



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

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

In Re: 23474869

Date: DEC. 14, 2022

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Advanced Degree Professional

The Petitioner seeks to employ the Beneficiary as a senior software engineer under the second-preference, immigrant classification for members of the professions with advanced degrees or their equivalents. Immigration and Nationality Act (the Act) section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A).

After initially approving the petition, the Director of the Nebraska Service Center revoked the petition's approval, concluding that the accompanying certification from the U.S. Department of Labor (DOL) does not describe the offered position.

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). The Administrative Appeals Office (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). Upon de novo review, we will sustain the appeal.

Immigration as an advanced degree 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 certification from the U.S. Department of Labor (DOL). *See* section 212(a)(5) of the Act, 8 U.S.C. § 1182(a)(5). DOL approval signifies that insufficient U.S. workers are able, willing, qualified, and available for a position. *Id.* Labor certification also indicates that the 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 certified labor application 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 considers whether a beneficiary meets the requirements of a certified position and a requested immigrant visa classification. If USCIS approves the 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.

At any time before a beneficiary obtains lawful permanent residence, however, USCIS may revoke a petition's approval for "good and sufficient cause." Section 205 of the Act, 8 U.S.C. § 1155. If

supported by the record, a petition's erroneous approval may justify its revocation. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988).

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(I)(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 accompanying labor certification may no longer be valid. *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 whether "there has been any other material change in the job opportunity covered by the original labor certification." 6 *USCIS Policy Manual* E.6(D), <https://www.uscis.gov/policy-manual>.

Here, the accompanying labor certification identifies the offered position as "Software Engineer III" and lists the following job duties:

Develop and implement software to contribute to the vision and design of [redacted] search, browse, and category pages for desktop and mobile properties. Enhance and maintain the Preso and Polaris search backend microservice software in Java. Design and implement search backend components in a massively scalable, high performance, multi-tenant system in the Tomcat or Jetty platform running on Java. Gather requirements for products and design, develop, test, and support the software applications. Uphold the overall codebase quality by participating in software design review, code review, and technical discussions. Develop and write unit-test and regression test cases for new software features and enhancements. Release features to production and execute the release procedures to ensure that new features are available to end-users. Provide technical support for day-to-day production or business issues.

The Director issued a written notice of intent to revoke (NOIR) the petition's approval, noting that the petition identifies the offered position by a different job title, "Senior Software Engineer." The Petitioner's support letter submitted with the petition states that senior software engineer is the "normal progression in employment from the role listed on the certified ETA Form 9089" and lists the same job duties. But the Director stated that the letter "was not sufficient evidence to justify the difference of job titles listed on Form I-140 and ETA Form 9089."

In response to the NOIR, the Petitioner submitted a letter from a company official indicating that, since the labor certification's issuance, the company promoted the Beneficiary in a normal progression of employment and without material change in the job duties. The official provided a comparison of the job duties of both positions and the percentage of time spent on each duty.

The Director determined that the Petitioner no longer offers the Beneficiary the same position described on the labor certification. The Director calculated that the Beneficiary spends 90% of the

time on the same job duties. He concluded that this demonstrates that the positions “are different in nature” and that the petition is not supported by a labor certification for the specific position. Here, the Petitioner demonstrated that the job duties of the offered position vary only slightly from those certified by DOL, and, therefore, the 10% discrepancy does not, in the facts presented in this case, result in a material change to the position. Contrary to the Director’s decision, we therefore conclude that the changes in the offered position’s job duties are not material. We will therefore sustain the appeal and reinstate the petition’s approval.

ORDER: The appeal is sustained.