U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27858234

Date: AUG. 31, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Advanced Degree)

The Petitioner, a provider of digital photography products and services, seeks to permanently employ the Beneficiary as a "Principal Software Engineer." The company requests her classification under the employment-based, second-preference (EB-2) immigrant visa category as a member of the professions holding an "advanced degree" or its equivalent. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). U.S. businesses may sponsor noncitizens for permanent residence in this category to work in jobs requiring at least bachelor's degrees followed by five years of progressive experience in applicable specialties. *See* 8 C.F.R. § 204.5(k)(2) (defining the term "advanced degree").

The Director of the Nebraska Service Center denied the petition. The Director concluded that the accompanying certification from the U.S. Department of Labor (DOL) does not correspond to the Petitioner's job offer. On appeal, the Petitioner contends that the Director made factual errors and misinterpreted evidence in finding that the company did not establish itself as a "successor in interest" of the employer listed on the labor certification.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). Exercising de novo appellate review, *see Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015), we conclude that the company has not established its claimed successorship. As the record does not demonstrate the petition's inclusion of a valid labor certification, we will dismiss the appeal.

I. LAW

Immigration as an advanced degree professional generally follows a three-step process. First, a prospective employer must obtain DOL certification that: there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and a noncitizen's employment in the position will not harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i).

Second, an employer must submit a DOL-approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204(a)(1)(F) of the Act, 8 U.S.C.

§ 1154(a)(1)(F). 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(k)(3); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977).

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.

II. ANALYSIS

A. Successorship in Interest

A petition for an advanced degree professional must generally include a valid individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the particular job opportunity, noncitizen, and geographic employment area stated on it. 20 C.F.R. § 656.30(c)(2).

A prospective employer may not use another business's labor certification for the same noncitizen unless the employer establishes itself as the business's successor in interest. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481, 482-83 (Comm'r 1986). To establish successorship, a petitioner must demonstrate its acquisition of the rights and obligations needed to operate a predecessor's business, or a discrete part of it, in the same manner as the predecessor. *See generally* 6 *USCIS Policy Manual* E.(3)(6), www.uscis.gov/policy-manual. A successor must:

- fully describe and document how it acquired ownership of a predecessor's business;
- demonstrate that, except for the change of employer, it offers the same job opportunity described on the labor certification; and
- establish eligibility for the requested benefit in all respects, including the continuous ability of it and a predecessor to pay the offered position's proffered wage.

Id. at E.(3)(F).

The record shows that the Beneficiary, an Indian native and citizen, has worked as a software engineer in temporary nonimmigrant work visa status in the United States. She began working for [redacted] like the Petitioner, a U.S. digital photography company - in 2017. In June 2019, [redacted] filed a labor certification application for her, which DOL approved about two months later. In October 2019, [redacted] submitted a Form I-140, Petition for Alien Worker, for her, which USCIS approved in the EB-2 advanced degree professional category the following month.

In January 2020, while the Beneficiary waited for an immigrant visa to become available to her, the Petitioner's parent company acquired [redacted] Later, in what the Petitioner describes as a "corporate reorganization" that took effect in 2021, the Beneficiary and her [redacted] co-workers became employees of the Petitioner, and both entities began using the same enterprise resource planning (ERP) software system. In May 2022, the Petitioner filed this petition for the Beneficiary, asserting itself as [redacted] successor and seeking to use [redacted] labor certification for her.

Attempting to demonstrate its claimed successorship, the Petitioner initially submitted a letter from a human resources representative, an "Affidavit of Corporate Merger" from a company officer, and

consolidated financial statements for 2020 containing an auditor's notes. The letter from the human resources representative states that "the [Petitioner's] organization acquired [redacted] in January 2020 and that '[redacted] employees are now employees of [the Petitioner]." The letter describes the Petitioner as "a successor-in-interest for immigration purposes" that "retains all immigration obligations, liabilities and undertakings arising from or under applications and petitions filed by [redacted] on behalf of those individuals now employed by [the Petitioner], including [the Beneficiary]." The Affidavit of Corporate Merger states that '[redacted] was acquired by the [Petitioner's] family of brands" in January 2020. The affidavit also indicates that, at the end of 2020, the Petitioner employed [redacted] workers "as a result of a corporate reorganization." The auditor's notes state that the Petitioner's parent acquired the Petitioner in July 2019 and [redacted] in January 2020.

