U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF V-B-H-S-

DATE: SEPT. 15, 2015

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a healthcare business, seeks to permanently employ the Beneficiary in the United States as a registered nurse for immigrant classification as a professional. *See* Immigration and Nationality Act (the Act) § 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). The Director, Nebraska Service Center, denied the petition. The matter is now before us on appeal. The matter will be remanded to the Director in accordance with the following.

The petition is for a Schedule A occupation. A Schedule A occupation is an occupation codified at 20 § C.F.R. 656.5(a) for which the U.S. Department of Labor (DOL) has determined that there are not sufficient U.S. workers who are able, willing, qualified and available and that the wages and working conditions of similarly employed U.S. workers will not be adversely affected by the employment of aliens in such occupations. The current list of Schedule A occupations includes professional nurses and physical therapists. *Id.*

Petitions for Schedule A occupations do not require the petitioner to test the labor market and obtain a certified ETA Form 9089 from the DOL prior to filing the petition with U.S. Citizenship and Immigration Services (USCIS). Instead, the petition is filed directly with USCIS with a duplicate uncertified ETA Form 9089. *See* 8 C.F.R. §§ 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.15.

The petition was initially filed on September 12, 2006 and approved on July 2, 2007. On October 14, 2014, the Director issued a notice of intent to revoke (NOIR) the approval of the petition because information indicated that a change in business structure may have occurred. On December 25, 2014, the Director revoked the approval of the petition, noting that no response was received to the NOIR and that according to 9 FAM (Foreign Affairs Manual) 40.51 N4.6-1, a new Form I-140 should have been filed due to the buyout or merger of your organization with another company. You appealed this decision to the Administrative Appeals Office (AAO).

The Petitioner's appeal is properly filed and makes a specific allegation of error in law or fact. We conduct appellate review on a *de novo* basis.[1] We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

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[1] *See* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would

First, we note that the Petitioner asserts it did not receive the Director's NOIR and the record indicates that this NOIR was sent to the Petitioner's former counsel. *See Matter of Arias*, 19 I&N Dec. 568 (BIA 1988) and *Matter of Estime*, 19 I&N Dec. 450 (BIA 1987). The record also indicates that the Director then issued the Petitioner another NOIR to the Petitioner's former counsel on December 23, 2014, giving the Petitioner 30 days to respond. However, the Director issued the decision revoking the approval of the petition on December 25, 2014, to the Petitioner's current counsel two days after the NOIR was resent to the Petitioner on December 23, 2014. Therefore, the matter will be remanded to the Director to reissue a notice of intent to revoke and allow the Petitioner and current counsel an opportunity to respond.

Second, related to the question of successorship, the record does not fully document the nature of the buyout and the restructuring that took place relating to the Petitioner's parent company. USCIS has not issued regulations governing immigrant visa petitions filed by a successor-in-interest employer. Instead, such matters are adjudicated in accordance with *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986) ("*Matter of Dial Auto*") a binding, legacy Immigration and Naturalization Service (INS) decision that was designated as a precedent by the Commissioner in 1986. Considering *Matter of Dial Auto* and the generally accepted definition of successor-in-interest, a petitioner may establish a valid successor relationship for immigration purposes if it satisfies three conditions. First, the petitioning successor must fully describe and document the transaction transferring ownership of all, or a relevant part of, the beneficiary's predecessor employer. Second, the petitioning successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the petitioning successor must prove by a preponderance of the evidence that it is eligible for the immigrant visa in all respects.

The record does not contain sufficient evidence establishing the details of the buyout to demonstrate whether it resulted in either: (1) a change in the Petitioner's name but not a change in the Petitioner's Employer Identification Number (EIN); or (2) an organizational change and a change in EIN that would give rise to a successorship, or multiple successor issues.

Specifically, we note that the record contains news articles about the buyout of your organization by [redacted] in [redacted] but the Petitioner has not submitted any other documentation of the specific details regarding the transfer of ownership that occurred. The evidence in the record reflects that the Petitioner's employees were initially paid by [redacted] which was replaced by [redacted] following the merger. The 2012 IRS Form 1065 for [redacted] LLC states the same EIN as [redacted] and states in schedule B-1 that VHS [redacted] has a 51% ownership interest in [redacted] and that [redacted] has a 49% interest, but the relationship of each of these entities to the Petitioner is unclear.

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have in making the initial decision except as it may limit the issues on notice or by rule."); *see also Janka v. U.S. Dept. of Transp., NTSB*, 925 F.2d 1147, 1149 (9th Cir. 1991). The AAO's *de novo* authority has been long recognized by the federal courts. *See, e.g., Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

[2] The submission of additional evidence on appeal is allowed by the instructions to Form I-290B, Notice of Appeal or Motion, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1).

[3] However, we note that the petitioning entity lists a different EIN number on Form I-140 and on ETA Form 9089.

(b)(6)

Your affidavit states that the Petitioner has two hospitals, one in and another in The business organization chart in the record identifies the and the listed under Your affidavit also states that "basically served to replace to hold the assets of the two " However, the record does not contain documentation specifically detailing the transfer of ownership of to or evidence demonstrating the relationship of and

The record contains an affidavit from President and CEO of describing the organizational changes that took place in and first between and and in , between and The Petitioner must demonstrate the full chain of successorship regarding these two separate transactions of restructuring in and Therefore, the matter will be remanded to the Director. He may request evidence related to these issues to determine whether a successorship occurred, and if so, whether the petitioner has established the full chain of successorship.

We note the additional following deficiencies which should be addressed on remand. The Texas Prevailing Wage Determination form (PWD) does not clearly match the requirements on the ETA Form 9089. The PWD form states the minimum education is an associate's degree and assigns a level one wage. However, the ETA Form 9089 requires a Bachelor's degree. *See* 20 C.F.R. § 656.15(b)(1). It is unclear whether the same level wage would have been assigned for the required bachelor's level education. A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm'r 1988).

In addition, it is not clear that the Beneficiary has a bachelor's degree, as required by Part H.4 of the ETA Form 9089, or if she instead has only a three-year course of study in Nursing. The record contains a certificate from the stating that the Beneficiary "has satisfactorily completed all requirements for the three year basic course in nursing" and conferred the title "graduate in nursing." This certificate does not state that the Beneficiary has completed a bachelor's degree. Part J of the Form ETA 9089 states that the Beneficiary has obtained a Bachelor's degree in Nursing from It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

In view of the foregoing, the previous decision of the Director will be withdrawn. The petition is remanded to the Director to properly issue a notice of intent to revoke addressing the issues raised above. The Director may request any additional evidence considered pertinent. Similarly, the Petitioner may provide additional evidence within a reasonable period of time to be determined by the Director. Upon receipt of all the evidence, the Director will review the entire record and enter a new decision.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). The Petitioner has not met that burden.

ORDER: The matter is remanded to the Director, Nebraska Service Center, for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Cite as *Matter of V-B-H-S-*, ID# 13157 (AAO Sept. 15, 2015)