U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-N-A-, INC.

DATE: AUG. 3, 2018

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a credit pricing and valuation services business, seeks to employ the Beneficiary as an AVP, application support engineer. It requests classification of the Beneficiary as an advanced degree professional 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 Director of the Nebraska Service Center denied the petition on the ground that the petition is not supported by the required labor certification. The Director found that the labor certification submitted with the petition was obtained by a different business entity, and the Petitioner did not establish that it is the successor-in-interest to that entity.

On appeal, the Petitioner asserts that the corporate names on the labor certification and the petition are closely related companies within a large multinational enterprise. It claims that the different names on the labor certification and the petition resulted from an internal administrative decision that did not amount to a material change of the labor certification or the petition.

Upon *de novo* review, we will dismiss the appeal. We also find that the employer has not established its ability to pay the wage, which is another ground for denial.

I. LAW

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the foreign national 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. The Labor Certification Does Not Support the Immigrant Visa Petition

Unless accompanied by an application for Schedule A designation or documentation 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 particular job opportunity stated on it. 20 C.F.R. § 656.30(c)(2).

A business may use another employer's labor certification if it establishes itself as the employer's successor in interest. *Matter of Dial Auto Repair Shop, Inc.*, 19 I&N Dec. 481 (Comm'r 1986). For immigration purposes, a successor must: 1) document its acquisition of a predecessor's business; 2) establish that, but for the ownership change, the job opportunity remains the same as listed on the labor certification; and 3) demonstrate its eligibility as a petitioner, including the abilities of it and its predecessor to continuously pay the proffered wage from the petition's priority date onward. *Id.* at 482-83.

The record shows that which filed the labor certification and which filed the immigrant visa petition, are subsidiaries of a multinational corporation, As explained by the Petitioner, while continues to operate and employ the Beneficiary,[1] is the Beneficiary's "payroll employer" by virtue of an administrative restructuring in January 2017 that moved U.S. employees of four U.S. subsidiaries (including to the payroll of the U.S. parent company, The Director found that the transfer of payroll responsibility did not create a successor-in-interest relationship between and that remains the actual employer, and that the labor certification approved for cannot be used in support of the immigrant visa petition filed by

On appeal the Petitioner agrees that there is no successor-in-interest relationship between and , but asserts that the Director erred by not recognizing that filing the Form I-140 petition in the name of rather than , involved no material changes to the terms of the labor certification. The Petitioner cites excerpts from a USCIS policy memorandum authored in 2009 by Acing Associate Director, entitled Even though this petition does not involve a successor-in-interest situation, the Petitioner asserts that the does address some changing business practices that are applicable to this case. As described by the Petitioner, the highlights that simple, immaterial changes such as a Petitioner's name change or a change of job location within the same intended area of employment do not rise to the level of a material change that would require a new or amended immigrant visa petition. Applying the principles to this case, the Petitioner

[1] The labor certification states that the Beneficiary's employment with began on February 1, 2013.

claims that (1) the job offer as described in the labor certification remains the same, (2) the job location indicated on the labor certification remains the same, (3) the company's ability to pay remains the same, and (4) the only change between the labor certification and the petition is that the employer is now the U.S. parent company rather than the subsidiary.

Contrary to the Petitioner's claim, the fourth item listed above does represent a material change between the labor certification and the petition. The labor certification employer did not undergo a simple name change, rather the labor certification and I-140 petition were filed by different companies. and are separate corporations with separate and distinct federal employer identification numbers (FEINs), corporate addresses, employee rosters, and business functions. As noted, a business may utilize another employer's labor certification in support of an I-140 petition only if it establishes itself as the employer's successor in interest. As the Petitioner clearly admits on appeal, no such successor in interest relationship exists between it and the labor certification employer. Therefore, the labor certification approved for does not support the immigrant visa petition filed by

B. The Labor Certification Employer Has Not Established its Ability to Pay the Proffered Wage

A U.S. employer must establish that it has the ability to pay the Beneficiary the proffered wage, as stated on the labor certification, from the priority date[2] of the petition onward. The regulation at 8 C.F.R. § 204.5(g)(2) provides, in pertinent part, as follows:

> Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. 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 the Service.

As stated in section G of the labor certification, as well as in part 6 of the petition, the proffered wage of the job offered is $84,864 per year.

[2] The priority date of a petition is the date the underlying labor certification was filed with the DOL, which in this case was April 10, 2017. *See* 8 C.F.R. § 204.5(d). A petitioner must establish that all eligibility requirements for the petition have been satisfied from the priority date onward

The record includes a letter from attesting that it employs more than 100 employees, and that in 2016 had gross income of $2.735 billion and net income of $153 million. The record also includes a copy of the Form 10-K that filed with the U.S. Securities and Exchange Commission in January 2017. As discussed in this decision, however, neither of these corporations is the labor certification employer. The record indicates that which filed the labor certification and claims to have employed the Beneficiary since February 2013, operates under its own FEIN and, files its own federal income tax returns. Yet, no copies of its federal income tax returns for 2017 or earlier years have been submitted. Nor have any annual reports or audited financial statements been submitted for Thus, none of the evidence specifically required by 8 C.F.R. § 204.5(g)(2) has been submitted. Moreover, no evidence has been submitted of the wages paid to the Beneficiary since the priority date.

We conclude, therefore, that the record does not establish the labor certification employer's continuing ability to pay the proffered wage from the priority date of April 10, 2017, onward. For this reason as well the petition cannot be approved.

II. CONCLUSION

The labor certification does not support the immigrant visa petition. In addition, the labor certification employer has not established its continuing ability to pay the proffered wage from the priority date onward.

ORDER: The appeal is dismissed.

Cite as *Matter of M-N-A-, Inc.*, ID# 1417085 (AAO Aug. 3, 2018)