The documents described above indicate that the Petitioner and [redacted] - as wholly owned subsidiaries of the same parent company - are affiliates. But, contrary to USCIS successorship requirements, the materials do not demonstrate the Petitioner's acquisition of all the rights and obligations needed to operate [redacted] business. *See Matter of Dial Auto Repair*, 19 I&N Dec. at 482 (requiring a claimed successor "to fully explain the manner by which [it] took over the business of [the predecessor] and to provide the Service with a copy of the contract or agreement between the two entities").

In response to the Director's request for additional evidence, the Petitioner submitted more proof of its parent's acquisitions of it and [redacted] and of its employment of [redacted] workers. The evidence indicates that the *Petitioner's parent* acquired all the assets and liabilities needed to operate the businesses of the Petitioner and [redacted] Also, copies of news articles about the acquisitions describe the "combined business" of the Petitioner and [redacted] But none of the documents demonstrates the *Petitioner's* acquisition of all the rights and obligations needed to operate [redacted] business.

Similarly, the Petitioner's evidence shows that, in 2021, it began treating the Beneficiary and her [redacted] colleagues as employees. But the Petitioner has not demonstrated that the employee transfer provided it with all rights and obligations needed to operate [redacted] business. "Contractual agreements or other arrangements in which two or more business entities agree to . . . provide services to each other without the transfer of the ownership of the predecessor to the successor do not create a valid successor-in-interest relationship." 6 *USCIS Policy Manual* E.(3)(F)(3).

On appeal, the Petitioner asserts "the evidence shows that [it] assumed all essential assets, rights and obligations of [redacted] With the exception of the employee transfer from [redacted] to the Petitioner, however, the record does not support the company's assertion. Rather, the record shows that the Petitioner's parent company - not the petitioning limited liability company - acquired the assets and liabilities needed to operate [redacted] The Petitioner has not demonstrated that the transfer of [redacted] employees onto its payroll, alone, allows it to operate [redacted] business as [redacted] did. The Petitioner would seem to need additional [redacted] assets - such as equipment, property (both real and intellectual), inventory, and contracts with customers and suppliers - to operate [redacted] business. The Petitioner has not demonstrated its acquisition of all essential assets from [redacted] or explained their omissions.

Counsel asserts that, as part of the 2021 corporate reorganization, "[redacted] essential assets and liabilities were moved under [the Petitioner] in the Company's consolidated books and records" and that the entities' agreement to use the same ERP system "included the transfer of [redacted] intangibles, intercompany receivables, fixed assets, trade receivables, cash, and various other essential assets to [the Petitioner]." But counsel's unsubstantiated assertions do not constitute evidence. *See, e.g., Matter of S-M-*, 22 I&N Dec. 49, 51 (BIA 1998) ("statements in a brief, motion, or Notice of Appeal are not evidence and thus are not entitled to any evidentiary weight"). The Petitioner must substantiate counsel's statements with independent evidence, which may include affidavits or declarations. Also, the record does not establish that the Petitioner's treatment of [redacted] assets as its own in financial statements would demonstrate its acquisition of those assets as required for the claimed successorship.

The Petitioner further faults the Director for mischaracterizing an affiliate involved in the Petitioner's July 2019 acquisition by its parent company. The Petitioner states that the affiliate was not an operating company but rather an entity formed solely to acquire the Petitioner and lacking its own operations. This error, however, did not materially undermine the Director's reasoning or decision. *See Matter of S-O-G- & F-D-B-*, 27 I&N Dec. 462, 467 n.2 (A.G. 2018), o*verruled on other grounds*, *Matter of Coronado Acevedo*, 28 I&N Dec. 648, 650-52 (A.G. 2022) (stating that, in the absence of prejudice, not all errors dictate reversals or remands).

The Petitioner has not demonstrated its acquisition of the assets and liabilities needed to operate [redacted] business. Thus, the Petitioner has not established itself as [redacted] successor or the labor certification's validity for its job offer. We will therefore affirm the petition's denial.

