U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF O-E- LTD.

DATE: JULY 2, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, a jewelry manufacturer, seeks to employ the Beneficiary as a jewelry inspector (quality control). It requests her classification under the third-preference immigrant category as an "other worker." Immigration and Nationality Act (the Act) section 203(b)(3)(A)(iii), 8 U.S.C. § 1153(b)(3)(A)(iii). This employment-based, "EB-3" category allows a U.S. business to sponsor a foreign national for lawful permanent resident status to work in a job requiring less than two years of training or experience.

The Director of the Nebraska Service Center denied the petition. The Director concluded that, contrary to the Act and Department of Homeland Security regulations, the Petitioner did not demonstrate the validity of the accompanying certification from the U.S. Department of Labor (DOL). Specifically, the Director found that the Petitioner did not establish itself as a successor in interest of the employer that filed the labor certification application.

On appeal, the Petitioner submits additional evidence and asserts that it has established its acquisition of all the labor certification employer's assets and liabilities. The Petitioner contends that DOL certified the application after learning of the company's successorship and that the Director unfairly demanded excessive documentation of an informal transaction.

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

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as an unskilled worker generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective 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 an offered position, and that employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves an offered position, an employer must next submit the 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 beneficiary meets requirements of an offered position and a requested visa classification. If USCIS grants 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 unskilled worker must include a valid, individual labor certification. 8 C.F.R. § 204.5(l)(3)(i). A labor certification remains valid "only for the particular job opportunity" stated on it. 20 C.F.R. § 656.30(c)(2).

A petitioner may use a labor certification filed by another employer only if the petitioner establishes itself as a successor in interest of the employer. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor must: 1) demonstrate that, except for the change of employer, the job opportunity remains the same as listed on the labor certification; 2) establish its eligibility as a petitioner, including the abilities of it and the predecessor to continuously pay the position's proffered wage from the petition's priority date onward; and 3) fully describe and document the transaction(s) by which it acquired the predecessor. *Id.* at 482-83.

> The evidence provided must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor.

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)* 8 (Aug. 6, 2009).

Here, the employer filed the labor certification application in August 2017. The Petitioner claims that it acquired all of the employer's assets and liabilities in January 2018, before DOL certified the application in May 2018.

A. The Petitioner's Description and Documentation of the Transaction

The Petitioner's chief executive officer (CEO) stated that it and the labor certification employer "merge[d]." As evidence, the Petitioner submitted copies of payroll records, workers' compensation insurance forms, and statements from its CEO and two shareholders. The CEO and shareholders purportedly served in the same roles with the labor certification employer, which also shared its location with the Petitioner.

The payroll records indicate that the labor certification employer paid the Beneficiary and her co-workers in 2017, while the Petitioner paid them in 2018. This suggests a movement of employees from one business to the other but does not indicate that a legal transaction took place. The payroll records

also do not "fully explain the manner by which the petitioner took over the business." *Matter of Dial Auto*, 19 I&N Dec. at 482.

The insurance forms indicate that, as of January 2018, the labor certification employer cancelled its workers' compensation policy and the Petitioner obtained one. The employer's form also states that the company went "Out of Business." The insurance forms indicate that the labor certification employer ceased business, but do not support a merger's occurrence. Also, contrary to case law and USCIS policy, they do not fully describe the transaction or confirm the Petitioner's acquisition of rights and obligations needed to carry on the labor certification employer's business.

The statements of the Petitioner's CEO and shareholders are also insufficient. The statements do not indicate the structure of the claimed merger, the rights or obligations transferred, or whether the Petitioner paid cash or other consideration for the stock of the labor certification employer. Also, two New York corporations planning to merge must adopt written merger plans and file them with state authorities. N.Y. Bus. Corp. §§ 902(a), 903(a). Upon merging, the surviving corporation (or the newly created entity) must also file a certificate of merger with state authorities. N.Y. Bus. Corp. §§ 904(a), 906(a). The Petitioner's evidence, however, lacks copies of merger plans or certificates, nor do online government records indicate the filing of any. *See* N.Y. Dep't of State, Div. of Corps., State Records & UCC [Uniform Commercial Code], https://www.dos.ny.gov/corps/ bus_entity_search.html (last visited May 15, 2019). The record does not explain the absence of merger documentation. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

On appeal, the Petitioner submits a joint memorandum from its CEO and shareholders. The memo describes the labor certification employer as "the payroll company for the employees of [the Petitioner]." It states that the CEO and shareholders "orally agreed to transfer the employee payroll" from the employer to the Petitioner and then to "close" the employer. On the labor certification, the Beneficiary described the employer as a jewelry manufacturer. In response to the Director's request for additional evidence (RFE), the Petitioner's CEO also stated: "Both companies are engaged in the same type of jewelry manufacturing business." The memo, however, indicates that the employer served only as a payroll company, apparently issuing wages to the Petitioner's workers without making jewelry of its own. The memo therefore casts additional doubt on the previously described "merger" between the Petitioner and the labor certification employer. *See Matter of Ho*, 19 I&N Dec. at 591 (stating that doubt cast on any aspect of a petitioner's proof may lead to a reevaluation of the reliability and sufficiency of the remaining evidence).

