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)(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 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 request for evidence 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 15, 2015.

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[1] *See* 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, Petitioner acknowledged that Part H.14 of the labor certification listed a drug screening and physical assessment as special requirements for the offered position, but maintained that they were not requirements for employment, as indicated by the Director, but intended only to promote a safe working environment. As proof of its claim, the Petitioner pointed to the fact that its drug screenings and physical assessments were performed only after job applicants had been offered employment.[3] It further asserted that its practice of requiring newly hired employees to pass a drug test and a physical assessment was known to the which assisted it with its local recruitment efforts. In support of this claim, the Petitioner submitted a letter from who states that it is his understanding that the Petitioner performs drug tests and physical assessments of new employees before they begin work.

The Petitioner also submitted the results of a December 4, 2015, drug test of the Beneficiary, reflecting that she was drug-free, and a February 2, 2016, medical report, stating that she had no history of drug use and was physically able to perform work requiring her to stand for long periods of time and repetitive hand motions. It further provided a December 31, 2015, criminal background check of the Beneficiary, which reported that, as of December 15, 2015, she had no criminal record in China. The Petitioner asserted that the submitted drug tests and physical assessment of the Beneficiary, although conducted after the priority date, established that it was more likely than not that she would also have met the drug screening and physical assessment required by Part H.14 of the labor certification as of the April 15, 2015, priority date. Although he acknowledged the Petitioner's submission of the above documentation, the Director concluded that, as the requirements in Part H.14 of the labor certification had not been met as of the petition's priority date, the Beneficiary was not qualified for the offered position.

On appeal, the Petitioner again contends that the drug screenings and physical assessments it requires of new employees are not job requirements. Instead, it describes them as the final step in its hiring process, conducted only after a job offer has been made to an applicant. The Petitioner further asserts 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 could well alter over the course of the employment-based immigrant visa process. It, therefore, maintains that requiring the Beneficiary in this matter to have undergone a drug screening and a physical assessment of her 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."

However, while the Petitioner may consider the drug screening and physical assessment requirements in Part H.14 of the labor certification to be part of its hiring process, we note that in cases before the Board of Alien Labor Certification Appeals (BALCA) where employers have also

[3] 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)

maintained that pre-employment screening is 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 (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). Having reviewed the preceding BALCA opinions, 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 visa petition's April 15, 2015, priority date.

Alternately, the Petitioner contends that the results of the drug tests, physical assessment, and criminal background check that it has submitted for the record should be viewed as proof that the Beneficiary meets the requirements of the labor certification. It maintains that, although not performed prior to the visa petition's priority date, these screenings, nevertheless, establish, by a preponderance of evidence, that the Beneficiary was also drug-free and physically able to perform the offered position's duties at the time it filed the labor certification with the DOL, thereby satisfying the requirements of the labor certification.

However, 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).

Here, while the purpose of the Petitioner's drug screening test may be a drug-free employee and its physical assessment, a worker capable of performing the duties of the offered position, those are not the requirements the Petitioner stated in Part H.14 of the labor certification. Rather, Part H.14 reflects the Petitioner's requirements for the job opportunity as a drug screening test and a physical assessment of the Beneficiary's ability to stand for long periods of time and perform repetitive hand motions, which, pursuant to regulation, must be met as of the visa petition's April 15, 2015, priority date. As the drug tests and physical assessment that have been submitted by the Petitioner in this matter were conducted subsequent to the visa petition's priority date, they do not meet the requirements of the labor certification.

[4] While we are not bound by BALCA decisions, we, nevertheless, may take note of the reasoning in such decisions when considering issues that arise in the employment-based immigrant visa process.

In the present case, the record does not demonstrate that the Beneficiary was screened for drugs and physically assessed to determine her ability to perform the duties of the job opportunity prior to the priority date. Therefore, the Petitioner has not established that she is qualified for the offered position.[5]

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.

ORDER: The appeal is dismissed.

Matter of C-F-P-, Inc., ID# 11477 (AAO Mar. 29, 2017)

[5] We note that USCIS records reflect that the Beneficiary in this matter is also the beneficiary of a second visa petition filed by the Petitioner under section 212(a)(3)(A)(iii) of the Act, which was approved on December 23, 2016.