



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

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

In Re: 23607700

Date: JAN. 03, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner seeks to employ the Beneficiary as a senior director, IT. It requests classification of the Beneficiary under the third-preference, immigrant classification for professional workers. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii). This employment-based, “EB-3” category 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 accompanying certification from the U.S. Department of Labor (DOL) does not describe the offered position.

In these proceedings, it is the Petitioner’s burden 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). The Administrative Appeals Office (AAO) reviews the questions in this matter de novo. *See Matter of Christo’s Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. EMPLOYMENT-BASED IMMIGRATION

Employment-based immigration generally follows a three-step process. To permanently fill a position in the United States with a foreign worker, a prospective employer must first obtain certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the employment of a foreign national will not harm wages and working conditions of U.S. workers with similar jobs. *Id.*

If DOL approves a position, an employer must next submit the certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the petition, a foreign national may finally 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 whether "there has been any other material change in the job opportunity covered by the original labor certification." 6 *USCIS Policy Manual* E.6(A), <https://www.uscis.gov/policy-manual>.

Here, the accompanying labor certification identifies the offered position as "Database Architect" and lists the following job duties:

- Responsible for developing and serving as a technical lead for Oracle and other database architectural strategies at the modeling, design and implementation stages to address business requirements.
- Developing, supporting and driving database operational strategy and vision in alignment with organizational goals.
- Driving cost effective database infrastructure procedures and consolidations.
- Driving organization data security standard procedures working with corporate security department.
- Designing, developing and implementing infrastructure to provide scalable and reliable database to meet the organization's objectives and requirements.
- Implementing data protection policies and high availability for enterprise-wide mission-critical systems.
- Developing and maintaining RDBMS standards such as Oracle and MySQL object naming conventions, coding standards and error handling techniques and procedures.
- Collaborating with system architects, software architects and others to understand business or industry requirements.
- Developing and maintaining archival and purge process for enterprise-wide database systems.
- Keeping current with trends and technological innovations and making appropriate development recommendations.
- Analyzing root cause and remediation techniques to improve the database systems uptime.

The Director's written notice of intent to deny the petition (NOID), however, noted that the petition identifies the offered position by a different job title, "Senior Director, IT" and does not specify the job's duties. The Director requested documentation of the job duties for both positions.

In response to the NOID, the Petitioner submitted a letter from a company official indicating that, since the labor certification's issuance, the Beneficiary's job title was updated to reflect a promotion with expanded job duties.¹ The official stated that, despite the promotion and differing job titles, the "core responsibilities have remained substantially the same." The official described the duties of the "Senior Director, IT" as follows:

- Directing and implementing corporate IT initiatives that support the strategy and goals of the company.
- Directing and implementing corporate IT initiatives that support the strategy and goals of the company.
- Directing IT functions for applications programming/analysis and enterprise systems development and administration.
- Organizing and directing the IT functions infrastructure development and maintenance to meet organization's objectives and requirements.
- Setting and overseeing the implementation of IT standards, policies and master plan for the IT function.
- Collaborating with system architects, software architects and others to understand business or industry requirements.
- Keeping up with current trends and technological innovations and making appropriate development recommendations.
- Responsible for the development and acquisition of new technologies and tools to improve the organization's internal operations and data delivery.

The Director concluded that the Petitioner no longer offers the Beneficiary the same position described on the labor certification. The Director stated that the position described on the I-140 petition is not the same as the position described on the labor certification and that "the job duties must remain the same in order to reuse the ETA Form 9089."

USCIS must assess whether "there has been any other material change in the job opportunity covered by the original labor certification." 6 *USCIS Policy Manual, supra*. An offered position may be "the same or similar" to a position on a labor certification. *Id.* (emphasis added). 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, and not materially different than the original position. In comparing the job duties of both roles, the Petitioner did not provide a breakdown of the specific amount of time spent on each new or expanded responsibility. For example, the job description listed on the labor certification indicated that the database architect is responsible for "developing" strategies and infrastructure. However, the senior director, IT is responsible for "directing" and "overseeing." The Petitioner does not describe this key difference in more detail, including whether the Beneficiary will continue to develop strategies, or will instead direct and supervise other employees performing this role. Without more information and

¹ The Petitioner filed the labor certification with DOL on December 23, 2011. After DOL certified the labor certification, the Petitioner filed Form I-140 and it was approved on July 2, 2012, classifying the Beneficiary as a member of the professions with an advanced degree under section 203(b)(2)(A) of the Act, 8 U.S.C. § 1153(b)(2)(A). The Petitioner now requests use of the same underlying labor certification to support this petition and classify the Beneficiary as a professional worker.

details regarding the expanded duties, we are precluded from determining that the position on the labor certification is the same or similar to the offered position. Additionally, it is unclear whether oversight includes specifically managing a number of employees, and whether any direct reports might have changed the assigned wage for the position, or the wage level of the position.²

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).

The labor certification states the proffered wage of the offered position as \$108,000 per year. The Form I-140 lists the offered salary for the position of senior director, IT as “at least \$108,000 per year.” Although the Petitioner has not specified exactly how much the Beneficiary will receive, an Internal Revenue Service Form W-2, Wage and Tax Statement, it issued to the Beneficiary in 2019 lists wages of \$252,325 in that year, which is more than twice the offered salary of a database architect. If the Petitioner’s recruitment efforts stated that the offered position pays \$108,000 per year and the company now is offering a job with a starting salary of more than \$108,000 per year, and a salary, which is actually over twice that amount, the labor certification would not remain valid as the terms and conditions, as well as the job do appear materially different. 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.

² In determining the appropriate wage level for a position, DOL will consider the number or range of people to be supervised. *See* U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at https://www.dol.gov/sites/dolgov/files/ETA/oflc/pdfs/NPWHC_Guidance_Revised_11_2009.pdf.

III. CONCLUSION

The Petitioner has not established that the offered position remains materially unchanged, and is the same or similar to the position that was certified by the DOL. Accordingly, the Petitioner has not established that the labor certification remains valid to support the instant petition. It is the Petitioner or Applicant's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Skirball Cultural Ctr.*, 25 I&N Dec. 799, 806 (AAO 2012). Here, the burden has not been met.

ORDER: The appeal is dismissed.