U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-F-P-, INC.

DATE: MAR. 29, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a poultry business, seeks to employ the Beneficiary as a production line worker. 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 that the record did not establish that the Beneficiary had met the drug screening and physical assessment requirements of the labor certification as of the petition's priority date and that the Beneficiary was, therefore, not qualified for the offered position.

The matter is now before us on appeal. The Petitioner contends that the Director erred in denying the petition, stating that requiring it to conduct the above drug screening and physical assessment as of the visa petition's priority date is unreasonable. Alternatively, the Petitioner asserts that the evidence establishes that the Beneficiary met the requirements of the labor certification as of the visa petition's priority date.

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 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). 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 the DOL, accompanies the petition. 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. 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)(l), (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 the 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 a beneficiary has met all of the requirements set forth in the labor certification by the priority date of the petition.[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: "[d]rug screening and physical assessment to stand long time and repetitive hand motion required. Age 18 and above."

The initial filing did not contain evidence that the Beneficiary met the requirements stated in Part H.14, so the Director issued a notice of intent to deny (NOID) to the Petitioner, asking for evidence establishing that the Beneficiary had met the requirements of a drug screening and physical assessment, as of the visa petition's priority date, April 10, 2015.

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[1] *See* 8 C.F.R. §§ 103.2(b)(l), (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 contended that the drug screening and physical assessment requirements in Part H.14 of the labor certification should be distinguished from those to be met prior to the filing of the labor certification, such as education or work experience. It maintained that, unlike education and work experience, which do not change after a labor certification is filed, a drug test is valid only as of the date it is conducted and, therefore, must be performed after hiring to ensure a new employee is drug-free. The Petitioner made this same argument with regard to the physical assessment requirement stated in Part H.14, asserting that the ability of an unskilled worker to stand for long periods of time and perform repetitive hand motions could change over the course of the employment-based immigrant visa process. It also pointed out that its screenings were not conducted until after the job offer was made, right before its new hires started work.

Nevertheless, the Petitioner, noting USCIS' repeated requests for the results of drug screenings for other employment-based petitions, submitted December 7, 2015, and February 25, 2016, drug tests for the Beneficiary, and a February 22, 2016, criminal records check of the Beneficiary, conducted by the Korean National Police Agency. It also provided a February 26, 2016, medical certificate confirming the Beneficiary's physical ability to perform a job requiring long periods of standing and repetitive motion. The Petitioner asserted that the submitted tests and screening, although conducted after April 10, 2015, established, by a preponderance of evidence, that the Beneficiary would have been able to satisfy the requirements in Part H.14 of the labor certification as of the priority date. The Director denied the visa petition finding that the reports the Petitioner had provided did not establish that the Beneficiary had met the requirements of the labor certification as of the petition's priority date.

On appeal, the Petitioner contends that the drug screening and physical assessment required of its new employees are not job requirements. Instead, it describes them as the final step in its hiring process, as they are not conducted until after a job offer is made to an applicant.[3] The Petitioner continues to assert that unlike a beneficiary's education and work experience, which do not change after a labor certification is filed, the results of the drug screening and physical assessment required by Part H.14 of the labor certification may alter over the course of the employment-based immigrant visa process. It, therefore, maintains that requiring the Beneficiary to have undergone a drug screening and a physical assessment of his ability to perform the duties of the offered position prior to the filing of the labor certification, as is the case with education and employment experience, is "unreasonable."

We note, however, that in cases before the Board of Alien Labor Certification Appeals (BALCA) where employers have maintained that pre-employment screening is simply part of their hiring process, BALCA has found otherwise, concluding that such screening is a job requirement that must be listed on a labor certification.[4] *See Matter of Aetna Life Insurance Company*, 2012-PER-03011

[3] On August 1, 2016, we issued a request for evidence to the Petitioner requesting proof that prospective job applicants had been aware of the drug test and physical assessment required for employment, including the submission of its recruitment materials for the offered position. In response, the Petitioner established that both requirements were included in its advertisements and the job order published by the (North Carolina)

[4] While we are not bound by BALCA decisions, we, nevertheless, may take note of the reasoning in such decisions when

(BALCA Dec. 14, 2016); *see also 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 Yiannis Electric, Inc.*, 2011-PER-00112 (BALCA Feb. 15, 2012); *Matter of Noll Pallet & Lumber*, 2009-PER-00082 (BALCA Dec. 16, 2009). Based on this reasoning, we find the drug screening and physical assessment requirements listed by the Petitioner in Part H.14 of the labor certification to be job requirements, which must have been met by the Beneficiary as of the April 10, 2015, priority date.

The Petitioner alternately asserts that even if the drug tests and physical assessments submitted in response to the Director's NOID were not completed as of April 10, 2015, they, nevertheless, establish by a preponderance of evidence that the Beneficiary met the requirements found in Part H.14 of the labor certification as of the priority date, i.e., that as of April 10, 2015, he was drug free and able to stand for long periods of time and perform repetitive hand motions. The Petitioner, however, misstates the requirements it placed in Part H.14 of the labor certification.

When determining whether a beneficiary is eligible for a preference immigrant visa, we may not ignore a term of the labor certification, nor may we 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).

In the present case, the requirements in Part H.14 of the labor certification, as stated by the Petitioner, require the Beneficiary to have undergone a drug screening test and a physical assessment of his ability to perform employment requiring long periods of standing and repetitive hand motion, which, by regulation, must have been conducted as of the priority date. The Petitioner, however, has submitted the results of drug tests and physical assessments that were conducted subsequent to the priority date. Therefore, they do not meet the requirements of the labor certification, regardless of the information they provide.

As the record does not demonstrate that the Beneficiary was screened for drug use and physically assessed to determine his ability to perform the duties of the job opportunity prior to the priority date, it does not establish that he is qualified for the offered position.

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considering issues that arise in the employment-based immigrant visa process.

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. Accordingly, we will affirm the Director's denial.

ORDER: The appeal is dismissed.

Matter of C-F-P-, Inc., ID# 10112 (AAO Mar. 29, 2017)