U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 27528493

Date: JULY 26, 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 senior software engineer. The company requests his classification under the employment-based, second-preference ("EB-2") immigrant visa category for members of the professions holding advanced degrees. *See* Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). Prospective U.S. employers 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, concluding that it lacks a valid certification from the U.S. Department of Labor (DOL). The Director found that the Petitioner did not demonstrate its claimed status as a "successor in interest" of the business that filed the accompanying labor certification application or that its job offer matches the one on the certification. On appeal, the company contends that the Director made "fundamental factual mistakes" and misinterpreted evidence.

The Petitioner bears the burden of demonstrating eligibility for the requested benefit by a preponderance of the evidence. *See 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 agree with the Director that the Petitioner has demonstrated neither the labor certification's application to the company's job offer nor the company's claimed successorship of the certification employer. We will therefore 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 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

Unless accompanied by an application for Schedule A designation or evidence of a beneficiary's qualifications for a shortage occupation, a petition for an advanced degree professional must include a valid individual labor certification. 8 C.F.R. § 204.5(k)(4)(i). A labor certification remains valid only for the noncitizen, particular job opportunity, 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 demonstrates that it is 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 that it acquired the rights and obligations needed to operate a predecessor's business or a discrete part of it. *See generally* 6 *USCIS Policy Manual* E.(3)(6), www.uscis.gov/policy-manual. A successor must: 1) fully describe and document how it acquired ownership of a predecessor's business; 2) demonstrate that, except for the employer change, it offers the same job opportunity described on the labor certification; and 3) 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 Beneficiary previously worked in the United States in temporary nonimmigrant work visa status for the Hewlett-Packard Company (HP). In April 2015, HP filed a labor certification application for him as a software designer in the company's digital photo services division. Later that year, while the application for the Beneficiary remained pending, HP sold the division where he worked to another company, [redacted] The Beneficiary then worked for [redacted] After DOL certified HP's application, [redacted] filed a Form I-140, Petition for Alien Worker, for him in July 2016 based on HP's labor certification.

Because [redacted] petition included HP's labor certification, the certification could not remain valid for [redacted] unless it established itself as the successor of HP's digital photo business. Finding that [redacted] demonstrated its acquisition of the rights and obligations needed to operate HP's business, USCIS approved [redacted] petition for the Beneficiary in August 2016.

The Petitioner claims that, by the end of 2020, it acquired [redacted] and began employing its former workers, including the Beneficiary. In May 2022, the Petitioner filed this petition with HP's labor certification, asserting itself as the successor of [redacted] and, thus, HP.

A. The Job Opportunity

A successor must generally offer a job with the same wage rate, geographical employment area, description, and requirements as stated on a predecessor's labor certification. *See generally* 6 *USCIS Policy Manual* E.(3)(F)(1).

> [O]fficers should deny any successor claim where the changes to the rate of pay, job description, or job requirements, as stated on [a] permanent labor certification, if made at the time that the permanent labor certification was filed with DOL, could have affected the number or type of available U.S. workers who applied for the job opportunity. However, an increase in the rate of pay due to the passage of time does not affect the successor-in-interest claim.

Id.

HP's labor certification identifies the offered position as "software designer." The Petitioner's Form I-140 states its intent to employ the Beneficiary as a "senior software engineer." The Director mailed a request for additional evidence (RFE), asking the Petitioner to clarify the duties of its offered job.

The company's RFE response included a letter from a human resources (HR) compliance specialist, indicating that, since the labor application's certification, the Beneficiary had received "step promotions." The letter states: "Although the proffered I-140 job title has changed from the title listed on the underlying ETA Form 9089, the primary job duties and responsibilities remain substantively the same." The letter states that the Petitioner's offered position includes all six job duties listed on the labor certification, with an additional two tasks. The duties listed on the labor certification include:

- Design, develop, maintain, test, and perform quality and performance assurance of system software products;
- Develop web applications and server side infrastructure;
- Extend application platform to support partner needs;
- Develop server side code and web application code and draft engineering design/architecture;
- Perform unit testing and provide guidance/support for QA/system testing; and
- Resolve defects/bugs during QA testing and in post-release patches and resolve defects/bugs on production.

The two additional duties are:

- Collaborate with product managers, cross-functional partners and stakeholders on platform development, and lead/coordinate teams in development activities that are located in remote locations; and
- Act as a technical lead for a small group of engineers, including offshore for assigned engineering projects.

Because the duties in the offers of the Petitioner and HP differ, the Director concluded that the Petitioner "is no longer offering the beneficiary the position identified on the labor certification." The Director therefore found the certification invalid for the Petitioner's job offer.

