U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C&SM-, [redacted]

DATE: AUG. 14, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a sewing plant, seeks to employ the Beneficiary as a sewing machine operator. It requests classification of the Beneficiary as an unskilled worker under the third preference immigrant classification. *See* Immigration and Nationality 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 two years of training or experience.

The Director of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish its ability to pay the proffered wage. We dismissed the Petitioner's subsequent appeal, affirming the Director's decision and also finding that the record did not establish that: the Petitioner was currently in business; the Petitioner was successor-in-interest to the company that had filed the underlying labor certification; and the Beneficiary possessed the experience required by the terms of the labor certification.

The matter is now before us on a combined motion to reopen and motion to reconsider. The Petitioner asserts that our findings were reached in error. It maintains that the existing record establishes its ongoing operations, its status as a successor-in-interest to the employer that filed the labor certification, and its ability to pay the proffered wage. It further contends that the evidence in the record demonstrates that the Beneficiary possessed the requisite employment experience.

Upon review of the record, we will deny both motions.

I. REGULATORY REQUIREMENTS FOR MOTIONS

The requirements of a motion to reopen are located at 8 C.F.R. § 103.5(a)(2), and the requirements of a motion to reconsider are located at 8 C.F.R. § 103.5(a)(3). We may grant a motion that satisfies these requirements and demonstrates eligibility for the requested immigration benefit.

A motion to reopen must state new facts and be supported by documentary evidence. 8 C.F.R. § 103.5(a)(2). We interpret "new facts" to mean facts that are relevant to the issue(s) raised on motion and that have not been previously submitted in the proceeding, which includes the original petition. Reasserting previously stated facts or resubmitting previously provided evidence does not constitute "new facts."

A motion to reconsider must establish that our decision was based on an incorrect application of law or policy and that the decision was incorrect based on the evidence in the record of proceedings at the time of the decision. 8 C.F.R. § 103.5(a)(3). We do not consider new facts or evidence in a motion to reconsider. A motion to reconsider must also be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

Here, the Petitioner has not provided the new facts and supporting documentary evidence required for the filing of a motion to reopen. Accordingly, the Petitioner's motion to reopen will be denied. The remainder of this decision addresses the Petitioner's motion to reconsider.

II. SUCCESSOR-IN-INTEREST

On motion, the Petitioner seeks to overcome our finding that the record does not establish it as the successor-in-interest to the business entity that filed the underlying labor certification in this matter.

The Petitioner points to the declaration from its president which states that he acquired and on December 31, 1999. The Petitioner further asserts that in approving a Form I-140 filed by on January 4, 2006, USCIS has already acknowledged it as successor-in-interest since that petition was also based on the labor certification in this matter and was the name by which it was then known. In support of its claim, the Petitioner submits a letter issued by the Virginia State Corporation Commission, which reflects that prior to August 25, 2004, the Petitioner operated as

The Petitioner also maintains that we should have considered additional factors in our successor-in-interest determination, including continuity of business operations, use of the same plant, continuity of the work force, similarity of jobs and working conditions, similarity of supervisory personnel, similarity in machinery, equipment, and production methods, similarity of products or services, and the ability of "the predecessor to provide relief."

As proof that it has assumed the obligations of its predecessor, the Petitioner points to the bill of sale from its owner's purchase of which reflects that in buying the company, he assumed responsibility for "[a]ll employment based immigration matters with the appropriate authorities that were initiated by the Seller in the previous years."

Pursuant to *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986), a valid successor relationship may be established if the job opportunity is the same as that originally offered on the labor certification; the entity claiming successorship establishes eligibility in all respects, including the ability to pay the proffered wage; and the petition fully describes and documents the transfer and assumption of ownership by the successor entity.

Evidence of transfer of ownership must establish that the successor not only purchased its predecessor's assets but also that it acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner. The successor must continue to operate the same type of business, and the manner in which the business is controlled must remain substantially the same as it was before the transfer of ownership. Further, it must establish its predecessor's ability to pay the proffered wage from the date the labor certification application was filed with the U.S. Department of Labor (DOL) until the date of purchase, and its own ability to pay the proffered wage from that date onward.

In the present case, the record does not establish the required transfer of ownership or the Petitioner's ability to pay the proffered wage.

A. Transfer of Ownership

Although the Petitioner's owner in his declaration states that he purchased both and on December 31, 1999, the bill of sale and purchase agreement identify only as having been acquired. While we note that the record contains tax returns for and for the years 1994 through 1996, these returns reflect a federal employer identification number (FEIN) of not the FEIN found on the Schedules C of the Forms I-140, U.S. Individual Income Tax Returns, filed by the sole proprietor of in 1990 and 1991 and submitted for the record.

