



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

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

In Re: 22260095

Date: AUG. 24, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advance Degree Professional

The Petitioner, a food distribution company, seeks to employ the Beneficiary as a marketing specialist. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based 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 Form I-140, Immigrant Petition for Alien Worker (Form I-140), concluding that the petition was not accompanied by an original, valid labor certification from the U.S. Department of Labor (DOL). The Director determined that the Petitioner did not adequately support its claim it submitted the original, valid labor certification with a previous Form I-140 filed on behalf of the Beneficiary. The matter is now before us on appeal.

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). We review 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 withdraw the Director's decision and remand the matter to the Director for the entry of a new decision.

I. THE EMPLOYMENT-BASED IMMIGRATION PROCESS

Employment-based immigration generally follows a three-step process. First, an employer obtains an approved labor certification 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 *id.* Second, the employer files an immigrant visa petition with U.S. Citizenship and Immigration Services (USCIS) with the certified labor certification. See section 204 of the Act, 8 U.S.C. § 1154. Third, upon approval of the petition, a foreign national may apply for an immigrant visa abroad, or if eligible, adjust status in the United States to lawful permanent resident. See section 245 of the Act, 8 U.S.C. § 1255.

II. ANALYSIS

The issue before us on appeal is whether the Director properly denied the petition because it was not filed with an original, valid labor certification.

A petition for a professional holding an advanced degree must include an original, valid labor certification. 8 C.F.R. § 204.5(k)(4)(i). However, USCIS will accept amended or duplicate petitions that are filed with a copy of a permanent labor certification that is expired at the time the amended or duplicate petition is filed, if the original permanent labor certification was submitted in support of a previously filed petition during the labor certification's validity period.¹

The Petitioner filed this Form I-140 on October 11, 2021. The Form I-140 submission included a copy of a labor certification with ETA Case Number: [REDACTED]. This labor certification was filed with DOL on May 1, 2019, and valid from April 14, 2020, to October 11, 2020. The submitted copy is not signed by the Petitioner, Beneficiary, or the preparer.

At Part 4, Item 9 of the Form I-140, the Petitioner marked “Yes” in response to the question “Are you filing this petition without an original labor certification because the original labor certification was previously submitted in support of another Form I-140.” In Part 11. Additional Information, the Petitioner stated that the original labor certification with ETA case number [REDACTED] was submitted to USCIS prior to August 31, 2020, that it was assigned receipt number [REDACTED], and that its current location, date of any final decision, and disposition were “unknown.” The Petitioner further explained:

The Texas Service Center issued an RFE and NOID. After replies to both were filed, the [Texas Service Center] stated the file was at the [Nebraska Service Center] and the [Nebraska Service Center] said it was at the [Texas Service Center]. No decision has been received by the Petitioner from USCIS.

The Director denied the petition because it was not accompanied by an original, valid labor certification as required by 8 C.F.R. § 204.5(k)(4)(i). He acknowledged the Petitioner’s statement that the original labor certification had been filed with a prior Form I-140 [REDACTED] during its 180-day validity period but advised the Petitioner that “USCIS records show that this receipt is not associated with the beneficiary.”

On appeal, the Petitioner submits additional evidence in support of its claim that the original labor certification, certified by DOL on April 14, 2020, was submitted in support of a Form I-140 it filed on behalf of the Beneficiary in August 2020. This evidence includes copies of a request for evidence and notice of intent to deny ostensibly issued by USCIS in August 2020 and December 2020, respectively, which are: (1) addressed to Petitioner’s former counsel, (2) reference the Petitioner and Beneficiary,

¹ See 6 USCIS Policy Manual E.6(B)(2), <https://www.uscis.gov/policy-manual/volume-6-part-e-chapter-6> (noting that this exception may apply: when there is a successor-in-interest employer change; when the petitioner files an amended petition to request a different immigrant classification; when USCIS determines that the previous petition was lost; and when the petitioner wishes to file a new petition subsequent to the denial, revocation, or abandonment of the previously filed petition, and the permanent labor certification was not invalidated due to material misrepresentation or fraud relating to the labor certification application).

and (3) indicate that the original labor certification was filed with a Form I-140 with receipt number [REDACTED]. The appeal also includes evidence related to counsel's and the Petitioner's efforts to contact USCIS to determine the status of that filing. The Petitioner has consistently claimed, at the time of filing and on appeal, that it filed the instant Form I-140 due to a lack of action on the previous filing and suggests that the previous filing may have been lost.

We note that our review of relevant USCIS systems reflects no record of a previous Form I-140 filed by the Petitioner on behalf of the Beneficiary. It also confirms the Director's determination that the receipt number provided for that claimed filing relates to an approved Form I-140 that is not associated with the Petitioner or the Beneficiary.² Nevertheless, the evidence submitted on appeal is material to the Petitioner's claim that such a filing occurred, and the Director has not yet had an opportunity to review it.³

Accordingly, we will withdraw the Director's decision and remand the matter to the Director for further consideration of the new evidence supporting the Petitioner's claim that it filed an original, valid labor certification with a prior Form I-140.⁴ The Director may request additional evidence and allow the Petitioner a reasonable opportunity to respond prior to issuing a new decision. If the Director determines that the original labor certification was in fact submitted with a previous filing, then he should issue a new decision on the merits of the petition.

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 USCIS records reflect that the petitioner that filed the Form I-140 with receipt number [REDACTED] was represented by the same attorney who represented the Petitioner with respect to its claimed prior Form I-140 on behalf of the Beneficiary.

³ The Director denied the petition without issuing a request for evidence or notice of intent to deny.

⁴ Under former 8 C.F.R. § 103.1(f)(3)(iii)(B), we lack appellate jurisdiction "when the denial of the petition is based upon lack of a certification by the Secretary of Labor." See Department of Homeland Security (DHS) Delegation No. 0150.1 II.U (effective March. 1, 2003), <https://www.hsdl.org/?view&did=234775> (delegating appellate jurisdiction to us over the matters stated in the former regulation). As noted above, however, there is an exception to the requirement at 8 C.F.R. § 204.5(k)(4)(i), and a Petitioner can submit a copy of a labor certification in instances where it establishes that the original, valid labor certification was submitted with a prior Form I-140. As the applicability of this exception is at issue in this case and requires further review, we find it appropriate to remand the matter rather than reject the appeal.