U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 21035673

Date: AUG. 09, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a computer software company, seeks to employ the Beneficiary as a Staff Front End QA Engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner, [redacted] did not establish that it was the successor-in-interest to the entity that originally filed the labor certification. Further, the Director determined that the Petitioner had not established the prior entity's ability to pay the Beneficiary's proffered wage from the priority date of February 3, 2015, through the claimed date of acquisition nor the Petitioner's ability to pay the proffered wage until the Beneficiary obtains lawful permanent residence.

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 dismiss the appeal.

I. LEGAL FRAMEWORK

Immigration as an advanced degree professional usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to establish that there are not sufficient U.S. workers who are available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant classification, and that the employer has the ability to pay the proffered wage. See 8 C.F.R. § 204.5. These requirements must be satisfied by the priority date of

the immigrant visa petition. See 8 C.F.R. § 204.5(g)(2), *Matter of Wing's Tea* House, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d). Third, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

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.

Finally, "[t]he 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." 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.

II. ANALYSIS

The underlying labor certification was filed on February 3, 2015, by [redacted] FEIN (Federal Employer Identification Number) [redacted], filed an immigrant petition with this labor certification seeking to employ the Beneficiary 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 November 9, 2015, with a priority date of February 3, 2015.[1] Following the approval of the immigrant petition [redacted] claims that it acquired 100% of the issued and outstanding shares of [redacted] and pursuant to that acquisition, the [redacted] the Petitioner in this case, assumed all immigration liabilities of the affected [redacted] employees.[2] On November 25, 2020, the Petitioner filed the instant petition with the underlying labor certification filed by [redacted] Pursuant to 8 C.F.R. § 204.5(e), the Petitioner requested approval of its petition with the priority date accorded to the previously approved [redacted] petition. In general, 8 C.F.R. § 204.5(e) accords noncitizens beneficiaries of approved second preference petitions the priority date of the approved petition for any subsequently filed petition within the section 203(b)(1), (2), or (3) classifications. If the noncitizen is the beneficiary of multiple approved petitions under section 203(b)(1), (2), or (3) of the Act, the noncitizen is entitled to the earliest priority date. 8 C.F.R. § 204.5(e). Accordingly, the Petitioner requested that the instant petition be approved and that it retain the priority date of February 3, 2015, from the previously approved [redacted] petition.

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

The Director issued a request for evidence (RFE) seeking additional documentation of the successor-in-interest relationship between [redacted] and the Petitioner. In the RFE, the Director explained that USCIS was unable to determine: (1) whether [redacted] merged into the Petitioner; (2) if [redacted] continued to exist and do business; (3) whether only employees transferred to the Petitioner, rather than an actual transfer and assumption of ownership of [redacted] to the Petitioner; and (4) when the claimed transfer and assumption of ownership of [redacted] occurred. Accordingly, the Director specifically requested the Articles of Acquisition to address the transfer of liability of [redacted] employees to the Petitioner.[3]

In support of the Petitioner's claims to have "assumed the essential rights, duties, assets, and obligations necessary to carry on the business in the same manner" as the employer listed on the labor certification, the RFE response included the following documents:

- Several media articles about the Petitioner's plans to acquire [redacted] One July 2016 media article stated that it was not yet clear "if [redacted] will continue to operate independently once the deal is completed, as there has been no reassurance from the company that existing customers will factor into [the Petitioner's] plans for the technology. [redacted] employees and office headquarters however, will be retained;"
- A Certificate of Merger for the merger of [redacted] with and into [redacted] filed with the Secretary of State of the state of Delaware to include an amended and restated Certificate of Incorporation of [redacted];
- A Common Stock Purchase Agreement between [redacted] and the Petitioner for 100% of [redacted] shares;
- A Form I-797 for a blanket L petition for the Petitioner dated February 20, 2019, and showing [redacted] as a subsidiary of the Petitioner;
- a Form 10K annual report for the Petitioner for the fiscal year ending January 31, 2017; and
- Three 2021 pay statements for the Beneficiary showing that the Petitioner is paying the Beneficiary more than the proffered wage.[4]

The RFE response further included a statement from Counsel that "following the acquisition of [redacted] in 2017," the Petitioner's ability to pay the Beneficiary continued. After receiving the Petitioner's RFE response, the Director denied the petition. The Director's decision explained that:

- The Certificate of Merger for the merger of [redacted] with and into [redacted] showed a merger between [redacted] and [redacted] but it was not evidence of the transfer or assumption of ownership of [redacted] by the Petitioner;
- The Common Stock Purchase Agreement executed between [redacted] and the Petitioner was not evidence of the transfer or assumption of ownership of [redacted] by the Petitioner;
- Several documents showed that [redacted] is a wholly owned subsidiary of the claimed successor and that it continues to exist and conduct business;
- The Petitioner submitted no evidence that it acquired a discrete business unit or units of [redacted]; and

[3] The Director also stated that based on the evidence provided, USCIS was unable to determine whether [redacted] had the ability to pay the Beneficiary from the priority date to the date of the claimed transfer and assumption of ownership.
[4] The Petitioner did not provide the previously requested Articles of Acquisition.

- [redacted] appeared to continue to exist and conduct business and that as such, the record did not support a finding that a valid successor-in-interest relationship existed for immigration purposes.

On appeal, the Petitioner continues to assert that a valid transfer of ownership occurred. In support, the Petitioner provides a letter from its Chief Financial Officer (CFO) asserting that "[the Petitioner] acquired [redacted] on August 5, 2016 and assumed all rights, duties, obligations, and assets (including immigration assets and liabilities) of [redacted] and will continue to operate the same kind of business. [redacted] no longer exists as a separate entity and all employees who worked for [redacted] were offered positions [with the Petitioner]. . . . "

We conclude that without supporting evidence to corroborate the CFO's claims, the letter is not sufficient evidence that a valid transfer of ownership took place. The CFO's letter does not adequately address the concerns laid out in the Director's decision. In other words, the successor has not fully described and documented the transfer and assumption of the ownership of the predecessor by the successor, as required per Matter of Dial Auto Repair Shop, Inc., 19 I&N Dec. 481 (Comm'r 1986). In addition, we question why the Petitioner has not submitted more substantial evidence of the claimed successor-in-interest transaction, such as the requested Articles of Acquisition. Without an adequate explanation or supporting evidence of the structure of the claimed acquisition transaction, the Petitioner has not met its burden. The burden of proof in these proceedings rests solely with the Petitioner. Section 291 of the Act, 8 U.S.C. § 1361.

Furthermore, we note that the Petitioner previously stated in its RFE response that the acquisition occurred in 2017, whereas on appeal, the Petitioner asserts that the acquisition occurred on August 5, 2016. The Petitioner must resolve this inconsistency in the record with independent, objective evidence pointing to where the truth lies. Matter of Ho, 19 I&N Dec. 582, 591-92 (BIA 1988). Based upon the evidence in the record, the date in which the claimed acquisition took place continues to remain unclear. Although the Petitioner requested approval of the instant petition and that it retain the priority date of February 3, 2015, from the labor certification of the previously approved [redacted] petition, the evidence does not establish when or how the claimed acquisition took place.

As the identified basis for rejecting the appeal is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve the arguments regarding Platfora, Inc. and the Petitioner's ability to pay from the priority date onward. See INS v. Bagamasbad, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); see also Matter of L-A-C-, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not established that it became [redacted] successor-in-interest. Therefore, the labor certification that [redacted] obtained cannot be used in support of this petition. Accordingly, the petition is not supported by a labor certification, as required.

ORDER: The appeal is dismissed.