U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13721956

Date: FEB. 16, 2021

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an educational services provider, seeks to employ the Beneficiary as a software engineer. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, "EB-3" category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that it was the successor-in-interest to the entity that filed the labor certification.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews the questions in this matter *de novo*. *See Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will withdraw the decision of the Director. The matter is remanded for the entry of a new decision consistent with the analysis below.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id*. Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id*.

If DOL approves a position, an employer must next submit the certified labor application 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 requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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. ANALYSIS

A. Procedural History

The underlying labor certification was filed on June 30, 2009, by [redacted] FEIN (Federal Employer Identification Number) [redacted].[1] [redacted] timely filed an immigrant petition with the labor certification seeking to employ the Beneficiary as an IT engineer under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). That immigrant petition was approved on July 23, 2010.

Following the approval of the immigrant petition, [redacted] underwent a name change and a subsequent reorganization. In 2013, [redacted] changed its name to [redacted] and retained its FEIN. In 2017, [redacted] was purchased by [redacted] and merged into [redacted] subsidiary, [redacted]. After the merger with [redacted] all [redacted] operations were transferred to the Petitioner, [redacted], FEIN [redacted].

On May 28, 2019, the Petitioner filed the instant petition with the underlying labor certification filed by [redacted] The petition requests a change in classification of the Beneficiary to the third-preference, immigrant classification for professional workers. The cover letter accompanying the petition states that it is a "Successor-in-Interest/Amendment" petition. On the petition, the Petitioner lists its company name as [redacted], an [redacted] company," with FEIN [redacted].

After issuing a request for evidence (RFE) seeking additional documentation of the successor-in-interest relationship between [redacted] and the Petitioner, the Director denied the petition. The Director stated that inconsistencies in the record suggested that the 2017 transaction was a merger of [redacted] and the Petitioner into [redacted] with [redacted] as the parent company. However, the Director found that the Petitioner did not establish a connection to the original entity, [redacted], because it did not submit evidence of the 2013 name change from [redacted] to [redacted] The Director also stated that the evidence indicates that [redacted] purchased [redacted] and reassigned employees to the Petitioner, but that the Petitioner did not demonstrate that it "purchased the business units, essential rights, duties, assets, and obligations from the predecessor," [redacted] Therefore, the Director concluded that the Petitioner did not establish that it was a successor-in-interest to [redacted]

On appeal, the Petitioner asserts that the Director did not consider all of the documents in the record, including evidence of the 2013 name change submitted with the initial filing. The Petitioner further asserts that the Director did not apply the correct standard to determine successorship, which does not require a purchase of the predecessor by the successor.

[1] The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d).

B. Successor-In-Interest

A valid successor-in-interest relationship exists if three conditions are satisfied. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). First, the successor must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must establish by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id.*

The record includes multiple documents to describe the reorganization of [redacted] including evidence of the 2013 name change; Security and Exchange Commission filings detailing the 2017 transaction between [redacted] and [redacted]; the Agreement and Plan of Merger detailing the transaction between [redacted], [redacted], [redacted] and the Petitioner; evidence of the assignment of [redacted] contracts, employees, leases, and trademark rights to the Petitioner; and evidence to demonstrate that the Petitioner continues to operate in the same business and location as [redacted]

In his decision the Director cites to *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) and *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980), stating that the Petitioner's counsel's claims that it is the successor to [redacted] do not constitute evidence. Although the Director lists many of the above documents in his decision, he does not acknowledge the evidence of the name change that was already in the record, nor does he specifically identify which documents resulted in the noted inconsistencies. Further, the Director does not cite to *Matter of Dial Auto* or discuss the analysis of the three conditions outlined in that precedent decision in either the RFE or his decision.

The Director appears to have strictly interpreted *Matter of Dial Auto* to limit a successor-in-interest finding to cases where a petitioner shows that it "purchased" the original employer's rights, duties, obligations, and assets. However, *Matter of Dial Auto* does not stand for the proposition that a valid successor relationship may only be established through a purchase of a predecessor entity's rights, duties, and obligations.

The Petitioner cites to a 2009 USCIS memorandum that provided a definition for "successor-in-interest" and recognizes that corporate transactions take varying forms. Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Successor-in-interest Determinations in Adjudication of Form I-140 Petitions; Adjudicator's Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* (Aug. 6, 2009), http://www.uscis.gov/legal-resources/policy-memoranda (Neufeld Memorandum). The Neufeld Memorandum states, "The transfer of the ownership of the predecessor to the successor may occur through a merger, acquisition or reorganization … The structure of business transactions resulting in the transfer of ownership of the predecessor to the successor vary from case to case."

We agree with the Petitioner that a "purchase" is not required to create a valid successorship. However, a mere transfer of assets, even one that takes up a predecessor's business activities, does not necessarily create a successor-in-interest. *See Holland v. Williams Mountain Coal Co.*, 496 F.3d 670, 672 (D.C. Cir. 2007). The transfer of assets from a predecessor will only result in a successor-in-interest relationship if the parties agree to the transfer and assumption of the essential rights and

obligations of the predecessor necessary to carry on the business.[2] *See generally* 19 Am. Jur. 2d *Corporations* § 2170 (2010). As noted above, the Petitioner was not required to purchase all of [redacted]'s assets, liabilities, and responsibilities in order to establish a valid successor-in-interest relationship. Instead, the transfer must have included the *bona fide* acquisition of the essential rights and obligations of the predecessor necessary to carry on the business.

Because the Director did not consider all of the evidence the Petitioner submitted to properly apply the three-prong test of *Matter of Dial Auto* and to specifically identify inconsistencies in the record, we will withdraw the Director's decision. We will remand the matter to the Director to request additional evidence, if deemed appropriate, and analyze the record to determine whether the business transaction between [redacted] and [redacted] (including the merger with [redacted] and assignment of assets to the Petitioner) creates a valid successor-in-interest relationship between [redacted] and the Petitioner. The Director should consider whether the Petitioner has established each of the conditions of *Matter of Dial Auto*, including whether the job opportunity offered by the Petitioner is the same as the job opportunity originally offered on the labor certification, and whether the Petitioner has established eligibility for the immigrant visa in all respects.[3] *See Matter of Dial Auto*, 19 I&N Dec. at 482.

ORDER: The Director's decision is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

[2] The mere assumption of immigration obligations, or the transfer of immigration benefits derived from approved or pending immigration petitions or applications, will not give rise to a successor-in-interest relationship unless the transfer results from the *bona fide* acquisition of the essential rights and obligations of the predecessor necessary to carry on the business. *See* 19 Am. Jur. 2d *Corporations* § 2170; *see also* 20 C.F.R. § 656.12(a).

[3] The successor must prove the predecessor's ability to pay the proffered wage as of the priority date and until the date of transfer of ownership to the successor. In addition, the successor must establish its ability to pay the proffered wage from the date of transfer of ownership forward. *See* 8 C.F.R. § 204.5(g)(2).