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U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF N- INC.

DATE: JAN. 13, 2017

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a producer of mobile devices, sought to permanently employ the Beneficiary as a senior manager, patent licensing, under the first preference immigrant classification for multinational executives or managers. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C). This classification allows a U.S. employer to permanently transfer a qualified foreign employee to the United States to work in an executive or managerial capacity.

The Director, Nebraska Service Center, denied the petition, concluding that the evidence of record did not establish that: (1) the intending U.S. employer still has a qualifying relationship with the Beneficiary's former foreign employer; and (2) the Beneficiary was employed abroad, and will be employed in the United States, in a managerial or executive capacity. By the time the Director denied the petition, the Petitioner had ceased to exist. a separate but related entity, appealed the decision.

We withdrew the Director's decision and remanded the petition back to the Director for a new decision on two issues: (1) whether a qualifying relationship existed between the petitioner and the foreign employer between July 2009 and July 2012; and (2) whether the beneficiary qualifies for portability under section 204(j) of the Act, 8 U.S.C. § 1154(j). The Director denied the petition a second time, finding that a qualifying relationship did exist during the relevant period, but that the petition could not be approved because: (1) the original job offer no longer exists and therefore section 204(j) of the Act does not apply; and (2) cannot qualify as the Petitioner's successor-in-interest.

The matter is now before us on appeal. In its appeal, asserts that the Director erred by disregarding the provisions of section 204(j) of the Act that allow a beneficiary to change employers when a Form I-485, Application to Register Permanent Residence or Adjust Status, has been pending for more than 180 days.

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

I. LAW

Section 203(b) of the Act states in pertinent part:

> (1) Priority Workers. – Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):
>
> . . . .
>
> (C) *Certain multinational executives and managers.* An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and the alien seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

A United States employer may file Form I-140, Immigrant Petition for Alien Worker, to classify a beneficiary under section 203(b)(1)(C) of the Act as a multinational executive or manager. A labor certification is not required for this classification.

II. ANALYSIS

A petition for a multinational manager or executive must be filed by the U.S. employer that intends to employ the beneficiary. *See* 8 C.F.R. § 204.5(j)(1). The petition must include a job offer from that employer. *See* 8 C.F.R. § 204.5(j)(5). The key issue in this proceeding is whether the petitioner's job offer still exists. For the reasons discussed below, we find that it does not.

A. Chronology

The Petitioner, [redacted] a subsidiary of [redacted] filed its Form I-140 petition on the Beneficiary's behalf on [redacted] 2013. [redacted] months later, on [redacted] 2013, the Beneficiary transferred from [redacted] to a newly incorporated affiliate, [redacted] This transfer resulted from the parent company's decision to stop manufacturing mobile devices and sell its mobile device operation to [redacted] while retaining some of [redacted] staff.

In a sworn statement signed on [redacted] 2013, and notarized the following day, [redacted] global human resources manager at [redacted] stated:

> Effective [redacted], [redacted] . . . initiated a corporate restructuring that will occur over several months, with the ultimate goal of divesting substantially all of our parent company's assets and liabilities in our Devices and Services business

> to Specifically . . . those assets and liabilities that were formerly held by and that are not being divested to were transferred from to on . . . .
>
> As part of the above-referenced corporate restructuring, employees of who are not affiliated with our Devices and Services business became employees of also assumed employment liabilities and obligations for these employees. . . .
>
> assumes all immigration-related obligations, liabilities and undertakings arising from or under the attestations made by as well as the corresponding assets, on behalf of the employees transferring to . . .
>
> As a result, operates as a successor-in-interest employer to for immigration matters with respect to the transferring employees.

On 2014, finalized its purchase of "substantially all of Devices & Services business." The sale resulted in the dissolution of several subsidiaries, including the Petitioner and (the Canadian subsidiary that had employed the Beneficiary from 2008 to 2012). The Local Share Transfer Agreement which formalized the sale in Canada referred to "the Stock and Asset Purchase Agreement . . . entered into as of 2013."

B. Identity of the Petitioner and Successorship-in-Interest

Throughout this proceeding, has maintained that it is the successor-in-interest to at least for immigration purposes. However, we need not explore the successorship issue in greater depth. While there is precedent allowing a successor-in-interest to use a labor certification that pertains to the prior entity,[1] has cited no authority to show that a successor-in-interest can take the place of the prior company within the context of an EB1 Multi-National Executive or Manager petition that has already been filed. A 2009 memorandum addresses this:

> Successor-in-interest determinations are principally relevant to the continuing validity of a labor certification. . . . An employer seeking to classify the alien as an EB1 Multi-National Executive or Manager . . . must file a new I-140 petition and establish the alien's eligibility under the requested category's specific eligibility requirements.

Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2. AD 09-37, 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) 10 (August 6, 2009), http://www.uscis.gov/laws/policy-memoranda.

[1] *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

The quoted passage was also incorporated into the Adjudicator's Field Manual at chapter 22.2(b)(5)(D). has, at various times, cited and quoted other parts of the Neufeld memorandum, but has not addressed the above passage or shown why it does not apply to this case. cannot nullify or supersede USCIS' own policy guidance with a sworn statement declaring that is the successor-in-interest to with authority to assume responsibility for all of then-pending immigration filings.

For the above reasons, we do not recognize as the successor-in-interest to

C. Portability

Section 204(j) of the Act reads as follows:

> **Job flexibility for long delayed applicants for adjustment of status to permanent residence** – A petition under subsection (a)(1)(D) [later redesignated (a)(1)(F)] for an individual whose application for adjustment of status pursuant to section 245 has been filed and remained unadjudicated for 180 days or more shall remain valid with respect to a new job if the individual changes jobs or employers if the new job is in the same or a similar occupational classification as the job for which the petition was filed.

asserts that the dissolution of the petitioning company and the sale of its assets to are not disqualifying factors, because the final sale occurred 186 days after the Petitioner filed the petition and the Beneficiary, on the same day, filed a Form I-485 adjustment application. maintains that the sale and dissolution are moot because of the portability provisions of section 204(j) of the Act.