Moreover, the record reflects that was purchased by the Petitioner's owner, not the Petitioner. A corporation is a separate and distinct legal entity from its owners and shareholders. *See Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980).

For these reasons, the evidence in the record is not sufficient to establish that the Petitioner is a successor-in-interest to

B. Ability to Pay the Proffered Wage

On motion, the Petitioner contends that its "pattern of profitable or successful years" demonstrates its ability to pay the proffered wage under the totality of circumstances analysis established in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967), a case in which the petitioning employer had been in business for more than 11 years but in the year that it filed the visa petition

had experienced unusual expenses and a temporary inability to conduct regular business operations.[1] Despite these financial setbacks, the former U.S. Immigration and Naturalization Service (now USCIS) approved the visa petition, determining that the totality of the company's circumstances established its prospects for a resumption of successful business operations, a decision that was, in part, based on its history of successful operations and its outstanding reputation within its industry.

Here, the Petitioner asserts that it and have operated the same type of business for the past 23 years. The Petitioner also maintains that USCIS' January 4, 2006, approval of a Form I-140 filed by demonstrates that it has already established its ability to pay the proffered wage from the October 26, 1987, priority date to 2006.

As proof that the evidence in the record on appeal established what it describes as a "long and sustained history of growth," the Petitioner points to its tax returns, as well as those of and and its reorganized business. It also notes its previous submission of statements from certified public accountant who asserts that the Petitioner's tax returns for the period 2000 through 2007 reflect both its growth and profitability; lawyer who discusses USCIS' ability to pay requirements; and the President of who reports that Petitioner's 2000 through 2007 tax returns reflect a "viable and sustainable business" and demonstrate its ability to pay the proffered wage. These three statements, the Petitioner maintains, represent professional business judgments that should be considered as evidence.

To establish its ability to pay in an employment-based immigration proceeding, a petitioner must demonstrate its ability to pay the proffered wage to the beneficiary as of the visa petition's priority date, which in this case is October 26, 1987,[2] until the beneficiary obtains lawful permanent resident status. 8 C.F.R. § 204.5(g)(2). Here, however, the Petitioner is claiming to be a successor-in-interest to the business that filed the labor certification, requiring it to demonstrate that company's ability to pay the proffered wage from the October 26, 1987, priority date until December 31, 1999,

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[1] The Petitioner on motion does not contest our determination that it has not established its ability to pay the proffered wage under the requirements at 8 C.F.R. § 204.5(g)(2). Nevertheless, it asserts that we abused our discretion in requiring it to establish that the adjusted gross income reflected on the Forms 1040 filed by sole proprietor in 1990 and 1991 was sufficient to cover not only the proffered wage but also his household expenses in those years. However, unlike a corporation, a sole proprietorship is not legally separate from its owner and, therefore, the owner's income, assets, and personal liabilities are considered in determining his or her business' ability to pay. Accordingly, to establish an ability to pay the proffered wage, sole proprietors must show that they can cover their existing business expenses as well as pay the proffered wage out of adjusted gross income or other available funds. Further, they must prove that they can sustain themselves and their dependents. *See Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Therefore, while the adjusted gross income reported on the 1990 and 1991 returns exceeded the proffered wage of $10,316.80 in both of these years, requiring the Petitioner to establish that this income was also sufficient to cover the monthly expenses of owner was neither arbitrary or capricious, but reflective of the factors routinely considered when assessing a sole proprietorship's ability to pay. Accordingly, we do not accept the Petitioner's assertion that our reasoning with regard to the tax returns filed by owner in 1990 and 1991 was an abuse of discretion.

[2] The priority date of a visa petition is the date on which the petitioner filed the underlying labor certification with DOL.

the date on which the Petitioner claims to have purchased it, and its own ability to pay the proffered wage from that date onward.

However, the record does not reflect the Petitioner's acquisition of on December 31, 1999, or at any point thereafter, which, as previously discussed, prevents it from proving the transfer of ownership required to establish a successor relationship. Moreover, without a transfer of ownership, there is no way to calculate the respective proffered wage obligations of and the Petitioner, i.e., no way to determine the date on which proffered wage obligation ended and the Petitioner's began. Accordingly, without evidence of the its purchase of the Petitioner cannot establish its ability to pay in this matter.

