U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF H-, INC.

DATE: SEPT. 15, 2017

APPEAL OF TEXAS SERVICE CENTER DECISION

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

The Petitioner, a holding company, seeks to employ the Beneficiary as an Indian specialty chef. It requests classification of the Beneficiary 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 immigrant classification allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of training or experience.

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

On appeal, the Petitioner states that the corporate reorganization of the labor certification employer as its subsidiary demonstrates that a successor-in-interest relationship has been established.

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 ETA Form 9089, Application for Permanent Employment Certification (labor certification) from the U.S. Department of Labor (DOL).[1] *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, 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 domestic workers similarly employed. 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.

[1] The date the labor certification is filed, in cases such as this one, is called the "priority date."

II. ANALYSIS

The labor certification in this case was filed on February 26, 2014, by [redacted] with a Federal Employer Identification Number (FEIN) of [redacted] The subsequent Form I-140 was filed on December 21, 2015 by [redacted] (FEIN [redacted]. The actual corporate name of the entity with this FEIN is [redacted]

A labor certification is only valid for the particular job opportunity stated on the application form. 20 C.F.R. § 656.30(c). If the Petitioner is a different entity than the employer listed on the labor certification, the Petitioner must establish that it is a successor-in-interest to that entity. Successor-in-interest determinations are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

Establishing a successor-in-interest relationship under *Matter of Dial Auto* is a three-part test.[2] First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id.*

The Director's decision denying the petition concluded that the labor certification employer and the Petitioner are separate corporate entities, and that the Petitioner did not establish that it is a successor-in-interest to the labor certification employer.

On appeal, the Petitioner states that the labor certification employer is a Qualified Subchapter S Subsidiary (QSSS) of [redacted] through a corporate reorganization on May 1, 2006. Therefore, [redacted] the labor certification employer, is a wholly-owned subsidiary of [redacted] the Petitioner. We note that this corporate reorganization occurred several years prior to the filing of the labor certification.

Specifically, the Petitioner states that [redacted] owned two Indian restaurants that were separate corporate entities, one of which was [redacted] the labor certification employer. In May 2006, the two restaurants became wholly-owned subsidiaries of the newly-formed [redacted] the Petitioner. The two subsidiary restaurants were designated as qualified subchapter S subsidiaries and they continued to do business.

The Petitioner states that its IRS Form 1120S for 2006 constitutes evidence of the reorganization in which [redacted] became a subsidiary of [redacted] and establishes the successor-in-

[2] *See also* Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, Successor-in-interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37). HQ 70/6.2 AD 09-37, August 6, 2009.

interest relationship between the Petitioner and the labor certification employer. The footnote to statement 1 on the 2006 Form 1120S states that it is a short year return due to a corporate reorganization and that became a QSSS of

The Petitioner cites a Virginia Department of Taxation, Tax Commissioner Ruling, which states that "a qualified subchapter S subsidiary is not treated as a separate entity for federal taxation purposes and will not have any federal taxable income" and that the subsidiary "will continue its legal existence and business activities in the Commonwealth of Virginia." *See Commonwealth of Virginia*, 1997 WL 584684, at *2. This ruling also states that "[f]or federal income tax purposes, the Parent will be considered the owner of all the Taxpayer's assets and liabilities." *Id.*

A QSSS is a subsidiary corporation wholly owned by an S corporation that has made a valid election for the subsidiary. I.R.C. § 1361(b)(3)(B). A QSSS is not treated as a separate corporation *for federal income tax purposes*. Treas. Reg. § 1.1361-4(a)(1)(i) (2008); *see also* I.R.C. § 1361(b)(3)(A)(i). All assets, liabilities, and items of income, deduction, and credit of the QSSS are treated as assets, liabilities, and items of income, deduction, and credit of the parent S corporation. Treas. Reg. § 1.1361-4(a)(1)(ii) (2008); *see also* I.R.C. § 1361(b)(3)(A)(ii). There is no separate federal income tax return for a QSSS. Its operations are reported in the parent S corporation's federal income tax return.

However, a QSSS is treated as a separate entity for federal employment taxes. Treas. Reg. § 1.1361-4(a)(7). Accordingly, the QSSS is responsible for employment taxes on wages paid to its employees and satisfying its other employment tax obligations. *Id.* A QSSS also remains a separate entity under state law.

In short, a QSSS is not treated as a separate entity for federal income tax purposes but nonetheless continues its legal existence as a separate entity for other purposes.

The corporate reorganization that the Petitioner claims gives rise to a successor-in-interest relationship occurred several years prior to the filing of the labor certification. Therefore, there was no transaction that occurred between the filing of the labor certification and the petition that would support a successor-in-interest claim. Further, while this reorganization resulted in special treatment for federal income tax purposes, the Petitioner has not established that there has been an actual transfer of the essential rights and obligations of to in all other respects to establish a successor-and-interest relationship.

Therefore, the record does not establish that the Petitioner stated on the Form I-140 is a successor-in-interest to the labor certification employer.

III. CONCLUSION

The appeal will be dismissed because the Petitioner has not established that it is the same entity as, or a successor-in-interest to, the employer that filed the labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of H-, Inc.*, ID# 510958 (AAO Sept. 15, 2017)