Contrary to the Director, we do not believe that all additional duties in the offers of would-be successors bar use of predecessors' labor certifications. Additional duties that do not significantly alter the natures of predecessors' jobs or do not require job-holders to spend proportionately significant amounts of time on the duties would not likely have changed the number or type of U.S. applicants for the positions.

The Petitioner's additional duties involve more leadership and collaboration responsibilities than stated in HP's original job offer. Thus, the company's offer could have resulted in more U.S. applicants with managerial skills. The additional duties therefore alter the job's nature. The Petitioner has not submitted evidence of how much time the Beneficiary would spend on the additional duties in relation to the job's other tasks. We therefore cannot accurately determine whether the Petitioner's additional duties bar the use of HP's labor certification. But the company bears the burden of proof. *See Matter of Chawathe*, 25 I&N Dec. at 375-76. Thus, the record does not demonstrate the Petitioner's offering of the job described on the labor certification.

On appeal, the Petitioner contends that both the duties of its and HP's job offers fall under the same Standard Occupational Classification (SOC) code: 15-1252.00 (software developers).[1] The company also states that "the minor changes to the job reflect a natural step-promotion that occurs as an employee incrementally progresses over time in their career."

These contentions may be true. But the Petitioner's additional duties also alter the job's nature, and the company has not demonstrated that the Beneficiary would not spend a significant proportion of his time on them. We will therefore affirm the Director's finding that the Petitioner has not established its offering of the same job described on the labor certification.

B. The Claimed Ownership Transfer

A successor must also fully describe and document its assumption of a predecessor's business. *See generally* 6 *USCIS Policy Manual* E.(3)(F)(3). Evidence of ownership transfer may include: legal agreements showing a predecessor's merger, acquisition, or other reorganization; Forms 10-K, 10-Q, 8-K or other relevant filings with the U.S. Securities and Exchange Commission (SEC); and newspaper articles or other media reports announcing mergers, acquisitions, or other reorganizations effecting ownership change. *Id.* A successor must not only demonstrate its acquisition of a predecessor's assets, but also its assumption of the essential rights and obligations needed to carry on the predecessor's business in the same manner as the predecessor. *Id.*

[1] The SOC system is a federal statistical standard that agencies use to classify workers into occupational categories. U.S. Bureau of Labor Statistics (BLS), "Standard Occupational Classification," www.bls.gov/soc/. The government revised SOC codes in 2018. BLS, "How often do Standard Occupational Classification (SOC) codes change?" www.bls.gov/soc/notices/2023/code_changes.htm. Thus, HP's labor certification lists a different SOC code than now applicable to software developers.

As the Director found, the Petitioner submitted insufficient evidence to demonstrate its claimed acquisition of [redacted] The Petitioner's initial evidence included audited financial statements of a holding company that acquired all of the Petitioner in September 2019. A note to the statements indicates that the holding company also acquired all of [redacted] in January 2020. Thus, the financial statements do not indicate the *Petitioner's* acquisition of [redacted] Rather, the statements indicate the *holding company's* acquisition of the Petitioner and [redacted] Therefore, while the statements indicate an affiliation between the Petitioner and [redacted] the documents do not demonstrate the Petitioner's ownership of [redacted] and thus the claimed successorship in interest of HP.

The Petitioner also included an affidavit from its chief strategic development, people, and legal officer. The affidavit, however, does not state the Petitioner's acquisition of [redacted] Rather, the document identifies the Petitioner's "family of brands" as [redacted] acquirer. The letter from the Petitioner's HR representative similarly states that the Petitioner's "organization" acquired [redacted] Both documents assert that a December 31, 2020 "corporate reorganization" turned [redacted] employees into the Petitioner's employees. But the documents do not explain how this employee transfer occurred, and the record lacks other documentary evidence detailing the reorganization.

In response to the Director's (RFE), the Petitioner submitted copies of additional documents regarding the acquisitions of it and [redacted] including SEC filings and published media articles. Some articles describe the "combination" of the Petitioner and [redacted] But none specifically demonstrates the Petitioner's acquisition or ownership of [redacted]

Regarding the corporate reorganization, the Petitioner's RFE response included a copy of a November 2020 email from a senior director to employees. The message states: "This is confirmation that effective 1/1/21, all [redacted] U.S. employees will be transitioned to the [Petitioner's] legal entity payroll." The email, however, does not specify the Petitioner's acquisition or ownership of [redacted]

The Petitioner submits additional evidence on appeal. But the record shows that the Director's RFE notified the company of additional needed evidence and provided it with a reasonable opportunity to submit documentation of its claimed [redacted] acquisition. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (declining to consider evidence on appeal where a petitioner received notice and a reasonable opportunity to provide proof before the petition's denial). The Petitioner does not claim that its appellate evidence was unavailable before the RFE response deadline. Therefore, we will not consider the Petitioner's appellate evidence.

