



May 5, 2020

PM-602-0177

Policy Memorandum

SUBJECT: *Matter of F-M- Co.*, Adopted Decision 2020-01 (AAO May 5, 2020)

Purpose

This policy memorandum (PM) designates the attached decision of the Administrative Appeals Office (AAO) in *Matter of F-M- Co.* as an Adopted Decision. Accordingly, this adopted decision establishes policy guidance that applies and shall be used to guide determinations by all U.S. Citizenship and Immigration Services (USCIS) employees. USCIS personnel are directed to follow the reasoning in this decision in similar cases.

Matter of F-M- Co. clarifies that for first preference multinational executives or managers, a petitioner must have a qualifying relationship with the beneficiary's foreign employer at the time the petition is filed and must maintain that relationship until the petition is adjudicated. *Matter of F-M- Co.* also clarifies that in the event a corporate restructuring affecting the foreign entity occurs prior to the filing of the petition, a petitioner may establish that the beneficiary's qualifying foreign employer continues to exist and do business through a valid successor entity.

Use

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

Contact Information

Questions or suggestions regarding this PM should be addressed through appropriate directorate channels to the AAO.



U.S. Citizenship
and Immigration
Services

ADOPTED DECISION

MATTER OF F-M- CO.

ADMINISTRATIVE APPEALS OFFICE
U.S. CITIZENSHIP AND IMMIGRATION SERVICES
DEPARTMENT OF HOMELAND SECURITY

May 5, 2020¹

- (1) For first preference multinational executives or managers, a petitioner must have a qualifying relationship with the beneficiary's foreign employer at the time the petition is filed and must maintain that relationship until the petition is adjudicated.
- (2) In the event a corporate restructuring affecting the foreign entity occurs prior to the filing of the petition, a petitioner may establish that the beneficiary's qualifying foreign employer continues to exist and do business through a valid successor entity.

FOR THE PETITIONER: Kyle Sherman, Esquire, Atlanta, Georgia

The Petitioner, an automobile manufacturer, seeks to permanently employ the Beneficiary as its "steering component technical expert" under the first preference immigrant classification for multinational executives and managers. Immigration and Nationality Act (the Act) section 203(b)(1)(C), 8 U.S.C. § 1153(b)(1)(C).² The Director of the Nebraska Service Center denied the petition, concluding that because the Beneficiary's last employer abroad had ceased to exist, it was

¹ On February 27, 2020, we issued this decision as a non-precedent decision. We have reopened this decision on our own motion under 8 C.F.R. § 103.5(a)(5)(i) for the purpose of making revisions in preparation for U.S. Citizenship and Immigration Services (USCIS) designating it as an Adopted Decision.

² In this role, the Beneficiary will oversee the technical development of the Petitioner's Autonomous Vehicle Motion Control technology. The Petitioner demonstrated that the offered position will be in a managerial capacity as defined at section 101(a)(44)(A) of the Act, 8 U.S.C. § 1101(a)(44)(A).

no longer doing business as defined in the regulations, and no longer had a qualifying relationship with the Petitioner.

The Petitioner asserts on appeal that the Director erred in (1) determining that the Beneficiary's employer abroad must continue its existence as a "separate and distinct legal entity" and (2) rejecting evidence that the Beneficiary's employer abroad continues to exist and do business through a successor-in-interest.

The petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). The Administrative Appeals Office (AAO) reviews 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 sustain the appeal.

I. LEGAL FRAMEWORK

This matter presents two related issues: (1) whether a petitioner must establish at the time of filing the Form I-140, Immigrant Petition for Alien Worker, that it maintains a qualifying relationship with the legal entity that employed the beneficiary abroad; and (2) if so, whether a petitioner can establish this ongoing qualifying relationship by demonstrating that the employer abroad continues to exist and do business through a successor entity.

To establish a "qualifying relationship," the Petitioner must show that the Beneficiary's foreign employer and the proposed United States employer are the same employer (a domestic entity with a foreign office) or related as a "parent and subsidiary" or as "affiliates." Section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(2) (providing definitions of the terms "affiliate" and "subsidiary"). We must examine "ownership and control" to determine the precise nature of the relationship between the United States employer and the foreign entity. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593 (Comm'r 1988).

II. BACKGROUND

Prior to his transfer to the United States to work for the Petitioner as a nonimmigrant, the Beneficiary worked for a German company, herein referred to as "FFA," for a period of 14 years. In October 2011, at the time of his transfer to the United States, the sole shareholder and parent company of FFA was "FW," a German subsidiary of the petitioning company.

