



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

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

In Re: 27333393

Date: JUL. 05, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Professional)

The Petitioner, a provider of accounting and tax preparation services, seeks to employ the Beneficiary as its office administrator. It requests her classification as a professional worker under the third preference employment-based immigrant visa category. Immigration and Nationality Act (the Act) section 203(b)(3)(A)(ii), 8 U.S.C. § 1153(b)(3)(A)(ii).

The Director of the Nebraska Service Center denied the petition because it was not accompanied by an individual labor certification from the U.S. Department of Labor (DOL), as required. The Petitioner subsequently filed a motion to reopen. The Director, after considering the additional evidence offered on motion, denied the petition on the same grounds. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review 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 dismiss the appeal.

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification (ETA Form 9089) from the DOL. *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). By approving the labor certification, the DOL certifies that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position and that employing a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. *See* section 212(a)(5)(A)(i)(I)-(II) of the Act. Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8 U.S.C. § 1154. Third, if USCIS approves the petition, the beneficiary 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.

Here, the record reflects that the Form I-140, Immigrant Petition for Alien Worker, was not properly filed as it was not accompanied by a valid labor certification, as required by 8 C.F.R. § 204.5(a)(2) and (l)(3)(i); *see also* 20 C.F.R. § 656.17(a)(1) (stating that the Department of Homeland Security will not process a labor-certification-based immigrant petitions unless it is supported by an original

certified ETA 9089 that has been signed by the employer, the beneficiary, and, if applicable, the attorney); *see generally* 6 *USCIS Policy Manual* E.6(B)(1), <https://www.uscis.gov/policy-manual> (stating that USCIS will reject a petition that is filed without the approved permanent labor certification and will deny a petition that was inadvertently accepted without a required, valid permanent labor certification).

A benefit request must be filed with all initial evidence required by the applicable regulations and other USCIS instructions and a petitioner must establish eligibility for the benefit request at the time of filing and continue to be eligible through adjudication. *See* 8 C.F.R. § 103.2(b)(1). The Petitioner filed the Form I-140 on November 1, 2021, and therefore was required to submit a labor certification that was certified by DOL and remained valid on this date. *See* 8 C.F.R. § 204.5(a)(2) and (l)(3)(i). On the Form I-140, at Part 4, the Petitioner indicated that it was filing the petition without an original labor certification, and instead requested that USCIS request a duplicate labor certification from the DOL. The Director requested and obtained the labor certification from the DOL and denied the petition because the labor certification, which was filed on October 28, 2021 (four days prior to the filing of this petition) had not been approved and certified by the DOL.

The Petitioner subsequently filed a motion to reopen with a copy of a letter from DOL denying the labor certification and evidence that the Petitioner had submitted a request for reconsideration of that denial to DOL in June 2022. The Petitioner maintained that the labor certification was erroneously denied and would ultimately be approved. The Director affirmed the denial of the petition, observing that the evidence submitted on motion did not establish that the Petitioner had obtained an approved labor certification from DOL prior to filing this Form I-140 in November 2021.

On appeal, the Petitioner requests that we approve the petition because the Beneficiary “is fully qualified to obtain the certified Labor Certification required in order to qualify for this benefit.” The appeal is accompanied by a January 20, 2023 letter from DOL denying the Petitioner’s request for reconsideration of its initial decision, and a copy of the Petitioner’s subsequent appeal to the Board of Alien Labor Certification Appeals (BALCA), which remains pending. The Petitioner asserts that DOL did not provide proper notice that it was auditing the labor certification prior to denying it and expresses its belief that its appeal to BALCA will be successful.

The Petitioner has not overcome the basis for denial. As discussed above, in order to meet the initial evidence requirements for this classification set forth at 8 C.F.R. § 204.5(a)(1) and (l)(3)(i), the Petitioner must establish that the labor certification it filed on behalf of the Beneficiary was approved and certified by DOL prior to the filing of this petition on November 1, 2021. Here, the labor certification was filed with DOL only four days prior to the filing of this petition, remained unadjudicated at the time the Form I-140 was filed, was ultimately denied, and has a pending appeal. The DOL has exclusive authority over the labor certification process, and we therefore need not address the Petitioner’s claim that the Beneficiary “is fully qualified to obtain the certified Labor Certification.”

Because this immigrant petition was not accompanied by the required valid labor certification, it was not properly filed and therefore cannot be approved. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.