Although unaddressed by the Director, the record also casts doubt that the Petitioner's parent obtained the assets and liabilities of the Petitioner and [redacted] Documents indicate that both transactions - one in July 2019 and the other in January 2020 - involved "reverse triangular mergers" under Delaware law. The record shows that the parent targeted the Petitioner and [redacted] by creating wholly owned subsidiaries to merge with them. Upon merger, the subsidiaries dissolved, leaving the Petitioner and [redacted] surviving as the parent's wholly owned subsidiaries. Under Delaware law, such mergers do not transfer assets or liabilities from the surviving entities. The Delaware Court of Chancery has held that, unless a transaction agreement includes a contrary provision, a reverse triangular merger under Delaware law does not result in assignment of a targeted company's assets. *Meso Scale Diagnostics, LLC v. Roche Diagnostics GmbH*, 62 A.3d 62, 88 (Del. Ch. 2013).[1] The court found that "[t]he vast majority of commentary discussing reverse triangular mergers" agrees that "the rights and obligations of the target are not transferred, assumed or affected." *Id.* at 83 (quoting *Lewis v. Ward*, No. Civ.A 15255, 2003 WL 22461894 *4 n.18 (Del. Ch. Oct. 29, 2003)). Thus, for this additional reason, the record would not establish the Petitioner's claimed successorship of [redacted]

[1] The Delaware Court of Chancery, a non-jury trial court, does not issue precedential decisions. But the court "is widely recognized as the nation's leading authority on corporate law issues." *Simmonds v. Credit Suisse Secs. (USA) LLC*, 638 F.3d 1072, 1089 (9th Cir. 2011), *vacated on other grounds*, 566 U.S. 221 (2012), *remanded to* 678 F.3d 1139 (9th Cir. 2012) (citing William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law 351 (1992)).

The Petitioner did not receive notice of, or an opportunity to respond to, our additional finding. We therefore do not base this decision on it. In any future filings in this matter, however, the company must address whether - as a matter of law - its parent obtained the assets/liabilities of it and [redacted]

The Director also denied the Petitioner's successorship claim because the company purportedly did not demonstrate its offer of the same job opportunity listed on the labor certification. But our conclusion that the company has not established its receipt of [redacted] essential assets and liabilities resolves this appeal. We therefore decline to reach and hereby reserve the Petitioner's appellate arguments regarding the job opportunities of it and [redacted] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) (stating that agencies are not required to make "purely advisory findings" on issues unnecessary to the ultimate decision); *see also Matter of L-A-C-,* 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant was otherwise ineligible for relief).

B. The Required Experience

Also unaddressed by the Director, the Petitioner has not established the Beneficiary's qualifying experience for the offered position. A petitioner must demonstrate a beneficiary's possession of all DOL-certified job requirements of an offered position by a petition's priority date. *Matter of Wing's Tea House*, 16 I&N Dec. 158, 160 (Acting Reg'l Comm'r 1977). This petition's priority date is June 20, 2019, the date DOL accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

When assessing a beneficiary's qualifications, USCIS must examine the job-offer portion of an accompanying labor certification to determine a position's minimum requirements. USCIS may neither disregard certification terms nor impose unstated requirements. *See, e.g., Madany v. Smith*, 696 F.2d 1008, 1015 (D.C. Cir. 1983) (holding that "DOL bears the authority for setting the *content* of the labor certification") (emphasis in original).

Here, the labor certification states the minimum requirements of the offered position of principal software engineer as a U.S. master's degree or foreign equivalent degree in computer science, applied computer science, or a closely related field, plus three years of "industry development experience on mobile platforms with focus on iOS development."[2] Also, part H.14 of the labor certification, "Specific skills or other requirements," states that the job requires experience with numerous types of specified technologies.

On the labor certification, the Beneficiary attested that, by the petition's June 20, 2019 priority date, she gained about 20 months of full-time qualifying experience in the United States. She stated that [redacted] employed her as a software engineer since October 2017. The Beneficiary did not list any other experience.

Contrary to requirements of the offered position, the labor certification does not indicate the Beneficiary's possession of at least three years of experience. Also, contrary to 8 C.F.R. § 204.5(g)(1),

[2] The labor certification states the offered position's title as "Senior Software Development Engineer (iOS)." As previously indicated, the title of the Petitioner's offered job is "Principal Software Engineer."

the Petitioner did not submit a letter from the Beneficiary's former employer regarding her claimed qualifying experience or demonstrate a letter's unavailability. The record therefore does not establish the Beneficiary's qualifying experience for the offered position.

The Director did not notify the Petitioner of this evidentiary deficiency. Thus, in any future filings in this matter, the company must provide evidence of the Beneficiary's claimed qualifying experience.

III. CONCLUSION

The Petitioner has not demonstrated itself as a successor in interest of the business listed on the accompanying labor certification. Thus, the labor certification does not correspond to the company's job offer, and the petition lacks a valid certification. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.