U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 22660639

Date: FEB. 27, 2023

Appeal of Texas Service Center Decision

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

The Petitioner, a law firm, seeks to employ the Beneficiary as a law clerk. 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 immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Texas Service Center denied the petition, concluding that the record did not establish that the Petitioner had the ability to pay the proffered wage to the Beneficiary. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (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

A petitioner seeking classification for a beneficiary under the second preference employment-based immigrant category must establish its ability to pay the proffered wage from the priority date of the petition until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence must generally include annual reports, federal tax returns, or audited financial statements. *Id.* If a petitioner employs 100 or more workers, U.S. Citizenship and Immigration Services (USCIS) may accept a statement from a financial officer attesting to the petitioner's ability to pay the proffered wage. *Id.* In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by USCIS. *Id.*

USCIS first determines whether the petitioner paid the beneficiary the full proffered wage each year from the priority date. If the petitioner did not pay the proffered wage in any given year, USCIS next determines whether the petitioner had sufficient net income or net current assets to pay the proffered wage (reduced by any wages paid to the beneficiary). If net income and net current assets are insufficient, USCIS may consider other relevant factors, such as the number of years the petitioner has

been in business, the size of its operations, the growth of its business over time, its number of employees, the occurrence of any uncharacteristic business expenditures or losses, its reputation within its industry, or whether a beneficiary will replace a current employee or outsourced service. *See Matter of Sonegawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).

II. ANALYSIS

The priority date of the petition is October 2, 2020, and the Petitioner must establish its continuing ability to pay the proffered wage from that date forward. The labor certification states that the proffered wage is $50,900 per year. The Petitioner indicates that it was established in 2012, has 47 employees, and has a gross annual income of $5 million.

In her decision, the Director noted that several forms of financial evidence had been submitted, including the Beneficiary's Forms W-2, Wage and Tax Statement, for 2020 and 2021, 2020 Form 1120-S, U.S. Income Tax Return for an S Corporation, and 2021 Form 941, Employer's Quarterly Federal Tax Return. However, all of those tax forms, as well as all other financial evidence submitted, referred to H-T- & L-, LLC, a different entity having a different Employer Identification Number (EIN) than that given by the Petitioner on Form I-140, Immigrant Petition for Alien Worker. Since H-T-& L-, LLC is a separate entity from the Petitioner, the Director concluded that this evidence does not establish that the Petitioner has the ability to pay the proffered wage.

On appeal, the Petitioner submits additional evidence and explains that in 2011, the partners formed T-L-& A-, LLC from H-T-& L-, LLC, and formalized a plan of merger which stated that the merger of the two firms would be complete no later than June 1, 2022. The new evidence includes bank account statements and checks showing the account holder's name as "H-T- & L-, LLC DBA T-L-& A-", the merger agreement, and a 2015 purchase agreement executed by T-L-& A-, LLC for the office building the firm had been leasing. The Petitioner also indicates that the remaining items to complete the merger by the deadline, including payroll, trust accounts, and other merchants, were in the process of being transitioned at the time the appeal was filed. It asserts that it is therefore a successor in interest of H-T-& L-, LLC, "the entity that has and continues to employ [the Beneficiary]."

A valid successor-in-interest relationship exists if three conditions are satisfied. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). First, the successor must fully describe and document the transfer and assumption of the ownership of the predecessor by the successor. Second, the successor must demonstrate that the job opportunity is the same as originally offered on the labor certification. Third, the successor must establish by a preponderance of the evidence that it is eligible for the immigrant visa in all respects. *Id.*

Here, the record indicates that at the time the petition was filed, the merger of H-T-& L-, LLC into T-L-& A-, LLC had not been completed. Article 1.2 of the Plan of Merger indicates that the merger will be consummated by filing with the relevant state authority, but there is no evidence that that filing had been done prior to the time the petition was filed. The Petitioner has therefore not documented that the transfer and assumption of ownership of H-T-& L-, LLC by T-L-& A-, LLC had occurred at the time of filing.

Also, petitioners may be considered as a successor in interest to assume a predecessor's previous immigrant benefit requests, including those filed with the Department of Labor. *See generally* 6 USCIS Policy Manual E.3(A), https://www.uscis.gov/policy-manual. But in this case, the Petitioner filed both the labor certification and Form I-140, and it does not claim, nor do USCIS records show, that there are any previous immigrant benefit requests by H-T-& L-, LLC for it to assume. For these reasons, the Petitioner cannot be considered to be a successor in interest to H-T-& L-, LLC.

As stated by the Director, the Petitioner and H-T-& L-, LLC are separate legal entities, and the Petitioner cannot establish its ability to pay the wage offered to the Beneficiary through the financial evidence of a different entity. Because a corporation is a separate and distinct legal entity from its shareholders (or members), the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). In a similar case, the court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [USCIS] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage." *Id.* at *2. As the Petitioner has not submitted its own federal tax returns, annual reports, or audited financial statements, or any other acceptable evidence to show its ability to pay the proffered wage, the petition will remain denied.

ORDER: The appeal is dismissed.