U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 11537095

Date: APR. 26, 2022

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Skilled Worker

The Petitioner, a clothing manufacturer, seeks to employ the Beneficiary as a sewing machine operator. It requests classification of the Beneficiary as a skilled worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(i), 8 U.S.C. § 1153(b)(3)(A)(i). This immigrant visa category allows a U.S. employer to sponsor a foreign national for lawful permanent resident status to work in a position that requires at least two years of education, training, or experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not establish its ability to pay the proffered wage; that the Beneficiary possessed the required experience for the offered position; that there existed a *bona fide* job opportunity for the Beneficiary with the Petitioner; and that the Petitioner is still doing business or has a successor-in-interest. The Director also made a finding that the Petitioner willfully misrepresented a material fact relating to the Beneficiary's employment history.[1]

The Petitioner bears the burden of establishing eligibility for the requested immigration benefit. *See* section 291 of the Act, 8 U.S.C. § 1361. Upon *de novo* review, we will reject the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Immigration as a skilled worker usually follows a three-step process. First, the prospective employer must obtain a labor certification approval from the U.S. Department of Labor (DOL) to demonstrate that there are not sufficient U.S. workers who are able, willing, qualified, and available for the offered position. Section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5).

Second, the employer must submit the approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). Section 204 of the Act, 8 U.S.C. § 1154. The immigrant visa petition must establish that the foreign worker qualifies for the offered position, that the foreign worker and the offered position are eligible for the requested immigrant visa category, and that the employer has the ability to pay the proffered wage. *See* 8 C.F.R. § 204.5. These requirements

[1] We rejected the subsequent appeal for being filed late but reopened the matter after counsel submitted evidence establishing that the appeal was timely filed.

must be satisfied by the priority date of the immigrant visa petition. *See* 8 C.F.R. § 204.5(g)(2); *Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg'l Comm'r 1977). In this case, the priority date is October 6, 2003.[2]

Finally, if USCIS approves the immigrant visa petition, the foreign worker may apply for an immigrant visa abroad or, if eligible, for adjustment of status in the United States. Section 245 of the Act, 8 U.S.C. § 1255.

II. SUCCESSOR-IN-INTEREST

An appeal may only be filed by an affected party. 8 C.F.R. § 103.3(a)(2)(i). An affected party is a party with standing in a proceeding, such as an applicant or petitioner. *See* 8 C.F.R. § 103.3(a)(1)(iii)(B). If an appeal is filed by a party that does not have standing, the appeal must be rejected as improperly filed. 8 C.F.R. § 103.3(a)(2)(v).

When, as in this case, an appeal is filed by a different legal entity than the employer that filed the labor certification and the petition, then the new entity that filed the appeal must establish that it is a successor-in-interest to the petitioner. *See Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). In *Matter of Dial Auto*, the Commissioner found that the petitioner did not adequately support its claim that it had assumed the predecessor company's rights, duties, and obligations in order to establish eligibility as a successor-in-interest. The successor entity has the burden to fully describe and document the nature of the transfer of rights, obligations, and ownership of the prior entity.[3]

Here, the petition was filed by [redacted] (Federal Employer Identification Number [redacted]), and the appeal was filed by [redacted] (Federal Employer Identification Number [redacted]). During the adjudication of the petition, the Director issued a request for evidence (RFE) and two notices of intent to deny (NOID). The RFE and NOIDs each raised several issues, including the fact that the Petitioner was no longer in business. In each notice, the Director requested documentary evidence that [redacted] (Appellant) was a successor-in-interest to [redacted] (Petitioner).

In response to the Director's requests, the Appellant submitted documents that show that the Appellant was incorporated during the adjudication of the petition, that the Appellant is owned by the same individual who owned the Petitioner, that the Appellant's address is the same as the Petitioner's former address, that the Appellant and the Petitioner are in the same business, and that the Beneficiary was employed by both the Appellant and the Petitioner. However, we agree with the Director that this information was not sufficient to "fully describe and document the nature of the transfer of rights, obligations, and ownership of the prior entity" under *Matter of Dial Auto* and the Neufeld Memorandum.

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[2] For petitions that require a labor certification, the priority date is the date on which the DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d).

[3] Memorandum from Donald Neufeld, Acting Associate Director, Domestic Operations, USCIS, HQ 70/6.2, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions; Adjudicator's Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37)* (Aug. 6, 2009), http://www.uscis.gov/legal-resources/policy-memoranda (Neufeld Memorandum).