Moreover, if the labor certification employer served merely as a payroll company, the record would not establish the Petitioner as its successor. A successor "must continue to operate the same type of business as the predecessor." Neufeld Memo, at 8. Here, the record identifies the Petitioner as a jewelry manufacturer. The record therefore does not demonstrate that the Petitioner would limit its operations to payroll processing as the labor certification employer apparently did. Also, the record does not establish that the staff of the labor certification employer, a payroll processor, would have included a jewelry inspector. The joint memo from the Petitioner's CEO and shareholders therefore does not establish the company as the successor of the labor certification employer.

The Petitioner argues that it informed DOL of its acquisition of the labor certification employer before the agency certified the application. DOL, however, only determines the successor of a labor certification employer if its ownership changed between the start of recruitment for an offered position and the filing of a labor certification application. DOL, "OFLC [Office of Foreign Labor Certification] Frequently Asked Questions and Answers," Advertisement Content, 10, https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm (last visited May 15, 2019). Here, the claimed ownership change occurred after the filing of the labor certification application. Thus, based on the timing of the claimed transaction, USCIS, rather than DOL, makes the successorship determination.

The Petitioner also argues that, by requiring additional evidence of its acquisition of the labor certification employer, USCIS "discriminate[s] against small companies which often make changes orally but do not have [additional documentary] evidence." The Petitioner notes that acceptable documentary evidence "may include, *but is not limited to*:" contracts of sale; mortgage closing statements; annual reports of publicly traded successors; newspaper articles; and audited financial statements. Neufeld Memo, at 7 (emphasis added).

Contrary to the Petitioner's argument, however, USCIS asked the company to provide only what governing case law requires. As previously discussed, a successor must "fully explain the manner by which [it] took over the business." *Matter of Dial Auto*, 19 I&N Dec. at 482. The Petitioner has submitted documentation showing that the labor certification employer ceased business and that employees moved from one company's payroll to another's. But it has not fully described or actually documented the transaction as case law requires. The record does not indicate the structure of the claimed merger, the assets or liabilities transferred, or whether the merger involved cash or other consideration. The Petitioner also has not explained the absence of merger documentation required by New York law, or the inconsistencies of record regarding the nature of the labor certification employer's business. *See Matter of Ho*, 19 I&N Dec. at 591. As such, the Petitioner has not demonstrated that it qualifies as a successor or that the petition is supported by a valid labor certification. We will therefore affirm the petition's denial.

B. Ability to Pay the Proffered Wage

Although unaddressed by the Director, the record also does not demonstrate the continuous abilities of the labor certification employer and the Petitioner to pay the proffered wage of the offered position from the petition's priority date onward. *Matter of Dial Auto*, 19 I&N Dec. at 482; Neufeld Memo, at 3. Evidence of ability to pay must include copies of annual reports, federal 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 jewelry inspector as $18.94 an hour, or $34,470.80 a year based on a 35-hour work week. The petition's priority date is August 2, 2017, the date 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).

The Petitioner submitted an IRS Form W-2, Wage and Tax Statement, for 2017 and copies of payroll records in 2017 and 2018. These documents indicate that the labor certification employer paid the

Beneficiary in 2017 and that the Petitioner paid her in 2018. Contrary to 8 C.F.R. §204.5(g)(2), however, the record lacks required evidence of the labor certification employer's ability to pay in 2017 and the Petitioner's ability to pay in 2018. The Petitioner therefore has not demonstrated the continuous ability of it and the labor certification employer to pay the proffered wage from the petition's priority date onward.

The lack of regulatory required evidence prevents a finding that the labor certification employer or the Petitioner have the ability to pay the proffered wage. Moreover, discrepancies in the submitted wage records raise questions about the credibility of the documentation. Records indicate that the U.S. government did not issue the Beneficiary the Social Security number that appears on her Form W-2 and payroll records for 2017 and 2018. The discrepancy in the Social Security number casts doubt on the validity of the evidence. *See Matter of Ho*, 19 I&N Dec. at 591 (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies).

Thus, in any future filings in this matter, the Petitioner must submit copies of annual reports, federal tax returns, or audited financial statements of the labor certification employer for 2017 and of itself for 2018. The Petitioner may also submit additional evidence of the abilities of it and the labor certification employer to pay the proffered wage, including proof of wages paid to the Beneficiary during those years and materials supporting factors stated in *Sonegawa*. The Petitioner must also explain the discrepancy in the Beneficiary's Social Security number and demonstrate that the companies paid her in 2017 and 2018 as claimed.

III. CONCLUSION

The record on appeal does not demonstrate the validity of the accompanying labor certification. The Petitioner has not established itself as a successor in interest of the employer that filed the certification application. We will therefore affirm the Director's decision. A petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. 1361. Here, the Petitioner did not meet that burden.

ORDER: The appeal is dismissed.

Cite as *Matter of O-E- Ltd.*, ID# 4703745 (AAO July 2, 2019)