In January 2015, the authorized representatives of these two German entities agreed to a merger by absorption in which FW acquired all of FFA's assets, rights, and obligations as the surviving entity. The merger agreement stipulates that the rights of FFA's employees transferred to FW, the operation of FFA by FW would continue, and the merger would not "affect the identity of the operation of [FFA]." The Petitioner filed the current immigrant visa petition in December 2016, following the merger of the two related entities.

III. ANALYSIS

A. Qualifying Relationship at the Time of Filing

The Director properly concluded that a petitioner must demonstrate a qualifying relationship with the beneficiary's last employer abroad as of the date it files the immigrant petition. As a long-standing tenet of immigration law, the petitioner must establish that all eligibility requirements for the immigration benefit have been satisfied from the time of the filing and continuing through adjudication. 8 C.F.R. § 103.2(b)(1); *see also Matter of Katigbak*, 14 I&N Dec. 45, 49 (Comm'r 1971).

A multinational executive or manager is one who "seeks to enter the United States in order to *continue* to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive." Section 203(b)(1)(C) of the Act (emphasis added). Accordingly, the petitioner must provide evidence that the prospective U.S. employer "is the same employer or a subsidiary or affiliate of the firm or corporation or other legal entity" which employed the beneficiary abroad. 8 C.F.R. § 204.5(j)(3)(i)(C). Therefore, it follows that the relationship between the petitioner and the beneficiary's foreign employer must exist both in the present and at the time of filing.

The principal focus of both the statute and the regulations is the continuity of the beneficiary's employment with the same multinational organization. *See* section 203(b)(1)(C) of the Act; 8 C.F.R. § 204.5(j)(3)(i)(A) and (B). This interpretation is consistent with the purpose in creating this classification as a means of permanently transferring key managers and executives within a multinational organization.³ A beneficiary cannot be transferred to the United States as a multinational executive or manager from a company that is no longer in the same multinational organization, whether that is because the former employer no longer exists in any form, or because it no longer shares the requisite common ownership and control with the petitioning U.S. employer.⁴ *Cf.* 52 Fed. Reg. 5738, 5741 (Feb. 26, 1987) ("requiring that the organization continue to do business in the U.S. and abroad" and overruling by regulation *Matter of Thompson*, 18 I&N Dec. 169 (Comm'r 1981)).

Further, the regulations require that a petitioner maintain its qualifying relationship from the time of filing and through the adjudication of the petition. *See* 8 C.F.R. § 103.2(b)(1).

B. Applying Successor-in-Interest Principles to the Qualifying Relationship Question

On appeal, the Petitioner maintains that FW is the successor-in-interest to FFA, the entity that employed the Beneficiary in Germany. As such, the Petitioner asserts that FW should be treated as the same entity that employed the Beneficiary for purposes of establishing an ongoing qualifying relationship. The Petitioner emphasized that a 2009 USCIS memorandum provided a definition for

³ Congress noted "the need of multinational business to transfer key personnel around the world as nonimmigrants is paralleled in this category to allow a basis upon which these individuals may immigrate." *See* H.R. REP. NO. 101-723 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6739, 1990 WL 200418.

⁴ Disqualifying changes in a qualifying relationship may include instances where the entity that employed the beneficiary abroad dissolves and ceases operations entirely or where the foreign employer is sold to a company that is not in the same multinational organization.

“successor-in-interest” and was intended to provide flexibility for legitimate successor-in-interest scenarios in the Form I-140 context. 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).

The Director rejected the Petitioner’s successor-in-interest claim, observing that the Neufeld Memorandum states that the successor-in-interest analysis is “not applicable to I-140 visa preference categories that do not require labor certification.” *Id.* at 10. Accordingly, the Director declined to consider corporate successorship principles and determined that the qualifying entity abroad must continue to exist and do business in the same legal form as it did when it employed the Beneficiary.

Upon review, we conclude that the Director’s decision applied an overly strict reading of the applicable statute, regulations, and USCIS policy when it required that the qualifying entity abroad must exist in the exact same legal form.

