



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

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

In Re: 22320929

Date: SEP. 8, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for a Professional

The Petitioner, a computer software provider, seeks to employ the Beneficiary as a software development manager. It requests classification of the Beneficiary under the third-preference, immigrant visa category for professionals. *See* 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 offered position differs from the one listed on the ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL), and therefore the labor certification is not valid. On appeal, the Petitioner submits a brief and contends that the Beneficiary was promoted but the job description is substantially similar as the description provided on the labor certification.

Upon *de novo* review, we will withdraw the Director's decision and remand the matter for entry of a new decision consistent with the following analysis.

I. LAW

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 won't 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. 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, 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 a petition "to ensure that the position offered is the same or similar position that was certified by the DOL." 6 *USCIS Policy Manual* E.6(A), <https://www.uscis.gov/policymanual>.

Here, the accompanying labor certification identifies the offered position as software developer and lists the following job duties:

Design, develop, troubleshoot and/or test/QA software. As a member of the software engineering division, apply knowledge of software architecture to perform tasks associated with developing, debugging, or designing software applications or operating systems according to provided design specifications. Build enhancements within an existing software architecture and/or suggest improvements to the architecture. May telecommute from home.

The Director's request for additional evidence (RFE) noted that the petition identifies the offered position by a different job title—software development manager—and does not specify the job's duties. The Director therefore found that she could not determine whether the Petitioner offered the Beneficiary the DOL certified position. In response to the RFE, the Petitioner indicated that the Beneficiary's new job title of software development manager is a result of a natural career progression, and the Beneficiary continues to perform substantially the same job duties. The Petitioner also stated that this incremental promotion does not alter the basic position duties or qualification in any significant way and does not require a new labor certification. The Petitioner submitted the job duties for software development manager as follows:

- Responsible for compliance frameworks development – 5%
- Responsible for code signing infrastructure development and signing keys management – 10%
- Static and dynamic security testing of [] and [] products – 10%
- Security and cryptography features development – 20%
- Security features reviews – 10%
- Manage development, testing, documentation for team – 5%
- Motivate team, track team performance – 10%
- Provide engineering support to public sector required validations, certifications and compliance standards – 10%
- People management: career development, performance review, training – 10%
- Project management, task assignment, status review – 10%

The Petitioner explained that although the last two duties, people management and project management, are new duties, they take only 20 percent of the Beneficiary's time, and he continues to perform at least 80 percent of the same, specific job duties that he performed as a software developer.

On appeal, the Petitioner contends that the duties listed on the labor certification are broadly stated and explained how the new job description coincides with the description on the labor certification as follows:

- I. Design, develop, troubleshoot and/or test/QA software – 20% of time. This job duty embodies the following specific job details:
 - Responsible for code signing infrastructure development and signing keys management – 10%
 - Static and dynamic security testing of [] and [] products – 10%
- II. As a member of the software engineering division, apply knowledge of software architecture to perform tasks associated with developing, debugging, or designing software applications or operating systems according to provided design specifications – 25% of time. This job duty embodies the following specific job details:
 - Provide engineering support to public sector required validations, certifications and compliance standards – 10%
 - Manage development, testing, documentation for team – 5%
 - Motivate team, track team performance – 10%
- III. Build enhancements within an existing software architecture and/or suggest improvements to the architecture – 35% of time. This job duty embodies the following specific job details:
 - Security and cryptography features development – 20%
 - Responsible for compliance frameworks development – 5%
 - Security features reviews – 10%

The Director concluded that the Petitioner no longer offers the Beneficiary the same position described on the labor certification. On appeal, the Petitioner contends they are substantially similar. We agree with the Petitioner. We conclude it has demonstrated that the job duties of the offered position vary only slightly from those certified by DOL and that the minor changes to the offered position's job duties alone do not render the labor certification invalid. We will therefore withdraw the Director's decision.

Whether the labor certification remains valid for the offered position, however, requires consideration of additional factors. Specifically, while we do not find the job duties problematic, we do question the offered salary.

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).

Here, the Petitioner stated that, after the approval of the labor certification application, the Beneficiary received a promotion. The labor certification states the proffered wage of the offered position as \$169,562 to \$222,815 a year. The petition states that the Petitioner will pay the Beneficiary “at least \$169,562 per year.” But the Petitioner has not specified exactly how much the Beneficiary will receive. Thus, for example, if the Petitioner’s newspaper ads stated that the offered position pays \$169,562 to \$222,815 a year and the company now is offering a job with a higher starting salary, the labor certification would not remain valid. 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. But the Director did not notify the Petitioner of the need for additional evidence to determine the validity of the labor certification for the offered position. We will therefore remand the matter for additional action.

On remand, the Director should ask the Petitioner to provide evidence of the salary offered for the position described as software development manager. We note that the job offered is prospective and does not necessarily have to be the position in which the Beneficiary is currently employed. However, in this case, the Petitioner has indicated that it intends to employ the Beneficiary in the position of software development manager, rather than in the position of software developer. The Petitioner must therefore demonstrate that the labor certification remains valid for the position in which they intend to employ the Beneficiary.

The Director should also provide the Petitioner with a reasonable period to gather and submit the required documentation and information. Upon receipt of a timely response, the Director should review the entire record and enter a new decision.

III. CONCLUSION

Alone, the minor changes in the offered position’s job duties do not render the accompanying labor certification invalid. The record, however, requires further development to determine the certification’s continued validity.

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