U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 20828241

Date: JULY 15, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a senior software developer under the third-preference, immigrant classification for professional workers. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based category allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status. The Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers, concluding that the Petitioner did not establish that it was a successor-in-interest to the original petitioning entity. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *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. LAW

Immigration as a skilled worker generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (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 would 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 DOL ETA Form 9089, Application for Permanent Employment Certification (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 noncitizen 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

There are four primarily relevant business entities involved in this case as the Director and the Petitioner have identified: [redacted]; [redacted];

[redacted] doing business as [redacted] (alternatively [redacted] or the Petitioner); and [redacted] HQ).

In 2005, [redacted] acquired all of the corporate stock of [redacted] was a provider of media buying and selling software. When [redacted] purchased 100 percent of [redacted] stock, [redacted] became a wholly-owned subsidiary of the parent corporation.[1] Even though [redacted] was a wholly-owned subsidiary of [redacted] it still remained a separate legal entity under federal laws governing employment taxes with its own Federal Employer Identification Number (FEIN). *See* 26 C.F.R. § 301.7701-2. Six years later, [redacted] filed the labor certification that DOL certified in November of 2011. In the same month of the DOL certification, [redacted] filed an I-140 petition on the Beneficiary's behalf that USCIS approved in May of 2012, and it remains approved today.

In 2020, [redacted] filed a new I-140 petition on the Beneficiary's behalf and the Director issued a request for evidence (RFE) relating to a successor-in-interest relationship and the ability to pay the offered wage. The record contains a letter from an [redacted] finance officer claiming a qualifying transfer occurred in January of 2016 in which all [redacted] employees "were transferred to the [redacted] payroll." The Petitioner offered support for that statement with the Beneficiary's Form W-2, Wage and Tax Statement (W-2) for 2015–2020 and his pay statements covering multiple years. The W-2s listed his employers' names as the following for each year: 2015 as [redacted] 2016 as [redacted] Management Corp.; and 2017–2020 as [redacted] HQ.

The Petitioner has not offered an explanation or evidence that might establish one of these entities is the petitioning entity [redacted] on the Form I-140 filed in 2020. Regarding the Beneficiary's pay statements, those documents cover portions of 2019, 2020, and 2021 calendar years. His pay statements reflect the issuing entity as [redacted] from August of 2019 through August of 2020, and as [redacted] HQ between January of 2021 through October of 2021. No other pay statements are part of the record, for instance during the period in which the Petitioner claims all of [redacted] personnel were transferred to [redacted]

The Director subsequently denied the petition noting the record does not show a "transfer event" between [redacted] and [redacted] The Director further found the purchase of [redacted] stock occurred in 2005 but the labor certification was filed in 2011; well after the [redacted] acquisition. The Director further noted news articles the Petitioner provided showed [redacted] was operating in 2018 and 2019. Based in part on that evidence, the Director indicated it appears the employees may have been transferred from [redacted] to [redacted] for payroll purposes only, but the employees continued to work for [redacted] This led the Director to conclude the Petitioner did not establish a qualifying successor-in-interest relationship between [redacted] and [redacted] The Director also decided that without such a relationship, the labor certification [redacted] obtained could not be used in support of the [redacted] petition, meaning the petition before us in this appeal was not supported by a required labor certification. *See* at 8 C.F.R. § 204.5(a)(2), (l)(3)(i) (requiring, in part, that every petition under this classification be accompanied by an individual labor certification from DOL). The Director included two separate bases for the denial questioning whether the Petitioner had demonstrated which entity was the actual intended employer and relatedly whether a *bona fide* job offer existed.

[1] A wholly-owned subsidiary means one company owns 95 percent or more of the outstanding voting securities of a second company. *See* 15 U.S.C. § 80a-2(a)(43).

On appeal, the Petitioner asserts the Director's requirement for a "transfer event" is not grounded in any authority and is *ultra vires*. The Petitioner notes the only requirements for a successor-in-interest claim are contained within precedent, *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482 (BIA 1986). The Petitioner describes those three main requirements as: (1) documenting the transaction transferring ownership to the new employer; (2) demonstrating the ability to pay the offered wage; and (3) ensuring the job offered by the successor is materially similar as the position depicted on the labor certification. We note that a petitioner must demonstrate all three of these elements to establish it is a valid successor-in-interest, and the failure to meet one can result in an adverse determination. The Petitioner also discusses whether the job offer is *bona fide* based on the Beneficiary's compensation originating from entities other than [redacted] the organization that filed the Form I-140 in 2020.