As noted, Congress created this immigrant classification to facilitate the transfer of managerial and executive employees within the same multinational organization.⁵ It is commonplace for large organizations to undergo reorganization and as a result, associated entities may be merged, consolidated, or dissolved. If those changes occur after a beneficiary has been transferred to the United States in L-1A classification and prior to filing an immigrant petition for a multinational manager or executive, as in the current case, it is the petitioner’s burden to fully disclose and document those corporate changes in support of its claim of a continuing qualifying relationship with the employer abroad, and to provide current evidence of the foreign employer’s ownership and control.⁶ Here, the Petitioner has disclosed and documented the merger of the Beneficiary’s foreign employer into its parent company. We see no barrier to conducting a successor-in-interest analysis in the immigrant visa context to determine whether a beneficiary’s foreign employer continues to exist through a successor company within the same multinational organization.

Additionally, we disagree with the decision’s complete rejection of the 2009 Neufeld Memorandum’s guidance in this context. It is true that the memorandum was issued to address successor-in-interest determinations in cases where a U.S. employer is claiming to be a successor-in-interest to the U.S. employer that filed a labor certification-based Form I-140, and that no certified labor certification is required in support of a multinational manager or executive petition. However, the memorandum provides useful guidance on agency accepted definitions of “successor” and “successor-in-interest” and does not prohibit USCIS from considering successor-in-interest claims in other contexts.

⁵ In promulgating the regulations on 203(b)(1)(C) of the Act, the former Immigration and Naturalization Service commented that “this regulation reflects the statute and follows criteria long in place for the adjudication of petitions for [L-1] nonimmigrant intra-company transferees . . .” 56 Fed. Reg. 30703, 30705 (July 5, 1991). Therefore, Congress and the agency recognized the clear parallels between the immigrant and nonimmigrant classifications.

⁶ A petitioner cannot rely on the prior L-1 approval as evidence of a qualifying relationship for purposes of a subsequent immigrant visa petition. The regulations recognize that the Beneficiary may already be working for the Petitioner or a related U.S. entity but still require a qualifying relationship with the foreign employer at the time of filing. *See* 8 C.F.R. § 204.5(j)(3)(i)(B).

The Neufeld Memorandum, which recognized changes in business practices in the areas of acquisitions and mergers, was issued “to allow flexibility for the adjudication of I-140 petitions that present novel yet substantiated and legitimate successor in interest scenarios.” *Id.* at 2. Like prior agency guidance on the issue of successor-in-interest eligibility requirements, it cited to *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 all of the predecessor company’s rights, duties, and obligations in order to establish eligibility as a successor-in-interest. The Neufeld Memorandum noted that *Matter of Dial Auto* had been interpreted too strictly and “did not state that a valid successor relationship could *only* be established through the assumption of all of a predecessor entity’s rights, duties, and obligations.” *Supra* at 3. The memo turned to *Black’s Law Dictionary* for definitions of “successor” and “successor-in-interest” and stressed the successor entity’s burden to fully describe and document the nature of the transfer of rights, obligations, and ownership of the prior entity.

“Successor-in-interest” is defined in *Black’s Law Dictionary* as “one who follows another in the ownership or control of property” and “retains the same rights as the original owner, with no change in substance.” *Black’s Law Dictionary* 1570 (9th ed. 2009). A “successor” is defined as “a corporation that, through amalgamation, consolidation or other assumption of interests is vested with the rights and duties of an earlier corporation.” *Black’s Law Dictionary* 1569 (9th ed. 2009).

In the event a corporate restructuring affecting the foreign entity occurs prior to the filing of a first preference multinational executive or manager petition, a petitioner may establish that the beneficiary’s qualifying foreign employer continues to exist and do business through a valid successor entity. If these conditions are met, USCIS will consider the successor-in-interest to be the same entity that employed the beneficiary abroad.

Here, the corporate restructuring occurred prior to the filing of the immigrant petition. The Petitioner has also established that the German entity that employed the Beneficiary was acquired through a well-documented merger by its parent company, FW, and FW, the successor-in-interest, owns and controls the original foreign employer’s property, has assumed its rights and duties, and carries on the same business with no change in substance. Further, the record demonstrates that the successor-in-interest is a subsidiary of the petitioning company and therefore part of the same multinational organization. Based on these facts, and for purposes of this petition, we consider the successor-in-interest, FW, to be the same entity that employed the Beneficiary in Germany. Accordingly, the Petitioner has established that it has a qualifying relationship with the entity that employed the Beneficiary abroad.

ORDER: The appeal is sustained.

Cite as *Matter of F-M- Co.*, Adopted Decision 2020-01 (AAO May 5, 2020)