



U.S. Citizenship
and Immigration
Services

Non-Precedent Decision of the
Administrative Appeals Office

In Re: 19785085

Date: AUG. 23, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner, a [redacted] company, seeks to employ the Beneficiary as a senior software engineer. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant category. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director of the Nebraska Service Center denied the petition, concluding that the job offered on the petition has additional responsibilities and is a higher-level position than the job offered in the labor certification. On appeal, the Petitioner asserts that the job duties listed in the petition are “substantially identical” to those of the duties listed in the labor certification. The Petitioner further states that the Beneficiary’s role as a senior software engineer is a logical progression given his experience and the salary increase was based on his “annual performance, straight-line promotion and normal progression in employment.”

The 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). It is the Petitioner’s burden to establish eligibility for the requested benefit by a preponderance of the evidence. See 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 the appeal.

I. LAW

Immigration as a professional 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 U.S. Department of Labor (DOL)’s certification. See section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). DOL’s certification signifies that insufficient U.S. workers are able, willing, qualified, and available for an offered position, and that 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 labor certification with an immigrant visa petition to USCIS. See section 204 of the Act, 8 U.S.C. § 1154. Among other things, USCIS

determines whether a beneficiary meets the requirements of a DOL-certified position and the requested classification. If USCIS grants a 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

The issue on appeal is whether the position offered on the petition is the same or similar to the position that the DOL certified.

A labor certification remains valid only for the particular job opportunity, the foreign national, and the 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." Memorandum from Michael Aytes, Acting Assoc. Dir., Domestic Ops., *AFM [Adjudicator's Field Manual] Update: Chapter 22: Employment-based Petitions (AD03-01)*, HQPRD70/23.12 6 (Sept. 12, 2006).¹

Here, the accompanying labor certification identifies the offered position as software engineer III. The Director's written request for additional evidence (RFE), however, noted that the petition identifies the offered position by a different job title, "Senior Software Engineer," and by the Petitioner's explanation, the position offered in the petition is a higher-level position. Therefore, the Director requested that the Petitioner submit additional evidence to address this discrepancy.

In response to the RFE, the Petitioner submitted a letter from a company official indicating that the Beneficiary was hired as a software engineer III and has received a "straight-line promotion" to the senior software engineer position. The letter further explained that this promotion is a "normal progression in employment" in their organization. The official listed the duties of both positions with corresponding percentage of time the Beneficiary would spend for each duty and stated that "the job duties have substantially remained the same." The Petitioner also submitted information regarding general career progression for software engineers and software architects at its organization, and an article about practical guide to recruiting and hiring of software engineers.

The Director concluded that although the two positions include most of the same duties, the senior software engineer position has added duties and is a higher-level position. On appeal, the Petitioner asserts that, contrary to the Director's conclusion, the positions remain the same as the Beneficiary

¹ Available at https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/Static_Files_Memoranda/Archives%201998-2008/2006/afm_ch22_091206r.pdf. See also USCIS Policy Manual, Chapter 6 – Permanent Labor Certification available at <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-6> (in general, any material change in the job opportunity covered by the original permanent labor certification requires the submission of a new original permanent labor certification in support of the petition).

continues to have no direct reports, and the job requirements and the duties remain the same.² Citing to a USCIS policy addressing the use of the term “same or similar” in the context of portability pursuant to section 240(j) of the Act, the Petitioner asserts that because the 80% of the duties remain the same, the experience and the skills requirements remain exactly the same, and the work location also remains the same; therefore the positions are “virtually identical.” As the Petitioner asserts, an offered position may be “the same or similar” to a position on a labor certification. Aytes Memo, at 6 (emphasis added). However, while the job duties of the offered position vary only slightly from those certified by DOL, the record does not establish that the requirements remain the same.

On appeal, the Petitioner submits its job posting for a senior software engineer position and states that this posting confirms that the requirements of the senior software engineer position are the same as that of the software engineer III position on the underlying labor certification. However, the posting indicates different position requirements than the ones stated on the labor certification. According to the posting, for the senior software engineer position, the Petitioner accepts a master’s degree in computer science or related technical field or a bachelor’s degree in computer science or related field, plus two years relevant experience. Furthermore, under the heading of “Minimum Qualifications,” the posting states, “Bachelor’s degree in Computer Science and 3 years’ experience in software engineering or related field OR 5 years’ experience in software engineering or related field” (emphasis in the original). However, on the labor certification, the Petitioner indicated that the minimum level of education required for the position is a master’s degree and an alternate combination of education and experience is not acceptable for the position. We further note that the required experience in specific skills listed in the posting are different than the required skills listed on the labor certification. Therefore, the Petitioner has not demonstrated that the position advertised is the same or similar position indicated on the labor certification.

Further, the labor certification states the proffered position is software engineer III and the proffered wage of the offered position is \$139,351.16 per year. However, the petition states that offered position is senior software engineer and the Petitioner will pay the Beneficiary \$156,765.71 per year. Because the Petitioner now is offering a job with a different job title and salary significantly higher than the one previously certified, the record as currently constituted, does not establish that the job offer is for the same or similar position or that the material changes in the job opportunity are covered by the labor certification.³

The Petitioner bears the burden of demonstrating its eligibility for the requested benefit. See section 291 of the Act; 8 U.S.C. § 1361. Here, the Petitioner has not demonstrated that the labor certification

² On appeal, the Petitioner submits organizational charts depicting the Beneficiary’s positions with no direct report.

³ 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 ad 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).

remains valid for the position in which they intend to employ the Beneficiary. Accordingly, we will dismiss the appeal.

ORDER: The appeal is dismissed.