U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF K-T- INC.

DATE: SEPT. 12, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of clothing and silk-screen services, seeks to employ the Beneficiary as a sales representative. It requests his classification under the third-preference, immigrant category as a skilled worker. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a position requiring at least two years of training or experience.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish the validity of the accompanying certification from the U.S. Department of Labor (DOL). Specifically, the Director found that the Petitioner did not demonstrate its claimed status as a successor in interest of the employer listed on the labor certification.

On appeal, the Petitioner asserts that evidence of its acquisition of assets and liabilities of the labor certification employer demonstrates its successorship. It also contends that the job opportunity remained continuously available from the filing of the application for labor certification onward.

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

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, an employer must first obtain DOL certification. *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, a prospective 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 requirements of a certified 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, 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 remains valid only for the particular job opportunity stated on it. 20 C.F.R. § 656.30(c)(2).

A petitioner may use another employer's labor certification if it establishes itself as the business'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) fully describe and document its acquisition of the rights and obligations needed to operate a predecessor's business; 2) demonstrate that, but for the change in employer, the job opportunity remains the same as stated on the labor certification; and 3) establish the petition's approvability, including the continuous abilities of the predecessor and the successor to pay the position's proffered wage from the petition's priority date onward.[1] *Id.* at 482-83; Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*, HQ 70/6.2, 3 (Aug. 6, 2009).

A. The Acquisition of the Employer's Business

Here, the DOL certified the offered position in 2008. The following year, USCIS approved a petition for the Beneficiary by the labor certification employer.[2] The Petitioner filed this petition in 2014, asserting that it acquired all of the employer's assets and liabilities. The Petitioner states that, from 2007 through 2009, it bought the employer's assets and, upon the employer's corporate dissolution in November 2010, absorbed the company's operations. The Petitioner's president/sole shareholder owned the labor certification employer, which was also a clothing company. Because of the common ownership, the Petitioner states that it did not draft a written merger agreement between the two corporations.

As proof of its acquisition of the employer's business, the Petitioner submitted documentation of its claimed asset purchases and assumption of liabilities. A copy of a September 2007 invoice indicates that the employer sold a silk-screen machine and other equipment to the Petitioner for $104,032. Also, a copy of the employer's federal income tax returns for 2009 indicates its $188,642 sale of a knitting machine and additional assets to the Petitioner. In addition, the Petitioner asserts that its federal tax returns for 2010 show its assumption of $96,712 in losses accumulated by the employer.

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[1] This petition's priority date is January 2, 2008, 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 labor certification has not expired. Pursuant to 20 C.F.R. § 656.30(b)(1), the employer filed the document in support of the prior petition within 180 days of its certification.

Contrary to the Petitioner's claim, however, the evidence does not demonstrate its acquisition of all the assets of the labor certification employer. The employer's 2009 tax return indicates that the company began the year with $888,432 in total assets, including "Buildings and other depreciable assets." The record does not explain how the Petitioner's purchase of $188,642 in equipment that year constituted acquisition of all of the employer's assets. Also, the record does not establish the Petitioner's purchase of all the assets needed to continue the employer's business, as required to demonstrate successorship. *See* Neufeld Memo, at 8 (requiring evidence "that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor"). The Petitioner has demonstrated its purchase of some of the employer's assets, but it has not demonstrated its acquisition of all the employer's assets as its claims, or the assets required to continue the employer's business as required for successorship.

The record also does not establish the Petitioner's claimed acquisition of liabilities of the labor certification employer. As the Petitioner states, its federal tax return for 2010 reflects its deduction of $96,712 in net operating losses. *See* U.S. Internal Revenue Serv. (IRS), Instructions to Form 1120, 15, https://www.irs.gov/pub/irs-pdf/i1120.pdf (last visited Aug. 24, 2018) (explaining that a corporation can use net operating losses in one tax year to reduce its taxable income in another). The record, however, does not indicate that the Petitioner's deduction included losses of the employer. "Statement 3" of the return indicates that the Petitioner offset its profits with losses from three years: 2007; 2008; and 2009. The Petitioner's 2009 tax returns indicate that it, rather than the employer, incurred the 2009 loss. Because the employer's 2007 tax return reflects a profit, the record also indicates that the Petitioner incurred the 2007 loss.[3] In addition, the Petitioner has not demonstrated its eligibility to include the employer's losses in its deductions of net operating losses. *See* 26 U.S.C. § 382 (stating limitations on carryforwards of net operating losses after ownership changes).

On appeal, the Petitioner notes the intention of the Neufeld memo "to allow flexibility for the adjudication of I-140 petitions that present novel yet substantiated and legitimate successor in interest scenarios." Neufeld memo, at 2. The Petitioner argues that the petition's denial reflects USCIS' lack of flexibility and disregard of evidence of "a transfer of real assets and liabilities from the predecessor to the successor."

