



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 1286716

Date: MAY 16, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Other Worker

The Petitioner, an operator of pizza restaurants, seeks to employ the Beneficiary as a food service worker. The company requests her classification under the third-preference, immigrant visa category for “other workers.” *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii).

The Director of the Texas Service Center denied the petition. The Director concluded that the Petitioner did not demonstrate the *bona fides* of its job offer or, in obtaining the accompanying certification from the U.S. Department of Labor (DOL), the company’s compliance with posting-notice requirements.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will withdraw the Director’s decision and remand the matter for entry of a new decision consistent with the following analysis.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an “other,” or unskilled, worker generally follows a three-step process. First, a prospective employer must apply to DOL for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) employment of a noncitizen in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, an employer must submit an approved 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 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(l).

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. THE POSTING-NOTICE REQUIREMENTS

The Director did not cite proper legal authority allowing him to deny the petition based on the Petitioner's alleged violation of DOL, posting-notice regulations. We will therefore withdraw that portion of the decision and remand the matter.

On remand, if citing proper authority for the potential denial ground, the Director may make further findings or inquiries regarding the Petitioner's notice of the labor certification filing to its employees at the proposed worksite. *See* 20 C.F.R. § 656.10(d)(1).

III. THE BONA FIDES OF THE JOB OFFER

Although most of the Petitioner's employees work part-time at its restaurants, a preponderance of evidence supports the company's claimed, full-time employment of its Form I-140 beneficiaries at the proposed worksite. Thus, the record sufficiently demonstrates the Petitioner's intent to employ the Beneficiary in the offered position on a permanent, full-time basis. We will therefore withdraw the Director's contrary finding.

IV. THE VALIDITY OF THE LABOR CERTIFICATION

Although unaddressed by the Director, the record does not establish the continuing validity of the accompanying labor certification.

A petitioner must establish eligibility "at the time of filing the benefit request and must continue to be eligible through adjudication." 8 C.F.R. § 103.2(b)(1). Unless accompanying an application for Schedule A designation or documentation of a beneficiary's qualifications for a shortage position, a petition for an "other worker" must include a valid, individual labor certification from DOL. 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid for the "particular job opportunity," noncitizen, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2).

The petition and accompanying labor certification identify the Petitioner as the Beneficiary's prospective employer by name, address, and federal employer identification number (FEIN). In October 2018, however, counsel notified USCIS of changes in his address and in the Petitioner's name. Counsel's submission included a copy of a "certificate of merger" from the office of the Texas Secretary of State. The certificate states that, effective December 25, 2017 - three days after this appeal's filing - the Petitioner merged with another Texas limited liability company (LLC). An accompanying "certificate of merger of domestic entities" describes the other LLC as the merger's surviving entity.

Under Texas law, "[w]hen a merger takes effect, the separate existence of each domestic entity that is a party to the merger, other than a surviving or new domestic entity, ceases." Tex. Bus. Orgs. § 10.008(a)(1). Thus, the merger certificates indicate that the Petitioner, as the non-surviving entity, ceased existence on the transaction's effective date of December 25, 2017. Because the certificates indicate that the Petitioner no longer exists, the record does not demonstrate the continuing validity of the "particular job opportunity" listed on the accompanying labor certification.

A surviving LLC may seek permission to permanently employ the Beneficiary in the offered position under the accompanying labor certification if the LLC establishes itself as the Petitioner's "successor in interest." *See Matter of Dial Auto*, 19 I&N Dec. 481 (Comm'r 1986). A successor must have acquired the rights and obligations needed to carry on a labor certification employer's business or a discrete part of it. A successor must: 1) fully describe and document the transaction(s) by which it acquired all, or a relevant part of, the predecessor's business; 2) demonstrate that the job opportunity, except for the change of employer, remains the same as stated on the labor certification; and 3) prove its eligibility for the requested beneficiary in all respects, including the continuous ability of it and the predecessor to pay the proffered wage from the petition's priority date onward. *Id.* at 482-83.

The record, however, does not establish the surviving LLC as the Petitioner's successor. The copies of the merger certificates document a transfer of ownership between the entities. But the certificate of merger of domestic entities refers to an "Agreement and Plan of Merger" dated December 1, 2017. The record lacks a copy of this document. The evidence therefore does not fully describe and document a transfer of ownership from the Petitioner to the surviving LLC.

The record also does not demonstrate that the job opportunity remains the same. The record lacks evidence that the surviving LLC intends to employ the Beneficiary in the offered position of food service worker at the same location and at the same proffered wage proposed by the Petitioner. Additionally, the record lacks required evidence of the surviving LLC's ability to pay the position's proffered wage after the December 2017 merger. The record therefore does not establish eligibility for the requested benefit in all respects.

Further, USCIS records indicate the Agency's receipt of three Form I-140 petitions listing a FEIN matching the one on this petition and accompanying labor certification but filed by an entity with a different name and address than the Petitioner and the surviving LLC.¹ The FEIN discrepancy casts doubt on the Petitioner's identity. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record).

For the foregoing reasons, the record does not establish the continuing validity of the labor certification. Neither we nor the Director notified the Petitioner of the doubts cast on the validity of the "particular job opportunity." Thus, on remand, the Director should inform the Petitioner of this additional, potential denial ground and ask the company or a successor to explain the listing of the Petitioner's apparent FEIN on the filings of another entity and to demonstrate the continuing validity of the "particular job opportunity."

V. CONCLUSION

The record does not sufficiently support the Director's denial of the petition based on posting notice requirements or the *bona fides* of the job offer. But the Petitioner has not established the continued validity of the accompanying labor certification.

¹ USCIS records identify the filer as [REDACTED] and the three petitions by the following receipt numbers: [REDACTED], [REDACTED], and [REDACTED].

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.