Even if we were to accept December 31, 1999, as the date on which the Petitioner acquired the record, which contains only two Forms 1040 filed by owner, offers insufficient proof that the totality of circumstances establish its ability to pay the proffered wage from the priority date to December 31, 1999. No documentary evidence establishes years of operation, or that it had the type of business history and industry reputation that supported the approval of the visa petition in *Sonegawa*. Moreover, the Forms 1120S, U.S. Income Tax Returns for an S Corporation, covering the period 2000 through 2008, submitted by the Petitioner as proof of its own financial history do not demonstrate that it has experienced consistent financial growth since its founding, and no evidence has been provided to explain the declines in the company's income that are reflected in its tax returns for 2002 and 2003, as well for 2006 and 2007.[3] Accordingly, even if the record established the Petitioner's purchase of and therefore the point at which proffered wage obligation ended and the Petitioner's began, the factors that led USCIS to approve the visa petition in *Sonegawa* are not present in this case.

With regard to the Petitioner's argument that USCIS has already found it to have established its ability to pay the proffered wage from the October 26, 1987, priority date to 2006, in light of the January 4, 2006, approval of an earlier Form I-140 based on the labor certification, we note that we are not bound by a director's prior decision. We are not required to approve applications or petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not be

[3] The decline in the Petitioner's income in 2006 and 2007 coincides with a change in its name on its Forms 1120S for those years to which is not explained by the record. Although the FEIN reflected on these returns remains the Petitioner's, the Petitioner has indicated that it did not acquire the name until it reincorporated in 2008. However, Virginia State Corporation Commission records reflect that the Petitioner was purged on June 30, 2012, indicating that, as of that date, its existence or registration had been canceled, revoked, terminated or withdrawn for a period of more than five years, a period coinciding with the change of its name on its 2006 and 2007 tax returns. *See* https://cisiweb.scc.virginia.gov/instant.aspx (last accessed August 10, 2017). Accordingly, in any future proceedings, the Petitioner should provide an explanation for its use of the name on its tax returns prior to its 2008 reorganization.

bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at *2 (E.D. La. 2000).

For the reasons just noted, the record does not demonstrate the Petitioner's ability to pay in this matter and, therefore, that it is eligible for the visa petition in all respects, as required to establish its status as a successor to

In that the record establishes neither the transfer of ownership between and the Petitioner, nor their respective abilities to pay the proffered wage, the Petitioner has not demonstrated that it is a successor-in-interest to Accordingly, it may not rely on the underlying labor certification in this matter and we will deny the motion to reconsider on this basis.

III. CURRENTLY DOING BUSINESS

We previously dismissed the Petitioner's appeal, in part, because the Virginia State Corporation Commission stated that the Petitioner's operations had been terminated as of April 30, 2007. Where a corporation fails to file an annual report, "the corporate existence of the corporation shall automatically cease." Va. Code Ann. §13.1-914. We further found that the record did not establish the entity the Petitioner had claimed as its reorganized business, as its successor-in-interest for immigration purposes.

On motion, the Petitioner asserts that we have erred in finding that it is no longer in operation as of April 30, 2007. It renews its argument that it and the name under which it reincorporated on December 10, 2008, are the same corporation, "in essence and substance," and that this fact is established by use of the same FEIN and business license numbers, and its location at the same address.

In support of this claim, the Petitioner has submitted a letter from it former accountant who states that and the Petitioner are the same company. He indicates that the Petitioner was required to reincorporate as it had not paid the required 2008 registration fee or filed an annual report and "reinstatement was not a valid option due to the length of time-lapse."[4] The Petitioner's former accountant also states that the reincorporation "was only done to correct procedural mistakes, not to establish a new business or to evade any corporate obligations."

The Petitioner also points to the evidence it previously submitted to establish its ongoing business operations after April 30, 2007, including a 2008 Form 1120S for which reflects the same FEIN; 2007 and 2008 Forms VA-6, Employer's Annual or Final Summary of Virginia Income Tax Withheld Returns, for the businesses licenses issued

[4] The Virginia State Corporation Commission's website states that reinstatement for a terminated business may be requested within five years of the date of termination, raising questions regarding this claim. *See* http://www.scc.virginia.gov/clk/rein.aspx) (last accessed August 10, 2017).

to it by [redacted] in 2007 and to [redacted] in 2008 and 2009; workers compensation and insurance policies for the years 2006 to 2010; and its telephone, recycling and trash bills from 2007 and 2008.

