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WHAT IF THE JOB HAS CHANGED SINCE THE LABOR CERTIFICATION APPLICATION WAS APPROVED MANY YEARS AGO?

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Foreign national workers who have been waiting in the employment-based second and third preference green card backlogs for many years have fortuitously become eligible to file I-485 adjustment of status applications due to the advancement of filing dates in the October 2020 Visa Bulletin.

Many of the labor certifications were filed between 2009 and 2014. A labor certification filed on behalf of a software engineer years ago may have been required to use very different technologies from today. Even the SOC Code 15-1031 for Software Engineer is now defunct and cross walks to SOC Code 15-1132 for Software Developer, Applications. In addition, the wage being paid is probably higher than what was indicated on the labor certification and the title may have changed to Vice President of Software Engineering or Director of Software Projects. While it is good news for the foreign national and the US employer when a skilled foreign national worker advances up the ladder, the employment-based immigration system requires that the duties still comply with what was indicated in the fossilized labor certification many years ago.

It is truly unfortunate that there has never been an expansion in the visa numbers in the employment based green card categories since the Immigration Act of 1990. Due to the per country limits within each employment preference, beneficiaries of approved labor certifications and I-140 petitions born in India are destined to wait in backlogs that can stretch over decades. The wait for the green card stalls careers and precludes job mobility. It is thus fortunate that the India EB-3 Dates of Filing in the October 2020 Visa Bulletin advanced to January 1, 2015 allowing tens of thousands of beneficiaries of approved I-140 petitions to become eligible to file I-485 adjustment of status

applications.

Many are now finding that their job descriptions have changed since the approval of the labor certification and they have also been promoted a few times over. While section 204(j) of the Immigration and Nationality Act (INA) allows the worker to exercise job portability to a same or similar occupation if the I-485 application has been pending for 180 days or more, such job mobility is not available at the time of filing the I-485. Whether the I-485 is being filed with either a concurrent I-140 petition, which may be a downgrade EB-3 petition, or by itself based on an old approved I-140 petition that is now current, it must be supported by a job offer from the employer that is substantially similar to the job described in the labor certification.

If the job has drastically changed, then the employer may need to file a new labor certification describing the new position, and if approved, a new I-140 petition that recaptures the old priority date. Alternatively, the employer may still offer the position in accordance with the terms of the approved labor certification. But the old job may have become obsolete due to a rapid advance in technology and it would also be unfair to expect the foreign worker to regress to the old job after a natural career progression. Yesterday's programmer may have today become a machine learning engineer. Or the automotive engineer involved with the internal combustion engine is now a high voltage battery test engineer. There is little USCIS guidance on dealing with career progression after a labor certification has been approved although it has been established USCIS policy that any material changes in the terms and conditions of employment requires an amended petition. Unfortunately, a future visa bulletin may no longer have current filing dates by the time a new labor certification is granted, and there is a risk that in the current economic downturn, the new labor certification may not even get approved.

On the other hand, if the job role remains the same and requires the same skills set, but only the technologies have changed, it is still possible to rely on the previously approved labor certification. In the case of the software engineer, if the duties still include involvement in all phases of the life cycle development process, but the technology has changed and the position has more responsibility than before, it may be possible to describe the new position as being similar to the old position, but that the beneficiary is using updated technologies of those listed in the labor certification. An increase in the salary would not be of concern if it is generally for the same job described

in the labor certification. Even a change in the job title should not be considered material so long as the position remains in the same SOC occupational code.

A recent AILA practice advisory suggests that when a promotion results in a substantial change "e.g., when a *Software Engineer* is promoted to *Director of Engineering* or a *Biostatistician* becomes a *Manager, Machine Learning,*" then a new labor certification and consequently a new I-140 petition is required. An incremental promotion, on the other hand, which does not alter the basic position duties or qualifications in any significant way, may not require a new labor certification. The AILA practice advisory provides the example of a "*Biostatistician I* who becomes a *Biostatistician III* with a salary increase but no substantial changes to duties or responsibilities. In this scenario, an employer may file a new I-140 based on the original Labor Certification to either upgrade or downgrade the beneficiary's classification depending on which visa category is current."

It is indeed a sad state of affairs that the tyrannical priority dates in the employment green card system have not just held up lives and careers of skilled immigrants for so many years, but the long waits also have the potential to render the prized labor certification approved years ago obsolete. It is hoped that the USCIS adopts a more flexible approach and makes allowances for job promotions and changes, even if the change is substantial, and even if the change has been from analyst to manager, so long as the foreign national worker's job description uses the same baseline skills and education, and is within the same or related SOC occupational code. Those who have waited patiently for so many years and played by the rules ought to be rewarded with a green card based on an old labor certification even if the job has naturally and incrementally progressed over time.