U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 08364245

DATE: MAY 21, 2020

Motion on Administrative Appeals Office Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a semiconductor manufacturer, seeks to employ the Beneficiary as a component design engineer. It requests professional classification for the Beneficiary under the third preference immigrant category. 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" immigrant classification 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. The Director determined that the Petitioner did not establish that it is the successor-in-interest to the company that filed the labor certification, and therefore could not use the labor certification in support of its petition.

The Petitioner filed an appeal, which we summarily dismissed on the grounds that it did not identify specifically any erroneous conclusion of law or statement of fact in the unfavorable decision and was not supported by any brief or additional evidence. The Petitioner filed a combined motion to reopen and motion to reconsider, pointing out that a brief and additional documentation had actually been timely submitted in support of the appeal. These materials, along with evidence of their timely delivery, were resubmitted with the motion(s). Accordingly, we will reopen this proceeding and consider the Petitioner's appeal on the merits.

In visa petition proceedings it is the petitioner's burden to establish eligibility for the requested benefit. See section 291 of the Act, 8 U.S.C. § 1361. The Petitioner asserts that the evidence of record establishes its successor-in-interest relationship with the company that filed the labor certification, and therefore its eligibility for the requested immigration benefit.

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

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved 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). 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 and that employing a foreign national in the position will not adversely affect the wages and working conditions of U.S. workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the

Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national may 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 petition for a professional must generally include a valid, individual labor certification. *See* 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid only for the particular job opportunity, the particular beneficiary, and the area of intended employment stated on the document. *See* 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. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). *Dial Auto* discussed three factors that must be considered in determining whether a valid successor-in-interest relationship exists between the labor certification employer and the I-140 petition employer. As interpreted and refined by USCIS in a subsequent policy memorandum (the "Neufeld Memorandum" in 2009)[1] which revised the Adjudicator's Field Manual, the three factors that must be demonstrated by a petitioner claiming to be the successor-in-interest to the labor certification employer are the following: (1) the job opportunity offered by the petitioner must be the same as that originally offered on the labor certification; (2) the petitioner must establish its eligibility for the immigration benefit in all respects, including the eligibility of the labor certification employer such as its ability to pay the proffered wage as of the date the labor certification application was filed with the DOL; and (3) the petitioner must fully describe and document the transfer of ownership from the labor certification employer and its assumption by the petitioner. In this case only the third factor is at issue.

The record shows that the labor certification application for the proffered position of component design engineer was filed by [redacted], a wholly owned subsidiary of the Petitioner, in December 2015. After its approval by the DOL in April 2016 the labor certification was initially submitted to USCIS with an immigrant visa petition filed by [redacted] in September 2016 requesting advanced degree professional classification for the Beneficiary. That petition was approved in May 2017. The Petitioner states that it filed the current I-140 petition, supported by the same labor certification, because there is greater immigrant visa availability for beneficiaries in the EB-3 classification (which includes professionals) than in the EB-2 classification (which includes advanced degree professionals).

When the instant petition was filed in late December 2018 the Petitioner was in the midst of a plan to liquidate and absorb [redacted] its wholly owned subsidiary organized in 2011. In a letter accompanying the petition the Petitioner explained that it was taking this measure to simplify and streamline business operations, better align its resources, and facilitate the access of transferred employees (including the Beneficiary, who had worked for [redacted] since December 2015) to all required intellectual property and

[1] 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; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* (August 6, 2009), http://www.uscis.gov/legal-resources/policy-memoranda.

[redacted] confidential information. As evidence of the transaction between itself and [redacted] the Petitioner submitted some documentation with the petition and in response to a request for evidence which, in the Director's judgement, "did not indicate that [the Petitioner] acquired the essential rights, duties, assets, and obligations necessary to carry on the business in the same manner of the employer ([redacted]) listed on the labor certification." Accordingly, the Director concluded that the record did not establish that the Petitioner is the successor-in-interest to [redacted] that the labor certification obtained by [redacted] could not be used to support the current petition, and that the petition must be denied because it was not supported by a valid labor certification.

On appeal, and again on motion, the Petitioner submits additional documentation relating to its transaction with [redacted] For the reasons discussed hereinafter, we conclude that the Petitioner has still not fully described and documented the alleged transfer of ownership of [redacted] and its business operations to the Petitioner.

The record includes copies of the following documents relating to the Petitioner's transaction with [redacted]

- An email communication in December 2018 from an HR director in [redacted] to all employees of [redacted] under the subject "Upcoming Legal Entity Change" advising them that "effective January 1, 2019, all employees of [redacted] will be moved into [redacted] or in a small number of cases into [redacted]" The email further advised: "For those with pending immigration actions or immigration status: Since this is an internal reorganization, in most cases little to no action will be needed to maintain your work authorization or permanent residency process. . . ."

