U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-J-C-, INC.

DATE: MAY 24, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a restaurant operator, seeks to employ the Beneficiary as a food service manager. It requests his classification as a skilled worker under the third-preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based category allows a U.S. business to sponsor a foreign national with at least two years of training or experience for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition and the Petitioner's following motion to reopen. The Director found that the record did not establish the Petitioner as a successor in interest to the employer stated on the accompanying labor certification. He therefore concluded that, contrary to regulations, the petition lacked a valid labor certification.

On appeal, we affirmed the Director's decision. We also found that the record did not establish the Beneficiary's possession of the experience required for the offered position. The matter is before us again on the Petitioner's motions to reopen and reconsider. On motion, the Petitioner asserts that we erred in our prior decision.

Upon review, we will deny the motion to reopen and motion to reconsider.

I. LAW

A. Motion Requirements

A motion to reopen is based on documentary evidence of *new facts*, and a motion to reconsider is based on an *incorrect application of law or policy*. 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.

B. Employment-Based Immigration

Employment-based immigration generally follows a three-step process. First, an employer files a labor certification application with 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). The DOL must certify that the United States lacks able, willing, qualified, and available workers for an offered position, and that employment of a foreign national will not hurt the wages and working conditions of U.S. workers with similar jobs. *Id.* If the DOL approves the labor certification application, the employer then files an immigrant visa petition with United States Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, 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. Motion to Reopen

Because the filing lacks the submission of new facts or additional evidence, we will deny the motion to reopen. *See* 8 C.F.R. § 103.5(a)(2) (requiring affidavits or other documentary evidence to support a motion to reopen).

B. Motion to Reconsider

On motion, the Petitioner urges reconsideration of its claimed successorship in interest to the labor certification employer and the Beneficiary's qualifying experience. For the following reasons, the record does not establish an incorrect application of law or policy or the Beneficiary's qualifications for the benefit sought. We will therefore also deny the motion to reconsider.

1. The Petitioner's Claimed Successorship in Interest

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

A petitioner may use another employer's labor certification if the petitioner establishes itself as a successor in interest that acquired the rights and obligations needed to continue the prior employer's business. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor in interest must: 1) fully describe and document its acquisition of a predecessor's business; 2) demonstrate that, but for the change in employers, the job opportunity remains the same; and 3) otherwise qualify for the petition's approval. *Id.* at 482-83. Qualifying for the petition's approval includes demonstrating the predecessor's ability to pay the proffered wage from the petition's priority date until the predecessor's transfer of the business, and the successor's ability to pay thereafter.[1] *Id.*

[1] In this case, the petition's priority date is the date DOL received the labor certification application for processing. *See*

In our appellate decision, we found that the Petitioner did not fully describe and document its acquisition of the rights and obligations needed to continue operating the labor certification employer's restaurant. The record contains a copy of a written agreement, documenting the Petitioner's 2013 purchase of the restaurant's furniture, equipment, and fixtures. But the agreement does not indicate the Petitioner's acquisition of other restaurant necessities, such as a deed or lease for kitchen and dining space. The record therefore does not document the Petitioner's acquisition of the rights and obligations needed to continue the restaurant's business.

On motion, the Petitioner interprets our finding as faulting it for not assuming the debts and liabilities of the labor certification employer. Our decision noted that the agreement appears to contradict the Petitioner's claim that it "inherited" the employer's debt. But the Petitioner need not establish its assumption of the employer's debts and liabilities. As discussed above, we find only that the Petitioner did not establish its acquisition of the essential rights and obligations needed to operate the employer's restaurant.

We also found that the Petitioner did not establish its job opportunity as the same one stated on the labor certification. On motion, the Petitioner states that the job duties of the offered position remain the same as the original job opportunity. Our finding, however, did not focus on the job's duties. Rather, we found that the record lacked evidence of the Petitioner's continued operation of a restaurant in the geographical area of intended employment stated on the labor certification.

On reconsideration, however, we note that the Petitioner's payroll and tax records indicate its operation of a restaurant from the worksite stated on the labor certification. Payroll records indicate the Petitioner's employment of "cooks," "wait staff," and "bussers." Its address on its tax records also matches the worksite on the labor certification employer. A preponderance of the evidence therefore establishes the Petitioner's job opportunity as the same one stated on the labor certification.

In addition, our decision found that the record did not establish the continuing abilities of the Petitioner and the labor certification employer to pay the proffered wage from the petition's priority date of June 26, 2008. *See* 8 C.F.R. § 204.5(g)(2). Specifically, we found insufficient evidence of the labor certification employer's ability to pay from 2009 through 2011, and the Petitioner's ability to pay from 2013, the year it purchased assets of the restaurant.

On motion, the Petitioner asserts that it has paid the Beneficiary the proffered wage "for quite some time. So there is no reason why the petitioner cannot continue to do so."

