



**U.S. Citizenship
and Immigration
Services**

**Non-Precedent Decision of the
Administrative Appeals Office**

In Re: 21764783

Date: AUG. 1, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, an [redacted] service provider, seeks to employ the Beneficiary as a manager, engineering (software engineer test lead). It requests classification of the Beneficiary under the third-preference, immigrant visa category for professionals. *See* Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with a baccalaureate degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the offered position differs from the one listed on the ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), and therefore the labor certification is not valid. On appeal, the Petitioner submits a brief and contends that the Beneficiary was promoted but the job description is essentially the same as the description provided on the labor certification.

We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). The Petitioner bears the burden of proof to establish eligibility for the requested benefit by a preponderance of the evidence. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). Upon *de novo* review, we will dismiss this case.

I. LAW

Immigration as a professional generally follows a three-step process. First, a prospective employer must apply to the U.S. Department of Labor (DOL) for certification that: (1) there are insufficient U.S. workers able, willing, qualified, and available for an offered position; and (2) the employment of a noncitizen in the position won't harm wages and working conditions of U.S. workers with similar jobs. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). Second, an employer must submit an approved labor certification with an immigrant visa petition to U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Finally, if USCIS approves a petition, a designated noncitizen 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 documentation of a beneficiary's qualifications in a shortage occupation, a petition for a professional must include a valid, individual labor certification. 8 C.F.R. § 204.5(I)(3)(i). A labor certification remains valid only for the particular job opportunity, foreign national, and geographic area of intended employment stated on it. 20 C.F.R. § 656.30(c)(2). If a job opportunity changes during a petition's pendency, the validity of an accompanying labor certification may expire. *Matter of United Inv. Grp.*, 19 I&N Dec. 248, 249 (Comm'r 1984).

For a job offer to remain as DOL-certified, "the facts of employment or intended employment must remain as stated and the specific employer-employee relationship stipulated and intended must continue both in present fact and prospectively." *Id.* USCIS must assess a petition "to ensure that the position offered is the same or similar position that was certified by the DOL." 6 *USCIS Policy Manual* E.6(A), <https://www.uscis.gov/policymanual>.

Here, the accompanying labor certification identifies the offered position as software engineer (test lead) and lists the following job duties:

Design, implement, and debug software for computers including algorithms and data structures for internet [redacted] company. Address all phases of product testing and development by providing necessary definition, development and deployment of all production application systems quality assurance strategy. Ensure delivery against QA department goals and objectives, i.e. meeting commitments and coordinating overall quality assurance schedule. Maintain product consistency throughout product cycle, to include the design, define and build phases through quality checkpoints and testing. Develop and manage quality assurance metrics for performance improvement of all teams. Implement ongoing quality improvement processes working with interdepartmental teams. Directly supervise QA team, Quality Assurance Engineers and Testers including the preparation and delivery of staff performance evaluations and career development activities. Supervise approximately two-four employees.

The Director's written request for additional evidence (RFE) noted that the petition identifies the offered position by a different job title as manager, engineering (software engineer test lead), and it does not specify the job's duties. The Director therefore found that she could not determine whether the Petitioner offered the Beneficiary the DOL-certified position. In response to the RFE, the Petitioner submitted the job duties for Manager, Engineering as follows:

Guide and coach a team to successfully deliver on lofty goals with speed and quality; Drive evolution of standards & design patterns with industry best practices and new technology to enhance productivity, quality, and system performance; Drive program & system architecture discussions to identify a suitable quality solution to the business requirement; Promote development of maintainable and thoroughly tested code; Ensure the team is following coding standards, testing standards and engineering excellence practices; Provide ongoing, real-time feed-back to engineers on your team to promote their growth; Partner with program managers to collect feedback and manage team

progress toward goals; Communicate clearly to product managers, partners, and engineers to remove ambiguity from larger projects; Provide high level engineering estimates; Responsible for cross organizational boundaries (brands, divisions) to collaborate with other.

