



SAVING THE LABOR CERTIFICATION FOR THE BACKLOGGED BENEFICIARY EVEN AFTER THE JOB HAS CHANGED

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In [“What if the Job Has Changed Since the Labor Certification Was Approved Many Years Ago”](#) we discussed strategies for noncitizen workers who are eligible to file an I-485 adjustment of status application, but find that their job has changed since the approval of the I-140 petition, which may have been many years ago. When the essence of the job remains the same, but the role may have evolved over time or require the use of updated technologies, the blog suggested that one may arguably still rely on the original labor certification and I-140. At the adjustment of status stage, it can be explained that the new position is similar to the one described in the I-140 position, but there has been some progression in the job duties over time. Even if the salary has increased or the job title has been updated, these changes may not be material so long as the core duties of the position remain very similar.

This is unfortunately a common issue with Indian born beneficiaries of approved I-140 petitions in the backlogged employment second (EB-2) and third (EB-3) preferences. They have not yet been able to file I-485 adjustment of status applications and are thus unable to exercise job portability. The labor certification may have been filed over 10 years ago for a job that has progressed as a result of changes in technologies with the advent of cloud computing and machine learning. While filing a new labor certification followed by the filing of a new I-140, and capturing the old priority date, is the safest way to proceed, there is no guarantee that a new labor certification may be approved or could even be filed if the company has had layoffs in the same or related occupation in the past six months.

USCIS has provided little guidance on job changes after I-140 approval, but we refer you to a 2023 AILA practice titled “Job Changes after the PERM Is Approved: Legal and Ethical Considerations for Experienced Practitioners Practice Advisory” by Loan Huynh, Cyrus Mehta and Christine Traversi. When a noncitizen employee’s job has changed or he has been promoted, USCIS provides the following [guidance](#) for purposes of job portability under INA 204(j) when an I-485 application has been filed and been pending for 180 days:

“If you change jobs or receive a promotion, USCIS will determine whether you remain eligible for a Green Card on a case-by-case basis and based upon the totality of the circumstances. You must establish by a preponderance of the evidence that the relevant positions are in similar occupational classifications. For example, if you move into a more senior but related position which is non-managerial, USCIS will use the criteria explained above to determine whether you are primarily responsible for managing the same or similar functions of your original job or the work of persons whose jobs are in the same or similar occupational classification(s) as your original position.”

Although this guidance is not clearly applicable outside the I-485 portability context, it suggests that demonstrating that a job remains in the same or a similar SOC code could be one way to establish that the position offered in the I-140 petition remains valid despite a promotion or progression in the duties.

The USCIS Policy Manual also provides [guidance](#) on job changes in the “successor in interest” context. When a company is sold, merged, or undergoes similar changes, “the new or reorganized company may demonstrate to USCIS that it can be considered a successor in interest (successor) of the original company to assume the predecessor’s prior immigrant benefits requests.” The Policy Manual states:

“The job offered in the successor-in-interest petition by the successor must remain unchanged with respect to the rate of pay, metropolitan statistical area, job description, and job requirements specified on the permanent labor certification. USCIS denies successor-in-interest claims where the position with the successor is changed such that the rate of pay, job description, or requirements specified on the permanent labor certification no longer relate to the labor market test.

In other words, officers should deny any successor claim where the changes to the rate of pay, job description, or job requirements, as stated on permanent labor certification, if made at the time that the permanent labor certification was filed with DOL, could have affected the number or type of available U.S. workers who applied for the job opportunity. However, an increase in the rate of pay due to the passage of time does not affect the successor-in-interest claim.”

Extrapolating from the guidance provided in the successor in interest context, noncitizens workers whose jobs have changed since the labor certification or I-140 approval can possibly demonstrate that these changes would not have impacted the number or type of U.S. workers who applied to the original job opportunity.

However, when there are job changes outside INA 204(j) portability largely due to technological changes, practitioners must vigorously advocate that the essence of the position remains the same and that a new labor certification is not required. Our firm’s recent anecdotal experience illustrates that challenges stemming from job changes after the approval of an I-140 petition can be overcome if it is demonstrated that the essential duties of the position remain the same. We assisted an individual who had applied for adjustment of status based on an I-140 petition that was approved some years ago. Since the approval of the I-140 petition and prior to filing the I-1485 application after many years, the employee had been promoted to a more senior job title and had taken on some more managerial job duties. USCIS issued a Notice of Intent to Revoke (NOIR) the I-140 petition, arguing that the position outlined in the I-140 petition was no longer a bona fide job offer given the progression of the role. After responding to the NOIR and asserting that the substance of the position remained unchanged despite an evolution of some of the specific duties, the I-140 petition was preserved and the employee’s adjustment of status application was ultimately approved.

It is unfair and impractical for an employer to file a new labor certification whenever there is job progression due to the passage of time and technological change. Beneficiaries of labor certifications also should not be bound by the same job for a decade or longer solely because they were born in a backlogged

country like India. It is hoped that the USICS applies common sense and flexibility in agreeing that a labor certification and corresponding I-140 petition do not get invalidated if there is a progression of the job so long as the essential aspects of the job remain the same.

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