U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27917121

Date: AUG. 8, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a provider of financial technology services, seeks to permanently employ the Beneficiary as a business IT (information technology) architect. The company requests his classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an advanced degree or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). Prospective employers can sponsor noncitizens for permanent residence in this category to work in jobs requiring at least bachelor's degrees followed by five years of progressive experience in the specialty. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").

The Director of the Nebraska Service Center denied the petition. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) does not correspond to the Petitioner's job offer. On appeal, the company contends that the Director erred in finding that it did not establish itself as the "successor in interest" of the business that filed the labor certification.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has not demonstrated its claimed successorship. We will therefore dismiss the appeal.

I. LAW

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C. § 1154(a)(1)(F). Among other things, USCIS determines whether a noncitizen beneficiary meets the

requirements of a DOL-certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(k)(3); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

Finally, if USCIS approves a petition, a beneficiary 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

Unless accompanied by an application for Schedule A designation or evidence of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the noncitizen, particular job opportunity, and geographic employment area stated on it. 20 C.F.R. § 656.30(c)(2).

A prospective employer may not use another business's labor certification for the same noncitizen unless the employer establishes itself as the business's successor in interest. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986). To establish successorship, a petitioner must demonstrate its acquisition of the rights and obligations needed to operate a predecessor's business or a discrete part of it. *See generally* 6 *USCIS Policy Manual* E.(3)(6), www.uscis.gov/policy-manual. A successor must: 1) fully describe and document how it acquired ownership of a predecessor's business; 2) demonstrate that, except for the employer change, it offers the same job opportunity described on the labor certification; and 3) establish eligibility for the requested benefit in all respects, including the continuous ability of it and a predecessor to pay the offered position's proffered wage. *Id.* at E.(3)(F).

The Petitioner filed the petition in November 2021. In an addendum to the Form I-140, Petition for Alien Workers, the company asserted its assumption of the business operations of [redacted] the Beneficiary's former employer that filed the accompanying labor certification. The petition included a copy of a press release stating that, in July 2019, the Petitioner's parent corporation acquired [redacted] parent corporation. Copies of an employee services agreement and addendum indicate that, effective January 2021, the Petitioner began treating the Beneficiary and his former [redacted] colleagues as the Petitioner's employees. A letter from an official of the Petitioner's parent corporation described the Petitioner as "the successor-in-interest for immigration filings by [the parent]."

The evidence did not establish the Petitioner as [redacted] successor. So, the Director issued the Petitioner a request for additional evidence. In response, the Petitioner submitted a letter from a company official and copies of press releases, news articles, payroll records, and filings with the U.S. Securities and Exchange Commission (SEC) regarding the merger of the parent companies of the Petitioner and [redacted]

The letter from the company official asserts that the Petitioner "assumed the assets and liabilities, including employees, of [redacted]" The employee services agreement, its addendum, and payroll records indicate that the Petitioner began employing former [redacted] workers. The record, however, lacks evidence that the Petitioner acquired any other assets and liabilities needed to operate [redacted] business.

On appeal, the Petitioner contends that USCIS disregarded evidence of its claimed successorship of [redacted]. The Petitioner states that its parent corporation "assumed all assets, rights, and obligations of [redacted]" and that it "assumed the business operations of the entity when it became the legal entity employer of [redacted] employees."

But, contrary to successorship requirements, the employee services agreement does not indicate the Petitioner's acquisition of all rights and obligations needed to operate [redacted] business. Under the agreement, in exchange for fees, the Petitioner provides its parent "with all employee services and staffing resources necessary for the [parent's] day-to-day operation and management" of [redacted] business and those of other affiliates. The agreement does not transfer any other rights, liabilities, or obligations to the Petitioner. Thus, neither the employee services agreement nor any other document of record indicates a transfer of [redacted] ownership to the Petitioner.

The Petitioner also contends that, to in considering the company's claimed successorship, USCIS mistakenly required the Petitioner to demonstrate that [redacted] ceased existence. The record, however, does not support the Petitioner's contention. The Director noted that, after the Petitioner's corporate parent acquired [redacted] parent, [redacted] continued to separately exist from the Petitioner. But the Director mentioned [redacted] continued existence in describing its relationship to the Petitioner as an affiliate. The Director did not base the petition's denial on [redacted] continued existence.

Although unaddressed by the Director, the record also casts doubt that the Petitioner's parent legally received [redacted] assets and liabilities in July 2019. SEC filings show that the transaction involved a "reverse triangular merger" under Delaware law. *See* SEC, www.sec.gov. The documents show that the Petitioner's parent targeted [redacted] parent by creating a wholly owned subsidiary to merge with it, and, upon merger, the subsidiary immediately dissolved, leaving [redacted] parent as the wholly owned subsidiary of the Petitioner's parent. Under Delaware law, however, such mergers do not transfer any assets or liabilities from the surviving entities. The Delaware Court of Chancery held that, unless a transaction agreement includes a contrary provision, a reverse triangular merger under Delaware law does not result in assignment of a targeted company's assets. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 88 (Del. Ch. 2013).[1] The court found that "[t]he vast majority of commentary discussing reverse triangular mergers" agrees that "the rights and obligations of the target are not transferred, assumed or affected." *Id.* at 83 (quoting *Lewis v. Ward*, No. Civ.A 15255, 2003 WL 22461894 *4 n.18 (Del. Ch. Oct. 29, 2003)). Thus, for this additional reason, the record does not establish the Petitioner's ownership interest in [redacted]

The Petitioner did not receive notice of, or an opportunity to respond to, this additional finding. Thus, in any future filings in this matter, the company should address whether its parent legally received [redacted] assets/liabilities in the July 2019 transaction.

[1] The Delaware Court of Chancery, a non-jury trial court, does not issue precedential decisions. But the court "is widely recognized as the nation's leading authority on corporate law issues." *Simmonds v. Credit Suisse Secs. (USA) LLC*, 638 F.3d 1072, 1089 (9th Cir. 2011), *vacated on other grounds*, 566 U.S. 221 (2012), *remanded to* 678 F.3d 1139 (9th Cir. 2012) (citing William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law 351 (1992)).

III. CONCLUSION

The Petitioner has not established itself as a successor of the business that filed the labor certification application. We therefore affirm the filing's denial for lack of a valid labor certification.

ORDER: The appeal is dismissed.