On reconsideration, we find that the record establishes the Petitioner's ability to pay the proffered wage of $19.46 an hour in 2013. For a 40-hour work week, the proffered wage constitutes $778.40 a week. In 2013, a copy of an IRS Form W-2, Wage and Tax Statement, indicates that the Petitioner paid the Beneficiary $20,500. Thus, during the 14 weeks remaining in 2013 after the Petitioner's

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8 C.F.R. § 204.5(d).

September 28 purchase of restaurant assets, the Form W-2 indicates weekly payments of more than $1,400. The record therefore establishes the Petitioner's ability to pay in 2013.

Beyond 2013, the record lacks required evidence of the Petitioner's ability to pay the proffered wage. *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 Petitioner submitted a copy of IRS Form 8879-S, *e-file* Signature Authorization for Form 1120S, for 2014. Although containing a summary of the company's annual financial information, this form does not constitute part of the tax returns the Petitioner submitted to the Internal Revenue Service (IRS). On its top, the form states: "Don't send to the IRS. Keep for your records." Thus, contrary to 8 C.F.R. § 204.5(g)(2) , the record does not contain required evidence of the Petitioner's ability to pay beyond 2013.

Also, as previously indicated, the record does not establish the labor certification employer's ability to pay the proffered wage in 2009 through 2011. Therefore, the record does not establish the continuous abilities of the Petitioner and the labor certification employer to pay the proffered wage from the petition's priority date onward.

Thus, the record on motion establishes the Petitioner's job opportunity as the same one stated on the labor certification. But the record does not establish the Petitioner's acquisition of the rights and obligations needed to continue the labor certification employer's business, or the continuing abilities of it and the labor certification employer to pay the proffered wage. The record therefore does not establish the Petitioner as a successor in interest to the employer, or the validity of the labor certification. We will therefore affirm our appellate decision.

2. The Beneficiary's Qualifications

The record on motion also does not establish the Beneficiary's qualifications for the offered position of food service manager. A petitioner must establish a beneficiary's possession of all the education, training, or experience stated on a labor certification by a petition's priority date. *See, e.g., Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). In this case, the labor certification states the minimum requirements of the offered position as 24 months in the job offered.

On the labor certification, the Beneficiary attested that, by the petition's priority date, he gained more than seven years of full-time, qualifying experience. The Beneficiary stated that he worked more than five years as a food service manager for the labor certification employer, from November 2002 to June 2008. He also stated that another U.S. restaurant employed him for two years, from April 1995 to May 1997.

A petitioner must support a beneficiary's claimed qualifying experience with a letter from an employer. 8 C.F.R. § 204.5(l)(3)(ii)(A). The letter must provide the employer's name, address, and title, and describe the beneficiary's experience. *Id.*

Here, the record contains two letters from the other U.S. restaurant. Both letters, issued on the same date with the same signatory, state the restaurant's employment of the Beneficiary from April 1995 to May 1997. One letter states the Beneficiary's employment as the restaurant's manager. The other, however, identifies his position as cook. The discrepancy in the Beneficiary's position casts doubt on his claimed qualifying experience in the job offered. *See Matter of Ho*, 19 I&N Dec. 582, 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence).

Also, with his application for adjustment of status, the Beneficiary submitted a Form G-325A, Biographic Information. Contrary to the Beneficiary's attestation on the labor certification, the Form G-325A states his employment as a manager from April 1995 to May 1997 by both the other U.S. restaurant and the labor certification employer. In addition, the Beneficiary submitted a letter from the labor certification employer in support of his adjustment application. Contrary to the Beneficiary's attestation, the 2013 letter states the labor certification employer's employment of him as manager since 1992. These additional, unexplained discrepancies in the Beneficiary's employment history cast further doubts on his claimed, qualifying experience.

On motion, the Petitioner denies that the letters from the other U.S. restaurant state inconsistent jobs. Because managers often perform other restaurant duties as needed, the Petitioner asserts that, as manager of the other U.S. restaurant, the Beneficiary could have served as a cook because of another worker's unavailability or an increased workload at the restaurant.

The record, however, lacks independent, objective evidence to support the Petitioner's assertion that the Beneficiary served the other U.S. restaurant as both a manager and cook. Also, the Petitioner must demonstrate the Beneficiary's possession of at least 24 months of experience in the offered position of food service manager. If the Beneficiary spent part of his tenure at the other U.S. restaurant as a cook, then he may lack the required 24 months of experience in the job offered. The record does not indicate the amount of time the Beneficiary spent working as a cook. The record therefore does not establish the Beneficiary's possession of the qualifying experience with the other U.S. restaurant.

For the foregoing reasons, the record on motion does not establish the Beneficiary's possession of the experience required for the offered position.

III. CONCLUSION

The Petitioner's motion to reopen lacks required evidence. The Petitioner's motion to reconsider does not persuade us of the labor certification's validity or the Beneficiary's qualifications for the offered position.

ORDER: The motion to reopen is denied.

FURTHER ORDER: The motion to reconsider is denied.

Cite as *Matter of K-J-C-, Inc.*, ID# 274828 (AAO May 24, 2017)