U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 13495339

Date: SEP. 22, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for an Advanced Degree Professional

The Petitioner, an information technology company, seeks to employ the Beneficiary as a project manager (IT). It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based "EB-2" immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The petition was initially approved, but the approval was subsequently revoked by the Director of the Nebraska Service Center. The Director determined that certain language in H.14 of the labor certification exceeded the "Kellogg language" and altered the minimum requirements of the labor certification and could potentially allow a beneficiary to qualify for the job offered with less than a master's degree or a bachelor's degree and five years of postgraduate experience in the specialty, and thus did not support the requested classification of advanced degree professional. [1]

On appeal the Petitioner provides evidence and a brief asserting that the minimum requirements specified on its labor certification are consistent with the petition's classification request of advanced degree professional.

In these proceedings, it is the Petitioner's burden to establish eligibility for the requested benefit. *See* Section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review of the evidence and arguments made on appeal, we conclude that the Petitioner has overcome the basis for the revocation. However, the

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[1] The regulation at 20 C.F.R. § 656.17(h)(4)(ii) states:

> If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

This regulation was intended to incorporate the Board of Alien Labor Certification Appeals (BALCA) ruling in *Francis Kellogg*, 1994-INA-465 and 544, 1995-INA 68 (Feb. 2, 1998) (*en banc*). The statement on the labor certification that an employer will accept applicants with "any suitable combination of education, training or experience" is commonly referred to as "*Kellogg* language."

record as presently constituted does not support the petition's approval. Therefore, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the analysis below.

I. LEGAL FRAMEWORK

Immigration as an advanced degree professional 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 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 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. "[A]t any time" before a beneficiary obtains lawful permanent residence, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If supported by a record, the erroneous nature of a petition's approval justifies its revocation. *Matter of Ho*, 19 I&N Dec. at 590.

USCIS properly issues a notice of intent to revoke (NOIR) a petition's approval if the unexplained and unrebutted record at the time of the notice's issuance would have warranted the petition's denial. *Matter of Estime*, 19 I&N Dec. 450, 451 (BIA 1987). If a NOIR response does not rebut or resolve alleged revocation grounds, USCIS properly revokes a petition's approval. *Id.* at 451-52.

II. SUCCESSOR-IN-INTEREST

The record shows that after this petition was filed and approved in 2016, the Petitioner was acquired by a French entity in 2018. In 2019, a newly formed entity – [redacted] – filed an amended petition seeking to employ the Beneficiary as the Petitioner's successor-in-interest.[2] In light of changes that took place after the filing of the original petition and the current claim that [redacted] is the Petitioner's successor-in-interest, [redacted] must establish that it is the valid successor-in-interest to the entity that filed the labor certification in order to continue to rely on the underlying labor certification in this matter.

A labor certification remains valid only for "the particular job opportunity," the noncitizen, and the geographical area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2); *see also* section 204(a)(1)(F) of the Act (stating that the Petitioner must "desir[e] and intend[] to employ [a designated noncitizen] within the United States"). Thus, if the Petitioner no longer does business or no longer intends to employ the Beneficiary in the offered position, the petition may not be approved. However, the Petitioner may still rely on the petition and the accompanying certification if evidence shows that

[2] The receipt number of the amended Form I-140 is [redacted]

a "successor-in-interest" of the Petitioner – a subsequent owner of the Petitioner's business – intends to employ the Beneficiary in the offered position. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986).

For immigration purposes, a successor-in-interest must demonstrate its acquisition of assets and liabilities needed to carry on a predecessor's business or a discrete part of it. *See id.* at 482-83; *see also* Memorandum from Donald Neufeld, USCIS Acting Assoc. Dir., Domestic Ops., *Successor-in-Interest Determinations in Adjudications of Form I-140 Petitions*, HQ 70/6.2 AD 09-37, 8 (Aug. 6, 2009) (stating that "[t]he evidence provided must show that . . . the successor acquired the essential rights and obligations necessary to carry on the business in the same manner as the predecessor"). A successor-in-interest must: 1) fully describe and document the transaction(s) leading to its acquisition of the employer's business; 2) establish that, except for the prospective employer, the job offer remains the same as stated on the accompanying labor certification; and 3) demonstrate eligibility for the requested benefit, including the abilities of the successor and the labor certification employer to continuously pay the proffered wage of an offered position from a petition's priority date onward. *Id.*

In the matter at hand, the record contains a Schedule 13D, which the Petitioner filed with the U.S. Securities and Exchange Commission showing that it was party to a merger agreement with [redacted], a wholly owned subsidiary of [redacted] the French entity that acquired the Petitioner. Information in Schedule 13D indicates that as the result of a 2018 merger, the Petitioner survived the transaction as the wholly owned subsidiary of the French company. However, the merger did not involve [redacted] the purported successor, whose Articles of Incorporation show that it was established in March 2019. Accordingly, the merger does not establish the claimed successorship between the Petitioner and [redacted]

The record also contains an "Assignment Agreement," showing that the Petitioner's assets and liabilities were transferred to the purported successor in June 2019. However, because the record indicates that the Petitioner's business involved providing integrated IT and "knowledge process" services to corporate clients in addition to client service agreements, the Petitioner's business likely required workers with IT and business knowledge to service the company's clients. *See* Neufeld Memo, *supra*, at 8 (requiring a successor to show that it "acquired the essential rights and obligations necessary to carry on the business in the same manner as the predecessor"). Here, the agreement does not specify the Petitioner's assignment of workers to its purported successor. Rather, it specifies only the Petitioner's assignment of obligations, rights, and interests in its "service agreements and all Statements of Work and other agreements under the service agreements."

Lastly, the record includes a copy of a June 2019 approval notice of a "blanket L" nonimmigrant visa petition. *See* 8 C.F.R. § 214.2(l)(4) (allowing eligible petitioners to obtain approvals of themselves and their parents, branches, subsidiaries, and affiliates as "qualifying organizations" to expedite issuances of L-1 visas to their employees). Although the approval notice indicates that USCIS found the Petitioner and [redacted] to be wholly owned subsidiaries of the French parent company, the approved blanket notice does not indicate whether the purported successor acquired the rights and obligations needed to carry on the Petitioner's business to meet the definition of a successor-in-interest.

In light of the above, the record does not currently demonstrate that [redacted] acquired all the assets

and liabilities needed to carry on the Petitioner's business. The Director may wish to request further evidence related to this issue on remand and provide the Petitioner an opportunity to respond.

III. CONCLUSION

Because the successorship issue had not been previously addressed, and the Petitioner therefore was not informed of the above-described evidentiary deficiencies, we will remand the matter. On remand, the Director should issue a new NOIR that will explain and allow the Petitioner to an opportunity to address the evidentiary deficiencies and offer evidence in support of the petition. 8 C.F.R. § 205.2(a).

If supported by the record, the new NOIR may include any additional, potential revocation grounds. The Director, however, must provide the Petitioner with a reasonable opportunity to respond to all issues raised on remand. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

ORDER: The decision of the Director is withdrawn. The matter is remanded for entry of a new decision consistent with the foregoing analysis.