The Neufeld memo stressed flexibility by clarifying that a successor need not acquire *all* of a predecessor's assets and liabilities. Neufeld Memo, at 3. The Petitioner here, however, claims that it acquired all of the assets and liabilities of the labor certification employer. Moreover, pursuant to the memo, we have flexibly considered whether the Petitioner demonstrated its acquisition of only the rights and obligations needed to operate the employer's business. As discussed above, the evidence of record does not meet this more flexible standard. In addition, the Neufeld memo still requires a successor to fully explain and document its acquisition of a predecessor's business. As previously indicated, the Petitioner has neither documented its claimed assumption of the employer's

[3] The record lacks tax returns or other financial documentation of either company for 2008. The record therefore does not indicate which company generated the reported loss that year.

liabilities, nor fully explained the significance of its purchases of the company's assets. The Petitioner's argument therefore does not change our opinion. For the foregoing reasons, the record does not fully explain or document the Petitioner's acquisition of rights and obligations needed to carry on the employer's business.

B. The Job Opportunity

As previously indicated, a successor must demonstrate that, but for the change in employer, the job opportunity remains the same as stated on the labor certification. Under USCIS policy, "[t]he job opportunity must also remain valid and available" from the filing of the labor certification application onward. Neufeld Memo, at 6. "[T]he original job opportunity ceases to exist if, at any time prior to the transfer of ownership, the predecessor ceases business operations entirely or, even partially so that the alien beneficiary's services are no longer required." *Id.*

Here, the record does not establish the continuous availability of the offered position. The labor certification employer designated its 2009 tax return as its "final return," indicating that it terminated its business that year. *See* IRS, "Closing a Business Checklist," https://www.irs.gov/businesses/small-businesses-self-employed/closing-a-business-checklist (last visited Aug. 24, 2018) (instructing a company to file a final return "[f]or the tax year in which your business ceases to exist"). Also, the Petitioner's president/sole shareholder stated that the employer applied for a certificate of dissolution almost a year before the document's issuance. Dated and signed by the president on December 31, 2009, the certificate attests that, by that date, the employer had paid its debts and liabilities, and had distributed its assets. If the employer terminated its business, paid its debts, and distributed its assets in 2009, the record does not explain why the employer required the services of a full-time sales representative in 2010 before the purported merger in November. The Petitioner's president stated that the employer did not close its business until the end of 2010, but the record does not explain the contrary information on the employer's final tax return and certificate of dissolution. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner asserts that a job opportunity remains available if a successor reaffirms the job offer. This assertion, however, ignores USCIS policy requiring the *continuous* availability of a job opportunity. *See* Neufeld Memo, at 6. Thus, contrary to USCIS policy, the record does not establish the continuous availability of the offered position from the filing of the labor certification onward.

C. Ability to Pay the Proffered Wage

Although unaddressed by the Director, the record also does not establish the Petitioner's claimed successorship because the company has not otherwise demonstrated the petition's approvability. Specifically, the record does not demonstrate the continuous abilities of the labor certification employer and the Petitioner to pay the proffered wage of the offered position.

A petitioner must demonstrate its continuing ability to pay a proffered wage, from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.* A petitioner claiming successorship of a labor certification employer must demonstrate the employer's ability to pay the proffered wage from the petition's priority date until the acquisition of the employer's business, and the petitioner's ability to pay the proffered wage thereafter. *See Matter of Dial Auto*, 19 I&N Dec. at 482.

Here, the labor certification states the proffered wage of the offered position of sales representative as $20.84 an hour, or $43,347.20 a year based on a 40-hour work week. As previously noted, the petition's priority date is January 2, 2008.

The record contains copies of the federal tax returns of the labor certification employer for 2005, 2006, 2007, and 2009. Contrary to 8 C.F.R. § 204.5(g)(2), however, the record lacks required evidence of the employer's ability to pay the proffered wage in 2008, the year of the petition's priority date. The record therefore does not establish the employer's ability to pay the proffered wage from the priority date.

Also, USCIS records indicate that both the labor certification employer and the Petitioner filed immigrant petitions for other beneficiaries. A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). The employer and the Petitioner here must therefore demonstrate their abilities to pay the combined proffered wages of their petitions that were pending or approved as of this petition's priority date of January 2, 2008, or filed thereafter, until the beneficiaries obtained lawful permanent residence.[4] *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming our revocation of a petition's approval where, as of the filing's grant, a petitioner did not demonstrate its ability to pay the combined proffered wages of multiple petitions).

To establish its claimed successorship, the Petitioner must, in any future filings in this matter, submit copies of the labor certification employer's annual report, federal tax returns, or audited financial statements for 2008. The Petitioner must also provide the receipt numbers, proffered wages, and priority dates of the companies' other petitions that were pending or approved as of January 2, 2008, or filed thereafter. The Petitioner may also submit additional evidence of the companies' continuous abilities to pay the proffered wages, including documentation of wages paid to beneficiaries in relevant years and in support of the factors stated in *Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967).

[4] The Petitioner need not demonstrate the abilities of it and the employer to pay the proffered wages of petitions that were denied, withdrawn, or revoked without a pending appeal or motion. It also need not demonstrate the abilities of it and the employer to pay the proffered wages of petitions before their individual priority dates.

III. CONCLUSION

The record on appeal does not establish the Petitioner as a successor in interest of the labor certification employer. The petition therefore lacks a valid labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of K-T- Inc.*, ID# 1758224 (AAO Sept. 12, 2018)