



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

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

In Re: 20199078

Date: JAN. 26, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Professional

The Petitioner, a technology services provider, seeks to employ the Beneficiary as a “Manager, Data Management.” It 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 job opportunity reflected in the Form I-140, Immigrant Petition for Alien Workers, was not the same position discussed in the ETA Form 9089, Application for Permanent Employment Certification.

On appeal, the Petitioner contends that the position offered to the Beneficiary in the Form I-140 is the same, or similar, to the position provided in the labor certification. The Petitioner states that the difference in salary between these positions should not be conclusive in determining that they are different.

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 withdraw the Director’s decision and remand the matter to the Director for the entry of a new decision.

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).¹

¹ The priority date of a petition is the date the DOL accepted the labor certification for processing. *See* 8 C.F.R. § 204.5(d). The priority date of the submitted labor certification in this case is April 6, 2012.

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). USCIS also assesses the petition to ensure that the position offered is the same or similar to the position that the DOL certified. *See generally* 6 USCIS Policy Manual E.6(A), <https://www.uscis.gov/policy-manual>.

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(l)(3)(i). A labor certification remains valid only for the particular job opportunity, noncitizen, 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). A new original permanent labor certification must be submitted in support of the petition where there has been a "material change in the job opportunity covered by the original permanent labor certification." 6 USCIS Policy Manual D.1, <https://www.uscis.gov/policy-manual>.

The Petitioner submitted the original permanent labor certification with a different Form I-140 petition for the Beneficiary under section 203(b)(3)(A)(ii) of the Act, which was approved on August 1, 2012. That petition listed the Beneficiary's position as "Senior Programmer Analyst." The Petitioner indicated in the labor certification that a master's degree in software engineering or computer science and twenty-four months of experience were required for the position. In the alternative, the Petitioner stated in the labor certification that a bachelor's degree and five years of experience would also be sufficient for the position. The Petitioner described the position's duties as follows in section H.11 of the labor certification:

Act as a Senior Business Intelligence developer with ETL and Data Integration experience in Business Intelligence (BI) and Customer Relationship Management (CRM) implementations. This role requires hands-on, experience in current data warehouse, business intelligence and ETL technologies, techniques, and architecture. Provide ETL requirements analysis, design, development, testing, and implementation. Participate in ETL requirement design activities. Coordinate in requirements input to logical and physical data model changes and collaborate to determine best data structure to delivery BI requirements. Assist in developing ETL flows, source to target maps, transformation rules and framework to support ETL development. Prepare and execute migration packages for new and modified ETL code and objects. Provide ETL support and operations issue resolution and troubleshooting. Recommend continuous improvement of the ETL architecture and processes.

In addition, the Petitioner listed the following specific skills or other requirements for the position in section H.14 of the labor certification:

2 y[ea]rs IT exp[erience] in data warehousing and business intelligence and ETL platform like Datastage, Informatica for Data Extraction, Data Mapping and Data Conversion and RDMBS like Teradata, Oracle, [and] SQL server

The Petitioner now requests use of the same underlying labor certification to support this petition to classify the Beneficiary as a professional worker.

The Petitioner filed the current petition on October 29, 2020, listing the Beneficiary's job title as "Manager, Data Management." The Petitioner also submitted the labor certification previously certified by DOL in 2012. The Petitioner submitted "expanded duties" for the Beneficiary in this role:

- Support and communicate ECM capacity needs (user and systems) with internal & external partners.
- Serve as a point of contact with technical teams for issues with tools, data, or processes.
- Operational and Functional Subject Matter Expert for retail and direct technical & operational partners.
- Customer marketing liaison for Compliance/Privacy initiatives.
- Manage and monitor system audit processes & reporting, data quality, process execution, periodic system/application updates, data enrichment processes.
- Manage and monitor vendor achievement against SLAs.
- Adhere to change management process.
- Provide clear communication for the CDM user community.
- Provide 24/7 pager support for incident management, resolution & communication (on a rotation basis).
- Support & communicate Database Enhancements.
- Support and communicate Process Changes.
- Ensure Data Integrity.
- Provide Subject Matter Expertise and functional support for Customer Data Initiatives.

The Petitioner stated that the Beneficiary's job duties had "slightly expanded" from those listed in the labor certification approved more than eight years prior to the date the petition was filed and claimed that this "reflect[ed] a normal career progression." The job certified by DOL had an annual proffered wage of \$88,000, while the current petition states the Beneficiary would earn \$135,200 per year in his new role as a manager. The Director later issued a request for evidence (RFE) requesting that the Petitioner submit evidence to demonstrate that the job offered to the Beneficiary in the petition was the same as that submitted in the labor certification.

In response, the Petitioner again indicated that the Beneficiary had been promoted to his current position as "Manager, Data Management" and that this was a "natural progression in his career." The Petitioner listed the following "expanded duties" for the Beneficiary:

- Building new ETL data flows, new reporting DB platforms.
- Overseeing the architecture, design and upgrading the systems to newer versions.
- Managing customer Marketing database (CDM), data science, analytics.
- Working with internal teams or external vendors to initiate the new capabilities that will enhance the business.

- CDM governing rules and working with legal, compliance and security teams for data compliance.
- Implementing and managing the cloud infrastructure for data science and Machine learning.
- Managing direct reports and project resources for allocating the work.

The Director later denied the petition, stating that the position discussed in the labor certification was not the same as that submitted with the current petition filed approximately eight years later. The Director also stated that the letter submitted by the Petitioner detailed how the position provided with the current petition was different from that job described in the 2012 labor certification.

As previously noted, USCIS must assess the petition to ensure that the position offered is the same or similar to the position that the DOL certified. A new original permanent labor certification must be submitted where there has been a material change in the job opportunity covered by the original labor certification. *See generally 6 USCIS Policy Manual, supra.* In denying the petition, the Director only considered whether the position described in the labor certification was the same as that provided with the petition. However, the Director did not analyze whether the Beneficiary's new position described in the petition was similar to that provided in the previously certified labor certification.² Therefore, upon remand, the Director should analyze whether the position described in the labor certification is similar to that listed in the petition, and in turn, whether the position offered in the petition remains materially unchanged from that described in the original labor certification.

ORDER: The decision of the Director is withdrawn. The matter is remanded for the entry of a new decision consistent with the foregoing analysis.

² If eligible under section 204(j) of the Act, 8 U.S.C. § 1154(j), a Form I-140 (and underlying permanent labor certification, if applicable) may remain valid and the beneficiary of an approved employment-based immigrant visa petition may transfer, or "port," to a qualifying new job offer that is in the same or a similar occupational classification as the job offer for which the petition was filed. The Petitioner asserts on appeal that even though the Beneficiary did not "port" to a new employer, the analysis used to determine whether a qualifying new job offer is in the "same or a similar occupational classification" under section 204(j) of the Act should be used here. The USCIS Policy Manual indicates that this analysis of "same or a similar occupational classification" under section 204(j) of the Act includes, but is not limited to, the following factors: the DOL occupational codes assigned to the respective jobs; job duties; job titles; the required skills and experience; the educational and training requirements; any licenses or certifications specifically required; the offered wage or salary; and any other material and credible evidence relevant to a determination of whether the new position is in the same or a similar occupational classification. *See generally 7 USCIS Policy Manual, supra*, at E.5. This issue should be addressed on remand.