Even if we accepted the appellate evidence, it would not demonstrate the Petitioner's claimed ownership of [redacted] Counsel asserts that, "[p]ursuant to the Corporate Reorganization, [redacted] essential assets and liabilities were moved under [the Petitioner] in the Company's consolidated books and records, and employees of [redacted] became employees of [the Petitioner], effective January 1, 2021." Counsel contends that the corporate action included "reorganization of certain functions and the transfer of employees and certain essential rights and assets from [redacted] to [the Petitioner]."

Counsel further states that:

> [p]ursuant to the Corporate Reorganization, [redacted] adopted a common enterprise resource planning (ERP) program, under which certain of [redacted] assets and liabilities were transferred to [the Petitioner's] balance sheet. The ERP asset transfer included the transfer of [redacted] intangibles, intercompany receivables, cash, and various other essential assets to [the Petitioner]. Excluding investments in subsidiaries, this was a majority of [redacted] remaining assets.

Counsel's assertions, however, do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 n.2 (BIA 1988) (citing *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980)). The Petitioner must substantiate counsel's statements with independent evidence, which may include affidavits or declarations.

The Petitioner submits March 7, 2023 "written consent" and "resolutions" of [redacted] sole member, purportedly ratifying the corporate reorganization. The documents indicate that [redacted] employees became the Petitioner's employees and that the companies use a common ERP system. But the documents do not confirm the claimed transfer of essential rights and assets from [redacted] to the Petitioner or otherwise indicate its acquisition or ownership of [redacted]

The Petitioner also submits copies of additional emails. But they also do not establish the company's acquisition or ownership of [redacted] For example, a November 2020 message from a [redacted] HR official to [redacted] employees states:

> Starting in January 2021, [redacted] employees in the United States will see [the Petitioner] as their employer on [IRS Forms] W-2, [Wage and Tax Statements] and other legal employment documents. This is because we are all members of the [Petitioner's] family of brands and are moving onto [the Petitioner's] HR and Financial system.

The message indicates that [redacted] is a member of the Petitioner's "family of brands." But it does identify the Petitioner as [redacted] owner or acquirer.

The Petitioner further submits copies of additional published media articles as proof of its purported acquisition of [redacted] essential rights and liabilities. One article, for example, states that '[redacted] (merged with [the Petitioner].)" The Petitioner, however, has not submitted any transactional or financial documentation detailing its purported merger with [redacted] Rather, a preponderance of the appellate evidence indicates that, although the Petitioner and [redacted] are affiliates, the Petitioner has no ownership interests in [redacted] Thus, the Petitioner's appellate evidence would not demonstrate its acquisition or ownership of [redacted]

Although unaddressed by the Director, the record also casts doubt on the holding company's purported receipt of the Petitioner's assets and liabilities in September 2019. The record contains documentation indicating that the transaction involved a "reverse triangular merger" under Delaware law. The documents show that the holding company targeted the Petitioner by creating a wholly owned subsidiary to merge with it, and, upon merger, the subsidiary immediately dissolved leaving the Petitioner surviving as the holding company's wholly owned subsidiary. Under Delaware law, such mergers do not transfer any assets or liabilities from the surviving entities. The Delaware Court of

Chancery 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).[2] 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 does not establish the Petitioner's ownership interest in [redacted]

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 should address whether the holding company legally received the Petitioner's assets/liabilities in the September 2019 transaction.

For the foregoing reasons, the Petitioner has not demonstrated its claimed acquisition of [redacted][3]

III. CONCLUSION

The Petitioner has established neither its offering of the job opportunity stated on the labor certification nor its claimed acquisition of the Beneficiary's former employer. Thus, the record does not establish the validity of the accompanying labor certification for the Petitioner's job offer. We will therefore affirm the petition's denial.

ORDER: The appeal is dismissed.

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[2] 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)).

[3] Although unaddressed by the Director, the Petitioner also has not demonstrated the Beneficiary's qualifying employment experience for the offered position. Contrary to 8 C.F.R. § 204.5(g)(1), the experience letters from his former employers omit the signatories' titles. In any future filings in this matter, the Petitioner must address this evidentiary deficiency.