- An "Affidavit of Immigration Successorship" signed by the Petitioner's U.S. immigration operations manager and dated December 17, 2018, stating that it "addresses immigration successorship in general, and the elements of H-1B successorship in particular . . . arising from the reorganization of [redacted] and its wholly-owned subsidiary, [redacted]." The affidavit stated, in pertinent part, that: "Whereas on or about January 1, 2019, [redacted] is reorganizing [redacted] resulting in the transfer of [redacted] employees into [redacted]. . . [and] the employment of the Transferring Employees will not change in any respect material for non-immigrant status or steps in the permanent residence process . . . [and] [redacted] wishes to be a successor for all immigration-related duties and obligations of the Transferring Employees . . . Now therefore . . [redacted] assumes all rights, obligations, liabilities and undertakings related to [redacted] sponsorship of immigrant and non-immigrant processes of the Transferring Employees."

- A [redacted] (EIN: [redacted]" signed by [redacted]'s president and dated December 30, 2018, stating that as of the effective date of January 1, 2019, [redacted] and its officers were authorized to take all necessary steps to wind up [redacted]'s business with the intention of completely liquidating and dissolving the company. The Plan charged [redacted] with settling its

liabilities and distributing its assets to a holding company [redacted] in a series of distributions to be concluded no later than three years after the close of the taxable year of the first distribution. The Plan also has a provision allowing [redacted]'s board of directors to "modify, amend, or abandon this Plan and the transactions contemplated hereby without further action by the [holding company].

- A "[redacted]" signed by three directors of [redacted] and dated December 30, 2018, declaring that the terms and conditions of the Plan for Complete Liquidation were approved, that the process of liquidation and subsequent distribution of assets would begin immediately and be completed as soon as practicable, and that "any officer of [redacted] . . . is authorized to execute and deliver the Plan and any such modifications, additions and deletions in the Plan as are deemed, in their sole discretion, necessary, appropriate, or advisable by such officer[s] . . ."

- A "Certificate" signed by [redacted]'s secretary and dated January 24, 2019, stating that the Liquidation Resolutions of December 30, 2018, "have not been amended, modified, revoked or rescinded and remain in full force and effect as of the date hereof."

- Invoices dated March 11 and March 30, 2019, which the Petitioner asserts document the transfer of assets from [redacted] to the Petitioner pursuant to the Liquidation Resolutions.

While the foregoing materials indicate an intention by the Petitioner and [redacted] to liquidate the subsidiary and absorb its business into the parent's operations, the record contains no definitive contract or other agreement between the two companies to effectuate this transaction. As explained in the Neufeld Memorandum on page 8, contractual agreements or other arrangements between two or more business entities to conduct business together or provide services to each other, without the transfer of the ownership of one to another, do not create a valid successor-in-interest relationship for the purposes of an I-140 petition. In this case, moreover, the liquidation plan signed by [redacted]'s president on December 30, 2018, gave [redacted]'s board of directors specific authority to "modify, amend, or abandon this Plan and the transactions contemplated hereby." The unanimous consent resolution of [redacted]s directors that same date confirmed that any one of them was authorized to make modifications, additions and deletions to the Plan. Thus, the liquidation of [redacted] and its absorption into the Petitioner remained subject to unilateral reversal by [redacted].[2] While [redacted]'s secretary certified on January 24, 2019, that the liquidation resolutions of December 30, 2018, had not been amended, modified, revoked, or rescinded as of that date, they remained subject to such action by [redacted] any time thereafter. The Petitioner cites the invoices of March 2019 as evidence that asset transfers from [redacted] to the Petitioner were occurring pursuant to the liquidation plan. The invoices do not state, however, that the asset transfers were pursuant to a liquidation plan. All of the invoices contain the notation:

[2] As another element of uncertainty, the liquidation plan provided for the transfer of [redacted]'s assets to a holding company, [redacted], without further explanation as to how or when the assets would be transferred to the Petitioner.

"Refer to inter-company contract for payment terms." No such inter-company contract is in the record to clarify the context of the invoices. While the record includes copies of earnings statements issued to the Beneficiary which show that he was on the Petitioner's payroll by January 2019, that fact simply shows that the Beneficiary had a change of employer, not that the Petitioner was [redacted]'s successor-in-interest. According to publicly available sources [redacted] continues to exist as a subsidiary of the Petitioner.

Thus, the Petitioner has not fully described and documented the alleged transfer of ownership of [redacted]'s business to the Petitioner. We conclude, therefore, that the Petitioner has not satisfied all three factors discussed in *Matter of Dial Auto* and the Neufeld Memorandum to establish that it is the successor-in-interest to the labor certification employer [redacted]. Accordingly, the labor certification obtained by [redacted] cannot be used to support the instant petition.

III. CONCLUSION

Since the petition is not supported by a valid labor certification, it cannot be approved. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.