However, this evidence does not establish that [redacted] is a successor-in-interest to the Petitioner for immigration purposes. In addition, a review of Virginia business records finds that [redacted] was "purged" on June 30, 2015, and, like the Petitioner, is no longer in business.[5]

Pursuant to the Commonwealth of Virginia State Corporation Commission website, when a business entity is purged, "then its existence or registration has been canceled, revoked, terminated or withdrawn for a period of more than 5 years and, under Virginia law, the entity is not eligible for reinstatement or restoration." *See* https://www.scc.virginia.gov/clk/ReinReq.aspx (last accessed August 10, 2017). Accordingly, we will affirm our previous finding that the Petitioner is no longer in business.

The evidence in the record does not establish that the Petitioner is still in business or that there exists a successor-in-interest for the company. Therefore, the motions will also be denied for this reason. Even if a motion could be otherwise approved, the approval of the petition would be subject to automatic revocation as a result of the termination of the Petitioner's business. *See* 8 C.F.R. § 205.1(a)(iii)(D).

IV. BENEFICIARY'S QUALIFYING EXPERIENCE

A petitioner must establish that a beneficiary satisfies all of the educational, training, and experience requirements of the offered position set forth on the labor certification by the priority date of the visa petition. 8 C.F.R. § 103.2(b)(1). *See 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).

In this case, the labor certification requires the Beneficiary to have six months of experience in the offered position of sewing machine operator. To establish that the Beneficiary had such experience as of the priority date, the Petitioner initially submitted a "Certificate of Career," dated November 10, 2005, from [redacted] which reflects that he employed the Beneficiary from December 6, 1986, until November 30, 1989, at the [redacted] in [redacted]

Our appeal decision discussed that an overseas investigation into the Beneficiary's work experience reported that [redacted] stated that he had never employed the Beneficiary. We found that the Petitioner's submission of an October 18, 2019, statement purportedly from [redacted] in which he retracted his earlier comments regarding the Beneficiary did not overcome the findings of the investigation. In his statement, [redacted] maintained that he had believed the telephone inquiry he had received regarding the Beneficiary was a prank call and that he had, therefore, told the caller that

[5] This same review found the Petitioner to have been purged as of June 30, 2012.

he did not understand what he was being asked and had hung up, giving the "wrong impression." also indicated that he had suffered an intracerebral hemorrhage in April 2006, which had left him exhausted and "weak of mind." He further asserted that, although U.S. immigration officials claimed to have come to see him in person and to have shown him a photograph of the Beneficiary, he was never visited by a U.S. immigration official or shown any photograph.

The Petitioner argues that our determination that there was insufficient evidence to establish the Beneficiary's qualifying experience was both erroneous and "highly prejudicial," and that we have failed to recognize the "flaws inherent in the . . . investigation."

However, as indicated on appeal, the certificates from do not resolve the doubts cast on the Beneficiary's qualifying experience. The Petitioner has not established through independent objective evidence (including, but not limited to, payroll, tax, or other records) to establish that history. *See Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, October 18, 2009, statement contains additional inconsistencies relating to his claim of having employed the Beneficiary during the relevant time period. Although, indicates in his declaration that the Beneficiary worked for him from December 6, 1986, to November 30, 1989, as a repair technician, he also states that he ran only from "1989 to 2006." Therefore, he could not have employed the Beneficiary since December 6, 1986.

We also find that, although the record contains medical evidence establishing that suffered an intracerebral hemorrhage, it does not support his claim that his medical condition should be viewed as a factor in his response to the overseas inquiry regarding the Beneficiary's employment history. While the Petitioner has submitted a printout of online information on intracerebral hemorrhage that reports a range of outcomes that can result from a stroke, the 2009 medical certificate found in the record does not identify how intracerebral hemorrhage affected him.

Further, although the Petitioner asserts that we must recognize the flaws inherent in the overseas investigation of the Beneficiary's employment history, it does not identify these flaws beyond noting claim that he was never visited by a U.S. immigration officer and shown a photograph of the Beneficiary. Our dismissal of the appeal, did not, however, state that was ever visited by any official, only that he was provided with a photograph of the Beneficiary and indicated that he did not recognize her.

Given these unresolved inconsistencies in the record, we conclude that the Petitioner has not established that the Beneficiary has the six months of experience as a sewing machine operator required by the labor certification.

V. CONCLUSION

The motion to reopen will be denied because the Petitioner has not alleged new facts or submitted supporting documentary evidence. The motion to reconsider will also be denied because the Petitioner has not demonstrated that it that it continues to do business, that it is a successor-in-

interest to the business entity that filed the labor certification, that it has the ability to pay the Beneficiary the proffered wage, or that the Beneficiary has the required employment experience to qualify for the offered position.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of C&SM-*, ID# 432940 (AAO Aug. 14, 2017)