We begin with the issue of an ownership transfer from [redacted] to [redacted], and we will first evaluate the Petitioner's claim that the Director's requirement for a "transfer event" is not proper. First, we put the Director's use of that phrase in context. After discussing the stock acquisition and other evidence and claims relating to [redacted] being a subsidiary of [redacted] the Director stated: "USCIS acknowledges that the evidence establishes that [redacted] purchased [redacted] in 2005. Further, the record shows that the petitioning entity and [redacted] are both subsidiaries of [redacted] However, the record does not show a transfer event between [redacted] and the petitioner [redacted]." The Director continued noting the labor certification was filed "well after the acquisition of [redacted]. . . ." It appears the Director's meaning of a "transfer event" was the process in which the Petitioner purportedly transferred and assumed ownership of [redacted] similar to the methods included within the nonexclusive means described in the *USCIS Policy Manual*. The *USCIS Policy Manual* provides examples such as:

- Legal agreements evidencing the merger, acquisition, or other reorganization of the predecessor;
- Mortgage closing statements;
- An SEC Form 10-K, Form 10-Q, Form 8-K or other relevant filing;
- Audited financial statements of the predecessor and successor for the year in which the transfer occurred;
- Documentation of the transfer or other assumption of real property, business licenses and other assets and interests from the predecessor to the successor;
- Copies of the financial or other legal instruments used to execute the transfer of ownership; and
- Newspaper articles or other media reports announcing the merger, acquisition, or other reorganization effecting the change between the predecessor and the successor.

6 *USCIS Policy Manual* E.3(F)(3), https://www.uscis.gov/policymanual. We therefore do not agree with the Petitioner that the Director's language that aligned with USCIS policy was not based in any authority, nor do we agree with the contention it was not proper.

As noted, the above list from the *USCIS Policy Manual* is not an exhaustive list and if a petitioning entity transferred and assumed ownership of a predecessor under a different process than these examples, it is their burden to demonstrate in what manner they assumed ownership. *See* 6 *USCIS Policy Manual*, *supra*, at E.3(F)(3) (generally stating the successor bears the burden of proof to establish all elements of eligibility as of the priority date and the successor must meet the definition

of employer and demonstrate the ability to pay the proffered wage as of the date of the transfer of ownership of the predecessor to the successor).[2]

The Petitioner has not demonstrated that it [redacted] had transferred and assumed ownership of [redacted] as of their petition's filing date in December of 2020. We revisit the relevant timeline and asserted facts:

- 2005 [redacted] purchases 100 percent of [redacted] stock;
- 2011 [redacted] files the labor certification;
- 2012 [redacted] files a Form I-140;
- 2014 "Retirement-Investment Plan" lists [redacted] as a [redacted] subsidiary;
- 2015 [redacted] issues Beneficiary's W-2;
- 2016 Petitioner claims all [redacted] employees were transferred to the [redacted] payroll;
- 2016 [redacted] Management Corp. issues Beneficiary's W-2;[3]
- 2017–2020 [redacted] HQ issues Beneficiary's W-2;
- 2019 article reporting [redacted] purchase of [redacted] in 2005; and
- 2020 [redacted] files a Form I-140 on the Beneficiary's behalf.

Absent from this scenario is the ownership transfer of [redacted] to [redacted] prior to—or after—it filed the petition in 2020. In other words, the Petitioner has not established [redacted] has ever demonstrated ownership of [redacted] in a manner that would qualify this petitioner as a successor-in-interest. At every turn, the record reflects [redacted] or [redacted] HQ are involved in ownership of [redacted] as it relates to possibly qualifying as a successor-in-interest. And the Director said as much when they stated "the record does not show a transfer event between [redacted] and the petitioner . . . ."

The Petitioner's appeal brief responds to this determination from the Director with statements that are not supported by the record. It is unclear if the Petitioner misunderstood which entity the Director made reference to, or for another reason, but on appeal the Petitioner only states that "[t]he record is replete with proof of [redacted] [i.e., [redacted]] ownership. Consequently, USCIS rendered a finding of fact that [redacted] owns [redacted]. Presumably, this element is no longer in dispute. Accordingly, [redacted] has met its burden of proof as to this element." We reviewed the Director's decision, and that review does not support the Petitioner's statements. There are at least five instances in which the Director discusses how [redacted] was not a qualifying successor to [redacted]

Next, the Petitioner argues because USCIS has approved H-1B petitions with [redacted] as the Beneficiary's employer, it should also approve this immigrant petition. In the H-1B case the Petitioner references [redacted] filed its own DOL ETA Form 9035 & 9035E, Labor Condition Application for Nonimmigrant Workers and a nonimmigrant petition (Form I-129, Petition for a Nonimmigrant Worker) on the Beneficiary's behalf. As these are separate filings with drastically different eligibility requirements, it is conceivable [redacted] could be a *bona fide* employer on one petition (the H-1B) but

[2] We follow the definition of an employer as described in the regulation at 20 C.F.R. § 651.10: Employer means a person, firm, corporation, or other association or organization which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a worker at a place within the United States and which has an employer relationship with respect to employees under this subpart as indicated by the fact that it hires, pays, fires, supervises, and otherwise controls the work of such employees.

[3] The Petitioner did not explain how [redacted] Management Corp. factors into this case.

not on the other. However, as the Petitioner has not demonstrated it is a successor to [redacted] it is unnecessary we make a determination as it relates to the *bona fides* of its employer status.