The Director, in the denial notice, noted that "job offers in Form I-140 petitions are prospective," with eligibility resting on a petitioner's *bona fide* intention to employ a beneficiary upon approval of the petition, and the beneficiary's corresponding *bona fide* intention to work for that petitioner. The Director found that offer to employ the Beneficiary "more likely than not expired on or about December 21, 2013," when transferred the Beneficiary to with the expectation that would soon cease to exist. That transfer occurred 2 months after the adjustment application's filing date, well before the 180 days needed to trigger portability. The Director also noted that, under the terms of the 2009 Neufeld memorandum, *supra*, ' must file a new petition" if it intends to employ the Beneficiary.

quotes a passage from the Neufeld memorandum, *supra* at 10, that reads: "in cases where an alien is eligible for AC21 'portability' pursuant to INA 204(j), a successor entity need not file a new petition on the alien's behalf." also cites a memorandum from William R. Yates, Associate Director for Operations, USCIS, HQPRD 70/6.2.8-P, *Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions*

Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313) (May 12, 2005), http://www.uscis.gov/laws/policy-memoranda. The Yates memorandum indicates that beneficiaries of multinational manager or executive petitions can port to new jobs, even with unrelated employers (*see id.* at 5), and that the change of employment can occur less than 180 days after filing (*see id.* at 6). contends that this memorandum "categorically negates the Adjudicating Officer requirement, there must continue to be a job offer on day 180."

Page 3 of the same memorandum instructs adjudicators to "[r]eview the pending I-140 petition to determine if the preponderance of the evidence establishes that the case is approvable or would have been approvable had it been adjudicated within 180 days." To resolve this somewhat ambiguous wording, the Department of Homeland Security (DHS) recently published a final rule relating to job portability under section 204(j) of the Act, U.S.C. § 1154(j). The rule, effective January 17, 2017, is not yet in effect at the time of this writing, but even if it were, it would not change the outcome of this decision. The preamble to the final rule states: "In final 8 CFR 245.25(a)(2)(ii)(A) and (B), DHS reaffirms that a qualifying immigrant visa petition has to be approved before DHS examines a portability request under INA 204(j)." 81 Fed. Reg. 82398, 82419 (Nov. 18, 2016). The new regulation at 8 C.F.R. § 245.25(a)(2)(ii)(B)(*2*) reads, in part: "The pending petition will be approved if it was eligible for approval at the time of filing and until the alien's adjustment of status application has been pending for 180 days." As noted in the preamble, this regulation "reaffirms" existing policy rather than sets forth a new policy that will not apply before January 17, 2017.

The preamble also states:

> Consistent with current policy and practice, DHS will review the pending petition to determine whether the preponderance of the evidence establishes that the petition is approvable or would have been approvable had it been adjudicated before the associated application for adjustment of status has been pending for 180 days or more.

Id. at 82420. Under the above reasoning, examining the validity of the job offer after the filing date, but before the passage of 180 days, is "[c]onsistent with current policy and practice."

The final rule and its preamble do not directly address the issue of the retraction or termination of a job offer, but the preamble does indicate that "DHS . . . will deny a Form I–140 petition if DHS receives the written withdrawal request, or a business termination occurs, *before* the associated application for adjustment of status has been pending for 180 days." 81 Fed. Reg. 82420 (Nov. 18, 2016).

In this instance, original job offer no longer existed 180 days after the date of filing. The Beneficiary transferred from to on months after the petition's filing date. At that time, arrangements for the sale and dissolution of were already underway. The Beneficiary's transfer occurred for the very reason that everyone involved knew that the company would soon cease to exist as a result of the sale. The

Petitioner has not established that, after the Beneficiary had a *bona fide* intention to return to or that had a *bona fide* intention to re-hire her. The original job offer described in the petition ceased to exist long before the critical 180-day mark, even if continued to exist, on paper, for a few days after the 180th day.

Furthermore, executed its purchase agreement to buy "substantially all of Devices & Services business" on weeks before had even filed this petition. on appeal, states that the Director did not consider "the **possibility** of protracted negotiations, the deal not coming to ultimate fruition, or any other delay common to mergers and acquisitions." In point of fact, the deal did come to fruition.

In any employment-based immigrant petition, there is always some possibility that, due to unforeseen circumstances, the beneficiary will not end up working for the petitioning U.S. employer. USCIS does not deny petitions because a given job offer might, hypothetically, fall through. On the same basis, we will not find that job offer remained valid even after the impending sale had been announced and the Beneficiary had been transferred to All parties involved had an intention and an expectation that the transfer would be permanent and that would soon cease to exist. Those expectations proved correct. Although any number of factors *could* have prevented that result, none actually did.

This disqualifying change of circumstances occurred well before 180 days after the petition's filing date of 2013. The petition had been pending for only months when the Beneficiary transferred from the Petitioner, to and less than a week later, a official executed the sworn statement quoted elsewhere in this decision.

For the above reasons, we find that the original job offer effectively ceased to exist months after the petition's filing date and for this reason, section 204(j) of the Act does not apply here. We also find that the Petitioner no longer exists, and that policy documents quoted above explicitly state that claims of successorship-in-interest do not allow substitution of petitioners within EB1 multinational manager or executive proceedings.

III. CONCLUSION

The petition will be denied and the appeal dismissed for the above reasons. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

Cite as *Matter of N- Inc.*, ID# 129916 (AAO Jan. 13, 2017)