In the brief submitted in response to the second NOID, Appellant's counsel stated that the Appellant performed a "takeover of business assets. Even though there was no formal name change registration of the existing entity, there certainly took places [sic] several facts based upon [the] takeover of [the Petitioner] by [the Appellant]." The brief also stated that "[i]t is highly presumable that the owner was trying to utilize the old entity of [the Petitioner] while expanding among the customers and suppliers before earning firm credit level of [the Appellant]. It would make the two entities overlap in existence for some period of time." Assertions of counsel 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)). Counsel's statements must be substantiated in the record with independent evidence, which may include affidavits and declarations.

On appeal, Appellant's counsel again claims that the Appellant "has transferred corporate assets of business premises, employees and management from the old company to [the] new company." However, there is no documentation of this transfer such as a merger agreement or a purchase agreement for all or substantially all of the Petitioner's assets. After reviewing the appeal, we issued a notice of intent to reject the appeal, again informing the Appellant that it must establish that it is a successor-in-interest to the Petitioner in order to be an affected party in this proceeding.

The brief submitted in response to our notice of intent to reject states that the Petitioner and the Appellant had the same owner, the same address, made the same products, used the same equipment, and had the same employees.[4] The brief states that the worker's compensation account changed from the Petitioner to the Appellant in 2012, and the Appellant's 2010 tax return had an entry for depreciation which shows the company overtook equipment from the Petitioner. The brief also states that the companies did not document the transfer because they were small businesses owned by the same person. The brief claims that *Matter of Dial Auto* and the Neufeld Memorandum apply to large corporations that have the resources to properly document their transactions, not small businesses like the Appellant and the Petitioner.

The notice of intent to reject response contains a letter from the Appellant's new president. The letter states that the Petitioner and the Appellant overlapped for a period while the operations of the Petitioner were winding down. The response also contains:

- The Appellant's 2010 tax return.
- The Petitioner's 2010 lease agreement.
- The Petitioner's Worker's Compensation and Employers Liability Policy for 2010-2011 and 2011-2012.
- A copy of the Appellant's Worker's Compensation policy from 2012-2013 as evidence that the Petitioner and the Appellant had the same address and type of business.
- A statement from [redacted] attesting that he has been employed as a manager with the Petitioner since 2006 and that the Beneficiary was an experienced employee when he joined the company. The document states that the Petitioner did not have a lot of funds and was therefore unable to train an inexperienced employee for the Beneficiary's position. The statement also claims that the Petitioner transitioned into the Appellant.
- [redacted]'s Forms W-2, showing his employment by the Petitioner in 2006 and 2009,

[4] As previously noted, assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. at 534 n.2.

and the Appellant in 2016.
- The Petitioner's 2005 corporate tax return.
- The Appellant's state annual reports for 2010-2014, showing that the Petitioner and the Appellant had the same owner.

The Appellant has established that the Petitioner and the Appellant were owned by the same person, operated at the same address, and engaged in the same type of business. In addition, it appears that more than one employee worked for the Petitioner and then the Appellant. However, the evidence in the record is not consistent (for example, regarding the date that the Appellant allegedly took over from the Petitioner)[5] and is not sufficient to establish that the Appellant acquired all or substantially all of the Petitioner's business. The fact remains that the Petitioner and the Appellant were separate corporate entities and the record does not contain sufficient evidence to establish that there was a transaction that resulted in the Appellant acquiring all or substantially all of the Petitioner's business.

The successor-in-interest issue has been raised with the Appellant multiple times. We have requested a detailed explanation and documentation of the claimed successor-in-interest relationship. For the reasons explained in the preceding paragraphs, the Appellant has not met its burden. Therefore, the appeal must be rejected as improperly filed under 8 C.F.R. § 103.3(a)(2)(v).[6]

III. CONCLUSION

The appeal must be rejected because evidence in the record does not establish that it was filed by an affected party.

ORDER: The appeal is rejected.

[5] The Appellant must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

[6] If we did not reject this appeal, we would have dismissed it on other grounds. We agree with the Director's conclusion that the evidence in the record does not establish (a) the Petitioner's continuing ability to pay the proffered wage from the priority date; and (b) that the Beneficiary possessed the required experience for the offered position as set forth on the labor certification. We also agree with the Director's finding that the Petitioner and the Beneficiary willfully misrepresented a material fact regarding the Beneficiary's claimed employment experience. Since the identified basis for rejection is dispositive of the Petitioner's appeal, we decline to reach and hereby reserve these issues. *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *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 is otherwise ineligible).