In response to the RFE, the Petitioner explained that the Beneficiary holds a new position due to an in-line promotion but stated that the “overarching core job duties of the Manager, Engineering position and the Software Engineer in Test position are the same,” and the minor difference between the two is that he has “more autonomy as a result of the higher level role.” The Petitioner also submitted a letter from the Beneficiary’s supervisor outlining the similarities between the job listed on the labor certification and the offered position. The supervisor stated that despite the promotion and differing job titles, the job duties of the Beneficiary’s new position “involved very minor difference in the scope of authority”

Upon review of the record, we conclude that the Petitioner did not provide sufficient evidence to establish that the position listed on the labor certification is the same or similar to the position offered to the Beneficiary. For example, the job description listed on the labor certification indicated that the Beneficiary will manage two to four quality assurance engineers and testers. However, while the offered position’s description states that the Beneficiary will “guide and coach a team” of software engineers, it does not indicate how many employees he will supervise or their specific job titles. The number of employees the Beneficiary will supervise is important information and helps to understand his daily responsibilities since they can greatly change if he is supervising two employees or twenty.

Furthermore, the Petitioner stated that although the two positions’ job duties are the same, the offered job has “more autonomy as a result of the higher level role.” However, the Petitioner did not provide sufficient information regarding the nature of this autonomy so that we could understand the true duties of the Beneficiary. For example, increased autonomy could mean that the Beneficiary has the authority to make final decisions without supervisory approval that may have been required for his previous position. Without more information and details regarding the increased autonomy, it is impossible to determine if the position on the labor certification is the same or similar to the offered position. Furthermore, the Petitioner did not provide a breakdown of time spent on each duty so that we can evaluate whether the Beneficiary will continue to spend the same amount of time on the core duties for both positions.

Furthermore, a determination of whether the labor certification remains valid for the offered position requires consideration of additional factors. The labor certification process requires an employer to test the labor market by placing advertisements for an offered position and soliciting applications from U.S. workers. *See* 20 C.F.R. § 656.17(e) (stating requirements for “pre-filing recruitment” of job opportunities). DOL “makes a determination either to grant or deny the labor certification on the basis of whether or not . . . [t]here is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity.” 20 C.F.R. § 656.24(b)(2). Thus, “[t]he outcome of this labor market test is of paramount importance.” *See, e.g., Zodiac Solutions*, 2015-PER-00179, slip op. at *3 (BALCA Feb. 22, 2019). Accordingly, DOL has specific advertising requirements. For example, an advertisement for an offered position in a newspaper or professional journal must “[n]ot contain wages or terms and conditions of employment that are less favorable than those offered to the alien.” 20 C.F.R. § 656.17(f)(7).

In response to the RFE, the Petitioner indicated that due to the Beneficiary's in-line promotion, his salary has increased. The labor certification states the proffered wage of the offered position as \$116,272 to \$130,644 a year. The petition states that the Petitioner will pay the Beneficiary "at least \$116,272 per year." But the Petitioner has not specified exactly how much the Beneficiary will receive. Thus, for example, if the Petitioner's newspaper ads stated that the offered position pays \$116,272 to \$130,644 a year and the company now is offering a job with a starting salary of more than \$130,644 a year, the labor certification would not remain valid. The Petitioner would have violated DOL regulations by advertising wages less favorable than those offered to the Beneficiary. *See* 20 C.F.R. § 656.17(f)(7). The Petitioner bears the burden of demonstrating its eligibility for the requested benefit. *See* section 291 of the Act; 8 U.S.C. § 1361.

In the RFE, the Director requested, among other things, the Beneficiary's Form W-2, Wage and Tax Statements; Form 1099-MISC, Miscellaneous Income; and pay vouchers. In response to the RFE, the Petitioner submitted these financial documents and indicated that the Beneficiary's wage is above the prevailing wage listed on his labor certification.

The Beneficiary's most recent pay voucher submitted in response to the RFE, which covered the pay period beginning on November 1-14, 2021, indicated that the Beneficiary's gross pay for that year up to that date was \$217,908.57. The Petitioner also submitted his Form 1040, U.S. Individual Tax Return for 2020 that indicated his wages as \$230,025. It appears that the Beneficiary is earning approximately \$100,000 more than the salary listed on the labor certification. Given that the labor certification was advertised for a much lower salary than the salary offered for the proffered position, the labor certification does not remain valid for the position in which the Petitioner intends to employ the Beneficiary.

III. CONCLUSION

For the reasons discussed, we affirm the Director's decision to deny the petition. We will dismiss the appeal because the Petitioner has not established that the labor certification is valid.

ORDER: The appeal is dismissed.