that the drug screening and criminal background check requirements reflected in Part H.14 of the labor certification should not be considered job requirements, they are not persuasive. For the reasons that follow, we find the record to demonstrate that both are job requirements, and that, as written, they require the Beneficiary in this matter to have undergone a drug screening and criminal background check as of the date on which the Petitioner filed the labor certification with DOL.

In support of its position that the drug screening and criminal background check in Part H.14 of the labor certification are nothing more than an explanation of its hiring procedures, mandated by DOL, the Petitioner points to the memorandum from its counsel. Our review of the memorandum, however, does not find it to offer proof that DOL requires employers to place other than job requirements in Part H of the labor certification.

Although counsel references *Matter of Erik Sussman*as providing an example of this DOL mandate, the decision does not support counsel's claim. In that case, BALCA found that an employer must list a background check requirement on the labor certification, regardless of whether the employer considered the background check to be a "job requirement." The case does not indicate that DOL considered the background check to be anything other than a job requirement. As a result, we do not

find counsel's memorandum to demonstrate that the Petitioner's drug screening and background check requirements in Part H.14 of the labor certification are simply personnel procedures.
The two BALCA decisions submitted by the Petitioner on appeal, *Matter of Crust and Crumb d/b/a Beach Sweets, Inc.*, 2011-PER-02196 (BALCA May 1, 2014) and *Matter of Yiannis Electric, Inc.*, 2011-PER-00112 (BALCA Feb. 15, 2012), also do not support the Petitioner's assertion that DOL mandates that requirements other than "job requirements" must be reflected in Part H of a labor certification. These decisions establish only that where job advertisements have reflected requirements for criminal background checks and drug tests not listed in the labor certification, BALCA has found the conditions of employment offered to U.S. workers to be less favorable than those offered to the labor certification's beneficiary, supporting the denial of the labor certification. They do not reflect that BALCA has concluded that such background checks and drug tests are not job requirements. Moreover, as discussed below, we find the decision in *Matter of Yiannis Electric, Inc.* to demonstrate that, contrary to the Petitioner's arguments, BALCA has found pre-employment screening, including drug screening and criminal background checks, to be job requirements.

In *Aetna Life Insurance Company*, 2012-PER-03011 (BALCA Dec. 14, 2016), the employer, like the Petitioner in this matter, argued that its drug and background screening were not job requirements, but "an informational reference to [its] 'post-offer and acceptance,' hiring process that [did] not have to be listed on the labor certification." In response, BALCA found the following:

> Other Board panels have agreed with the CO that pre-employment screening is a job requirement and that inclusion of a reference to such screening in a newspaper advertisement when screening is not listed as a job requirement on the Form 9089 violates the § 656.17(f)(6) prohibition that a newspaper advertisement must not contain any job requirements or duties which exceed the job requirements or duties listed on the Form 9089 . . . . We agree with these panels and similarly conclude that the [e]mployer's inclusion of the drug and background screening language in its newspaper advertisements violated § 656.17(f)(6) . . . .

In its decision, BALCA identified other cases in which pre-employment screening had been found to be a job requirement as including *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, one of the BALCA cases submitted by the Petitioner on appeal.

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, while the Petitioner may consider its drug screening and criminal background check requirements to be no more than hiring procedures, they are clearly job requirements, which must be met by the Beneficiary as of the visa petition's January 28, 2015, priority date.

Having found the drug screening and criminal background check in Part H.14 of the labor certification to be job requirements, we will consider the Petitioner's alternate argument in this

matter, which is that it, alone, has the right to determine the actual meaning of these requirements and that "[if] USCIS does not adhere to [its] terms, then [USCIS] is adding requirements to the 9089 that do not actually exist." With regard to its drug screening requirement, the Petitioner states that its true requirement is a beneficiary's "willingness to submit to, and pass, these employer-conducted checks." It notes that this willingness is expressed in Section K of the labor certification, which has been signed by the Beneficiary. It also maintains that its requirement with regard to a criminal background check is proof that a worker has a "satisfactory criminal record," rather than the criminal record check itself, which can be performed before or after the filing of the labor certification.

In his memorandum, the Petitioner's counsel echoes its claim that as drug abuse screening is its requirement, it has the exclusive right to define the term. He further states that the interpretation of "initial drug screening," is "often misunderstood, both factually and legally," but means that "employment applicants must be willing to take and pass a company-administered drug screen immediately before commencing employment" and that it is this willingness to take the drug test, as expressed in Part K of the labor certification that establishes a beneficiary's eligibility.

Although we note the Petitioner's claim that we must accept its definitions of the requirements listed in Part H.14 of the labor certification, it has cited no statute or regulation, nor any precedent decision, that limits our authority to determine the requirements of the offered position in this matter, as those requirements are stated in Section H of the labor certification.

We also find there is insufficient evidence in the record to support the meanings that the Petitioner has assigned to its requirements in Part H.14 of the labor certification. The record contains no documentation, e.g., internal company memoranda, that establishes counsel's definition of "initial drug screening" as reflective of the understanding of that term in the Petitioner's company at the time the labor certification was filed with DOL. While we note the Petitioner's reference to the language in Part K.b.9 of the labor certification, which states that "[t]he alien is willing to submit to any employer-required drug screen," we do not find this one sentence, placed in the labor certification's section on work experience, to be sufficient to establish the Petitioner's assertions. The record also does not provide evidence that the Petitioner's requirement for a criminal background check was, at the time of the labor certification's filing, understood within its company to be a requirement for a satisfactory criminal record, not an actual background check. A petitioner cannot meet its burden of proof in immigration proceedings simply by claiming a fact to be true. In the absence of supporting evidence for its claims, the Petitioner's alternate definitions of its drug screening and criminal background check requirements appear to reflect an attempt to circumvent the regulation at 20 C.F.R. § 656.11(b), which prohibits the amendment of a labor certification after it has been filed.

When determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *Madany v. Smith*, 696 F.2d at 1012-1013. We must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* 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, we find the plain language of Part H.14 of the labor certification to establish the Petitioner's requirements for the offered position as a drug screening and criminal background check, as those reuirements are commonly understood, which must have been met by the Beneficiary as of January 28, 2015, the visa petition's priority date.

In the present case, the Petitioner has submitted the results of a drug screening of the Beneficiary, dated May 11, 2016, and a May 5, 2016, criminal background check that reports she had no criminal record in China as of May 4, 2016. However, as both were conducted subsequent to the filing of the labor certification, they do not meet its requirements and, therefore, do not establish the Beneficiary's qualifications for the offered position.

III. CONCLUSION

The record in this matter does not establish that the Beneficiary met the requirements of the labor certification as of the visa petition's priority date. Therefore, we will affirm the Director's denial of the visa petition.

ORDER: The appeal is dismissed.

Matter of D-S-, Inc., ID# 29389 (AAO Mar. 28, 2017)