



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

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

In Re: 22458903

Date: JUL. 15, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, an international chain of sportswear and casual clothing, seeks to employ the Beneficiary as a network engineer. The Petitioner requests his classification under the third-preference, immigrant category as a professional. 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 Petitioner did not submit sufficient documentation to establish the job offer was in accordance with the terms and conditions of the labor certification. The Director dismissed the Petitioner's subsequent combined motions to reopen and reconsider, concluding that the Petitioner submitted insufficient evidence to address and resolve the discrepancies regarding its job offer. The matter is now before us on appeal.

The Petitioner bears the burden of establishing eligibility for the requested benefit by a preponderance of evidence. *See* section 291 of the Act, 8 U.S.C. § 1361 (discussing the burden of proof); *see also Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010) (discussing the standard of proof). Upon *de novo* review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

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 will not 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. Among other things, USCIS determines whether a noncitizen beneficiary meets the requirements of a certified position and a requested immigrant visa category. 8 C.F.R. § 204.5(l).

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

The accompanying labor certification states the proffered wage of the offered position of network engineer is \$110,000 a year. The petition's priority date is December 20, 2013, the date DOL accepted the labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date).

The Director denied the petition finding insufficient evidence to determine that it was supported by the certified labor certification. To support that determination, the Director noted discrepancies in the record regarding the position's job title and salary. Specifically, an August 2014 letter represented the position as a "Network Engineer," earning an annual salary of \$110,000. A second letter dated October 7, 2020 represented the position as a "Systems Engineer III," earning an annual salary of \$184,605. A third letter dated October 8, 2020 represented the position as a "Network Engineer" earning an annual salary of \$91,125.

The Director issued a request for additional evidence (RFE) to, in part, provide the Petitioner an opportunity to resolve the discrepancies in the three letters. The RFE also specifically requested information regarding the difference between the positions of "Systems Engineer III" and "Network Engineer" within the Petitioner's operations. The RFE included a list of evidence that would sufficiently address these concerns, and requested a full and complete job description, and the minimum requirements, for each position, among other relevant documentation. The Petitioner responded to the RFE with a letter dated September 27, 2021, signed by its "Sr. Manager of Global Mobility" confirming the Beneficiary's job offer, his salary of at least \$110,000, and stating that he would work as a Network Engineer. The Petitioner's RFE response did not attempt to address the discrepancies in the record, and it did not provide any details regarding the role or duties of a "Systems Engineer III." The Director's decision noted the unresolved discrepancies and determined the Petitioner did not establish its intent to employ the beneficiary in accordance with the terms and conditions of the labor certification.

In its combined motion to reopen and reconsider, the Petitioner argued that the Director erred by determining that the Petitioner had failed to sufficiently address the discrepancies in the filing. The Petitioner further argued that it did not submit one of the letters referenced by the Director and that the Director erred by listing this letter as evidence. Moreover, the Petitioner argued that the letter's author was not its "signatory." The Petitioner's combined motions did not include the evidence requested in the Director's RFE to establish the substantive nature of the "Systems Engineer III" position. Instead, the Petitioner argued that the two positions were "interchangeable," and that thus there was no discrepancy to resolve. In addition, the Petitioner provided a letter signed by its "Sr. Manager of Global Mobility" characterizing the job offer as continuing, and reiterating the job title and duties as found in the September 2021 letter.

The Director dismissed the Petitioner's combined motions. In particular, the Director cited to evidence undermining the Petitioner's argument that its "Systems Engineer III" and "Network Engineer" positions were interchangeable and therefore similar. The Director also correctly noted that given the

opportunity to submit additional, pertinent evidence in response to the RFE, the Petitioner declined. Finally, the Director disputed the Petitioner's contention that the letter verifying the Beneficiary's job offer for a position titled "Systems Engineer III" was not part of the record, and quoted directly from that letter, which referenced the Beneficiary by name, to support its decision to dismiss the Petitioner's arguments as mere assertions that lacked objective evidence.

On appeal, the Petitioner provides an appellate brief, and copies of the two letters previously submitted and signed by the Petitioner's "Sr. Manager of Global Mobility." The Petitioner argues that the Director erred in determining that the record contained unresolved discrepancies regarding its job offer. To support its contention that the positions of "Systems Engineer III" and "Network Engineer" are "interchangeable," the Petitioner submits a new letter dated March 31, 2022, which is signed by the same individual the Petitioner previously argued was not a signatory for the company. We decline to accept this letter on appeal. *See Matter of Soriano*, 19 I&N Dec. 764, 766 (BIA 1988) (requiring rejection of appellate evidence where a party received prior notice of the required materials and a reasonable opportunity to submit them). The Director's RFE notified the Petitioner of its need to submit additional evidence to resolve the discrepancies, and afforded it a reasonable opportunity to respond. On appeal, the Petitioner has not attempted to explain why it did not submit this evidence earlier in the proceedings, and it does not appear that this evidence was not reasonably available. *See Oyeniran v. Holder*, 672 F.3d 800, 808–09 (9th Cir. 2012) ("It is not sufficient that the evidence physically existed in the world at large; rather, the evidence must have been reasonably available to the petitioner."). Therefore, we decline to review this evidence.

However, even if we were to accept this letter as evidence that the two positions are similar, it would fall short of establishing this fact by a preponderance of the evidence. As the Director noted in the decision dismissing the Petitioner's combined motions, publicly available information on the Petitioner's website showed that the two positions contain different job and experience requirements, which is a discrepancy the new evidence does not address. Instead, the letter describes, in vague terms, how the Petitioner undergoes regular restructuring of its internal team organization, and that those restructurings result in updated job titles. However, that explanation does not get to the core of the Director's reason for denying the petition, which is that the job offer is not in accordance with the terms and conditions found in the associated labor certification. Moreover, it does not explain why the Petitioner's website advertised both positions as open, and containing different job and experience requirements. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988) (a petitioner must resolve inconsistencies with independent, objective evidence pointing to where the truth lies and unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit.). In addition, the vagueness of the letter's reference to "regular restructuring" and the fact that the signatory of this letter is the same individual the Petitioner previously argued is not its signatory, undermines the probative value of the letter's contents.

For the foregoing reasons, the record does not establish the job offer is consistent with the terms and conditions found in the labor certification. If the Petitioner pursues this matter further, it must explain the discrepancies noted above and submit additional independent objective evidence to support its assertions.

III. CONCLUSION

The record as presently constituted does not establish the Petitioner's intent to employ the Beneficiary in accordance with the terms and conditions of the labor certification. As such, we must dismiss the appeal.

ORDER: The appeal is dismissed.