The Petitioner next turns to the issue of which entity is paying the Beneficiary and proposes that it is acceptable to delegate such corporate responsibilities and services to corporate affiliates. While "offloading" such responsibilities may be conceivable, two issues frustrate this argument. The first and primary reason this possibility is irrelevant is because the record is devoid of evidence that [redacted] assumed ownership of [redacted] so the Petitioner has not shown [redacted] is [redacted] successor. Second, the Petitioner did not provide evidence that all of its employees are compensated by one particular subsidiary or entity within the parent corporation. While it offered a letter from an officer in [redacted] finance and accounting unit stating all [redacted] employees "were transferred to the [redacted] payroll," he did not specify which entity under the [redacted] umbrella that "[redacted] payroll" constitutes. So, it is unclear which [redacted] entity handles such payroll issues.

Additionally, the Petitioner only submitted this finance officer's letter and did not offer any evidence to corroborate those statements. And we conclude it is necessary for the Petitioner to provide clarifying evidence because they submitted W-2s in which the issuing entity does not match the entity on the Beneficiary's pay statements from the same timeframes (i.e., 2019 and 2020 W-2s from [redacted] HQ but 2019 and 2020 pay statements from [redacted]. Here, the Petitioner has submitted at least two forms of evidence that put forth conflicting facts and must resolve this dissonance 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).

Further, because this letter does not adequately prove the Petitioner's contention, it is not considered to be probative. Probative evidence is the type that "must tend to prove or disprove an issue that is material to the determination of the case." *Matter of E-F-N-*, 28 I&N Dec. 591, 593 (BIA 2022) (quoting *Matter of Ruzku*, 26 I&N Dec. 731, 733 (BIA 2016)); *see also* Evidence, *Black's Law Dictionary* (11th ed. 2019). Therefore, if some form of the Petitioner's evidence does not adequately prove their contention, then it is not considered to be probative. As we noted, the Petitioner did not offer that type of corroborating evidence and explain its relevancy. Moreover, while there may be an explanation for the "mismatch" in what entity compensated the Beneficiary, there does not appear to be an easy explanation for the first issue as the Petitioner [redacted] has not demonstrated it ever assumed ownership of [redacted]

The Petitioner's final appellate arguments continue down the trail of shared responsibilities among its corporate subsidiaries, but they seemingly stray from the beaten path by expanding what functions can be shared. The Petitioner's arguments ultimately dilute the three factors that *Matter of Dial Auto Repair Shop, Inc.* established as necessary to adequately show one entity is a valid successor-in-interest to a predecessor. For instance, after stating the successor-in-interest framework was developed to adapt immigration law to the realities of the corporate world, the Petitioner characterizes the *USCIS Policy Manual* as focusing on whether a single corporation—whether through amalgamation, consolidation, or other assumption of interests—remains ultimately responsible for the rights and duties of an earlier corporation, even if that earlier corporation continues to perform some functions on the successor's behalf.

Here, the Petitioner appears to assert when a parent corporation owns multiple subsidiaries, it can share functions and responsibilities across any number of subsidiaries of its choosing, with the added ability to assign or impute ownership of other subsidiaries at its discretion; all while continuing to qualify for an immigrant visa. If this is the Petitioner's contention on appeal as it appears to be, then we disagree. The Petitioner is free to operate in the manner it sees fit and we are not dictating anything in that realm. However, inherent with employing foreign workers are additional burdens a U.S. employer must satisfy when compared to hiring U.S. workers. Part of that burden here includes satisfying the requirements presented in *Matter of Dial Auto Repair Shop, Inc.*, as well as those within the regulation, and within USCIS policies. Ultimately, the Petitioner has not presented any legal authority permitting it to delegate or impute ownership of [redacted] among its subsidiaries without fully describing and documenting the transfer and assumption of the ownership of the predecessor by the successor. *Dial Auto Repair Shop, Inc.*, 19 I&N Dec. at 482–83; 6 *USCIS Policy Manual*, *supra*, at E.3(F)(3).

The failure to satisfy even one of the three main requirements found in *Matter of Dial Auto Repair Shop, Inc.* (described above) will preclude the Petitioner from demonstrating it has a valid successor-in-interest relationship to [redacted] Because the Petitioner has not satisfied the first of those three main requirements, that failure is fatal to their eligibility claims and it is dispositive of the appeal. Because the identified basis for not demonstrating a valid successor-in-interest relationship is dispositive of this appeal, we decline to reach and hereby reserve the Petitioner's remaining successor-in-interest arguments in the appeal. *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 M-F-O-*, 28 I&N Dec. 408, 417 n.14 (BIA 2021) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

Based on the current record, the Petitioner here has not demonstrated it is a successor to [redacted]

III. CONCLUSION

The appeal will be dismissed for the above stated reasons, with each considered an independent and alternative basis for the decision. In visa petition proceedings, it is a petitioner's burden to establish eligibility for the immigration benefit sought. The Petitioner has not met that burden.

ORDER: The appeal is dismissed.