U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF C-T-, INC.

DATE: AUG. 30, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a provider of travel and expense management services, seeks to employ the Beneficiary as a senior software engineer. It requests his classification under the second-preference, immigrant category as a member of the professions holding an advanced degree. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows a U.S. business to sponsor a foreign national with a master's degree, or a bachelor's degree and five years of experience, for lawful permanent resident status.

The Acting Director of the Nebraska Service Center denied the petition, concluding that it lacked a required, valid certification from the U.S. Department of Labor (DOL). The Petitioner acquired the employer listed on the accompanying certification before the filing of the certification application. The Director therefore barred the Petitioner from using the document as the employer's successor in interest.

On appeal, the Petitioner submits additional evidence and asserts that the acquisition's timing did not preclude the Petitioner's successorship. Although the merger occurred before the certification's filing, the Petitioner argues that the Beneficiary remained on the employer's payroll after the submission.[1]

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

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, an employer must first obtain DOL certification. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

[1] The record indicates that the labor certification employer temporarily employed the Beneficiary in nonimmigrant visa status.

If the DOL certifies a position, an employer must next submit the 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. If USCIS approves a petition, a foreign national may finally 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 VALIDITY OF THE LABOR CERTIFICATION

Unless accompanied by an application for Schedule A designation or documentation 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 certification remains valid only for the particular job opportunity stated on it. 20 C.F.R. § 656.30(c)(2). USCIS may deny a petition accompanied by an invalid certification. *See Matter of Sunoco Energy Dev. Co.*, 17 I&N Dec. 283, 284 (Reg'l Comm'r 1979) (affirming denial of a petition accompanied by a certification invalid for the geographic area of intended employment).

A petitioner may use another employer's labor certification if the petitioner establishes itself as the employer's successor in interest. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor must: 1) fully document its acquisition of all or a relevant part of a predecessor; 2) demonstrate that, but for the change in employer, the job opportunity remains the same as certified; and 3) establish the petition's approvability, including the continuous abilities of it and the labor certification employer to pay the proffered wage. *Id.* at 482-83.

Here, the Petitioner documented its acquisition of the labor certification employer, describing the transaction as a "reverse triangular merger." The Petitioner formed a wholly owned subsidiary that merged into the corporation listed as the employer on the certification. The certification employer then survived the transaction as a wholly owned subsidiary of the Petitioner.

The Petitioner is the parent company of the labor certification employer. But the record does not establish the Petitioner as its successor in interest. A "successor" is "a corporation that, through amalgamation, consolidation, or other assumption of interests, is vested with the rights and duties of an earlier corporation." Memorandum from Donald Neufeld, Acting Assoc. Dir., Domestic Ops., USCIS HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5)(AD09-37)* 2 (Aug. 6, 2009) (quoting *Black's Law Dictionary*, 1473 (8th Ed. 2004)). In order to be eligible as a successor, the Petitioner must demonstrate that it is now vested with the rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor. *See id* at 8. The record here does not establish that the Petitioner assumed rights and duties of the labor certification employer. Rather, the labor certification employer appears to have survived the merger intact, continuing its prior business activities with the same rights and obligations it had before the transaction. *See, e.g., Morgan v. Powe Timber Co.*, 367 F. Supp. 1032, 1037 (S.D. Miss. 2005) (citation omitted) (holding that, in a reverse triangular merger, "the rights and obligations of T, the

acquired corporation, are not transferred, assumed or affected"). The Petitioner, therefore, has not demonstrated that it is the successor in interest. We acknowledge that the Petitioner now employs the Beneficiary; however, there is a difference between a change due to a successor-in-interest and simply a change of employer. Without documentation of the transfer of the rights, obligations, and ownership of the predecessor necessary to carry on the business of the predecessor, the new employer is not a successor-in-interest and must obtain its own labor certification from the DOL.

Also, based on the Petitioner's acquisition of the labor certification employer almost two months before the filing of the labor certification application, USCIS policy supports denial of the petition. In a 2010 policy memorandum, the Agency stated:

> USCIS will make successor-in-interest (SII) determinations in Form I-140 petitions supported by an approved labor certification if the transfer of ownership took place *anytime while such application for labor certification was still pending or after the labor certification was approved by the [DOL].*

USCIS Policy Memorandum PM-602-0005.1, *Evaluation of Evidence Submitted with Certain Form I-140 Petitions; Revisions to the Adjudicator's Field Manual (AFM) Chapter 22.2, AFM Update AD11-14* 1 (Dec. 22, 2010), https://www.uscis.gov/legal-resources/policy-memoranda?ftopics_tid=0&page=12 (emphasis added). As such, the timing of the Petitioner's acquisition of the labor certification employer would prevent the Petitioner's use of the labor certification even if it were to demonstrate that it is otherwise the successor in interest.

We note that DOL policy allows a successor to acquire a labor certification employer before the filing of a certification application. *See* DOL, Office of Foreign Labor Certification (OFLC), "OFLC Frequently Asked Questions and Answers," Question #10 under Advertisement Content, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited May 25, 2018). But the acquisition must occur after the completion of recruitment for the job opportunity. *Id.; see also* 20 C.F.R. § 656.17(e) (requiring employers to advertise a job opportunity before filing a certification application).

Here, the record indicates that the Petitioner may have acquired the labor certification employer after the employer completed recruitment for the job opportunity. Assuming the Petitioner's ability during the certification process to establish itself as the employer's successor, it could have filed the certification application using the employer's recruitment. *Id.* Contrary to DOL policy, however, the employer, rather than the Petitioner, filed the application.

Based on the foregoing, the labor certification submitted is not valid for the immigration petition. Unsupported by a valid labor certification, the petition must be denied.

Although unaddressed by the Director, the record also does not establish the labor certification employer's ability to pay the proffered wage. As previously indicated, a successor in interest must establish the continuous abilities of it and the certification employer to pay the proffered wage, from

a petition's priority date until a beneficiary obtains lawful permanent residence. *Matter of Dial Auto Repair Shop*, 19 I&N Dec. at 482.[2] Evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

Here, the labor certification states the proffered wage of the offered position of senior software engineer as $160,000 a year. The Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, indicating that the labor certification employer paid the Beneficiary more than the proffered wage in 2016, the year of the petition's priority date. Without submission of evidence required under 8 C.F.R. § 204.5(g)(2), however, the Form W-2 does not establish the employer's ability to pay.

III. CONCLUSION

The record on appeal does not establish the Petitioner as a successor in interest of the labor certification employer and thus does not demonstrate the certification's validity. We will therefore affirm the Director's decision.

ORDER: The appeal is dismissed.

Cite as *Matter of C-T-, Inc.*, ID# 1215800 (AAO Aug. 30, 2018)

[2] This petition's priority date is November 28, 2016, the date the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).