U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF E- INC.

DATE: JAN. 31, 2019

APPEAL OF NEBRASKA SERVICE CENTER DECISION

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

The Petitioner, an information services company, seeks to employ the Beneficiary as an IT business analyst. 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 "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. The Director found that the Petitioner did not establish that it is the successor-in-interest to the company that filed the labor certification, and therefore could not use the labor certification in support of its petition.

On appeal the Petitioner asserts that it is a successor-in-interest as a matter of fact and law to the company in whose name the labor certification was filed, and that the labor certification therefore supports the petition.

Upon *de novo* review, we will dismiss the appeal.

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 U.S. 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 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, the particular beneficiary, and the area of intended employment stated on the document. 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. *See 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 ability of it and its predecessor to continuously pay the proffered wage from the petition's priority date onward. *Id.* at 482-83. In this case the only issue on appeal is whether the Petitioner has adequately documented its acquisition of its predecessor's business.

The record shows that the labor certification application was filed by on November 30, 2016,[1] and after its approval by the DOL in January 2017 the labor certification was submitted to USCIS with the immigrant visa petition filed by in March 2017. a Missouri corporation, was a provider of payroll-related services and human resources business process outsourcing services. is engaged in collecting, organizing, and managing numerous types of credit, financial, public record, demographic, and marketing information regarding individuals and businesses. The Petitioner asserts that an extended merger and acquisition process began with the approval by shareholders on May 15, 2007, of an Agreement and Plan of Merger (APM), and concluded nearly ten years later with an employee management and services agreement (EMSA) between and on December 17, 2016. After reviewing and discussing these two documents, and all of the other documentation furnished by the Petitioner, the Director found that the evidence did not establish that a valid successor-in-interest relationship was created between and [2] on December 17, 2016, or at any other time following the priority date of November 30, 2016. For the reasons discussed below, we agree with the Director's decision.

The documentation in the record shows that acquired the original in 2007 by means of a forward triangular merger in which created a wholly-owned subsidiary, into which was merged, with being the surviving entity. The result of this transaction (the APM), completed on May 15, 2007, was that became the successor-in-interest to then changed its name back to on June 7, 2007.

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[1] The date the labor certification application was filed is the priority date of the subsequent employment-based immigrant petition. See 8 C.F.R. § 204.5(d)

[2] The Federal Employer Identification Number (FEIN) of is while that of is

No successor-in-interest relationship was created between [redacted] and [redacted] in 2007 because the business assets and operations of the former [redacted] entity remained with the newly merged [redacted] entity, which is a subsidiary of [redacted] While some sections of the APM contemplated the assumption of certain employment obligations by [redacted] and/or [redacted] from the former [redacted] entity, the APM did not provide for any subsequent transfer of employees and/or business assets from the new [redacted] entity to [redacted] The record indicates that from June 2007 to December 2016 the new [redacted] operated as a wholly owned subsidiary of [redacted] and one of its five business units.

In December 2016, by means of the EMSA, [redacted] launched an employee reorganization whereby employees of its subsidiary, [redacted] would be transferred to the parent. The agreement provided that [redacted] was to be the employer of all "worksite employees" assigned to perform work for [redacted] at [redacted] worksite. However, the EMSA does not provide for the transfer of [redacted] business assets to [redacted] In fact, section 4.B of the agreement specifically provides that [redacted] remains the owner of all its intellectual property, both pre-existing and created by "worksite employees" pursuant to the EMSA, and section 6.B of the agreement indicates that [redacted] business assets utilized by "worksite employees" to provide services under the EMSA remain the property of [redacted] Furthermore, section 10 of the agreement provides that the EMSA had an initial one-year term, renews automatically thereafter for additional one-year terms, and may be terminated by either party on 60 days written notice or immediately for cause. Finally, section 10.A of the agreement provides that upon termination of the EMSA, [redacted] will become the employer of those employees working for it, including presumably all "worksite employees" assigned to perform work for [redacted] pursuant to the EMSA. Thus, the continuation of [redacted] as an operating business entity is expressly indicated in the EMSA with [redacted]

On appeal the Petitioner refers to the Memorandum from Donald Neufeld, Director, Acting Associate Director, Domestic Operations, USCIS, HQ, *Successor-in-Interest Determinations in Adjudication of Form I-140 Petitions*; Adjudicators Field Manual (AFM) Update to Chapter 22.2(b)(5) (AD09-37) PDF, 642 KB), August 6, 2009 (Neufeld Memorandum), and to specific language therein that advises USCIS "to allow flexibility for the adjudication of I-140 petitions that present novel yet substantiated and legitimate successor-in-interest scenarios." The Petitioner asserts that the instant petition presents just such a scenario with the decade-long process of merging [redacted] and [redacted] According to the Petitioner, after the effective date of the EMSA on December 17, 2016, [redacted] no longer employed any workers, normal business operations of [redacted] ceased, and [redacted] was totally integrated into [redacted] Therefore, the Petitioner asserts that [redacted] should be recognized as the successor-in-interest to [redacted]

As previously discussed, however, the documentation of record does not substantiate the Petitioner's assertion that [redacted] was totally integrated into [redacted] by the EMSA on December 17, 2016. The Neufeld Memorandum, which affirmed the three-part test of *Dial Auto* for determining whether a valid successor-in-interest relationship exists, states with regard to the transaction between the merging entities that "[t]he evidence provided must show that the successor not only purchased the predecessor's assets but also that the successor acquired the essential rights and obligations of the predecessor necessary to carry on the business in the same manner as the predecessor." Neufeld

Memorandum, supra, at 8. It also states that"[c]ontractual agreements or other arrangements in which two or more business entities agree to conduct business together or agree to provide services to each other without the transfer of ownership of the predecessor to the successor do not create a valid successor-interest relationship for I-140 purposes." *Id.* In this case, the EMSA indicates that there was no transfer of assets, only employees, from [redacted] to [redacted] Moreover, the employees transferred to [redacted] continued to be utilized for the business operations of [redacted] Contrary to the Petitioner's claim, therefore, the evidence indicates that [redacted] business operations have not ceased, and [redacted] has not been totally integrated, or merged, into [redacted] as claimed. Although 100% acquisition of the predecessor is not required, the successor must show that it acquired the essential rights and obligations to carry on the predecessor's business.[3] Because [redacted] has not demonstrated that the EMSA vested [redacted] with the rights and obligations of [redacted] necessary to carry on the business in the same manner, [redacted] cannot be considered a successor in interest.

III. CONCLUSION

The Petitioner has not established a successor-in-interest relationship with the labor certification employer. As such, the I-140 petition is not supported by the required labor certification.

ORDER: The appeal is dismissed.

Cite as *Matter of E- Inc.*, ID# 1645827 (AAO Jan. 31, 2019)

[3] There is a difference between a change due to a successor-in-interest and simply a change of employer. Without documentation of the transfer of the rights, obligations, and ownership of the predecessor, the new employer is not a successor-in-interest and must obtain its own labor certification from the DOL.