U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF D-D-S-L-, INC.

DATE: AUG. 7, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an operator of a dental laboratory, sought to employ the Beneficiary as a dental lab technician. It requested his classification under the third-preference immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This category allows a U.S. business to sponsor a foreign national for lawful permanent resident status based on a job offer requiring less than two years of training or experience.

The Acting Director of the Nebraska Service Center denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the minimum qualifications for the offered position.

On appeal, the Petitioner submitted additional evidence and asserted the Beneficiary's qualifications for the position. During the appeal's pendency, however, the Petitioner terminated its business. Another corporation asserts itself as the Petitioner's successor in interest.

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

I. EMPLOYMENT-BASED IMMIGRATION LAW

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain 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). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If the DOL approves a position, an employer must next submit the labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS considers whether a Beneficiary meets the DOL-certified job requirements of a position. If USCIS approves a petition, a foreign national may finally 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.

II. SUCCESSORSHIP IN INTEREST

Unless accompanied by an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage occupation, an "other worker" petition must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid only for the particular job opportunity stated on it. 20 C.F.R. § 656.30(c)(2).

A business may use another employer's labor certification if it establishes itself as the employer's successor in interest. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor must: 1) document its acquisition of a predecessor's business; 2) establish that, but for the ownership change, the job opportunity remains the same as listed on the labor certification; and 3) demonstrate its eligibility as a petitioner, including the abilities of it and its predecessor to continuously pay the proffered wage from the petition's priority date onward. *Id.* at 482-83.[1]

Here, in response to our notice of intent to dismiss (NOID), the Petitioner's former president concedes that, after the appeal's filing, the petitioning corporation dissolved. He asserts that another corporation, of which he is also president and chief executive officer, acquired the Petitioner's business and seeks to employ the Beneficiary in the offered position.

The record, however, does not establish the other corporation as the Petitioner's successor in interest. Contrary to *Dial Auto*, the record does not document the corporation's acquisition of the Petitioner's business. Copies of business certificates and corporate statements indicate the corporation's operation of a dental laboratory at the Petitioner's former address. But these documents do not demonstrate the corporation's acquisition of the rights and obligations needed to continue the Petitioner's business.

The corporation argues that an accountant has not yet prepared audited financial statements that will demonstrate its successorship. But the record does not establish the unavailability of other evidence of the corporation's claimed acquisition of the Petitioner's business. *See Matter of Dial Auto,* 19 I&N Dec. at 482 (requiring a claimed successor to "fully explain the manner" of the business takeover and to provide a copy of "the contract or agreement" detailing the transaction).[2]

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[1] This petition's priority date is March 10, 2017, the date the DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

[2] The record also lacks evidence of the abilities of the corporations to continuously pay the proffered wage from the petition's priority date of March 10, 2017. *See* 8 C.F.R. § 204.5(g)(2) (requiring evidence of ability to pay in the form of annual reports, federal income tax returns, or audited financial statements). The claimed successor, however, argues that required evidence of the corporations' abilities to pay is not yet available. It states that it did not begin business until 2018 and that the Petitioner has not yet filed its 2017 federal income tax returns. Because of the unavailability of required evidence, we do not base our successorship determination on ability to pay. In any future filings in this matter, however, the claimed successor must submit required evidence of the corporations' abilities to continuously pay the proffered wage from the petition's priority date.

Before requiring it to prove successorship, the corporation argues that we should decide the appeal based on the Beneficiary's qualifications for the offered position. We decline to do so, however. The Petitioner terminated its business. Thus, without sufficient evidence of the new corporation's successorship, the invalidity of the labor certification bars the petition's approval based on the new job offer. The Beneficiary's qualifications for the position are therefore moot. *See Matter of Luis-Rodriguez*, 22 I&N Dec. 747, 753 (BIA 1999) (holding that, as a matter of prudence, administrative tribunals may dismiss appeals or deny motions that lack practical significance).

The corporation further contends that, under USCIS policy, our immediate consideration of its successorship first requires issuance of a request for evidence (RFE). Quoting an internal USCIS memorandum, the corporation states that adjudicators "should issue an RFE to the petitioner if the petitioner has failed to demonstrate a qualified successor-in-interest relationship." Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudications Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* 9 (Aug. 6, 2009), https://www.uscis.gov/ legal-resources/policy-memoranda.

Pursuant to the memo, however, our NOID effectively served as an RFE. The NOID notified the Petitioner's former president and counsel of the ability of a successor to continue the appeal, stated that a successor "must first establish" its successorship under *Dial Auto*, and provided a reasonable opportunity to submit evidence. The corporation's "[s]ubmission of only some of the requested evidence will be considered a request for a decision on the record." 8 C.F.R. § 103.2(b)(11). Also, similar to our issuance of the NOID, the Commissioner of the former Immigration and Naturalization Service in *Dial Auto* instructed the petitioner's counsel on appeal to explain and document its claimed acquisition of the business of the labor certification employer. *Matter of Dial Auto*, 19 I&N Dec. at 482. Our NOID therefore complies with USCIS policy and precedent case law.

For the foregoing reasons, the record does not establish the claimed successorship in interest.

III. CONCLUSION

Absent sufficient evidence of successorship in interest, the Petitioner's termination of its business rendered the accompanying labor certification invalid. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

Cite as *Matter of D-D-S-L-, Inc.*, ID# 1409585 (AAO Aug. 7, 2018)