U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: JUN 0 3 2014 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the immigrant visa petition and the petitioner appealed the matter to the Administrative Appeals Office (AAO). The AAO dismissed the appeal on February 4, 2014. The matter is now before the AAO as a motion to reopen and reconsider this decision. The motion to reconsider will be granted. The previous decision of the AAO will be affirmed. The petition remains denied.

The petitioner describes itself as an information technology business. It seeks to permanently employ the beneficiary in the United States as a "Project Manager Client Services." The petitioner requests classification of the beneficiary as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment Certification (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is September 20, 2012. *See* 8 C.F.R. § 204.5(d).

The director's decision denying the petition concludes that the beneficiary did not possess the minimum experience required to perform the offered position by the priority date. We also concluded that the beneficiary did not meet the experience requirements of the labor certification.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.[2]

The regulations at 8 C.F.R. § 103.5(a)(2) state, in pertinent part, that "[a] motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence." In this matter, the petitioner presented no facts or evidence on motion that may be considered "new" under 8 C.F.R. § 103.5(a)(2) and that could be considered a proper basis for a motion to reopen. All evidence submitted on motion was previously available and was discovered or presented in the previous proceeding. The petitioner has not provided any evidence with this motion that was not submitted originally. As the petitioner was previously put on notice and provided with a reasonable opportunity to provide evidence addressing the reasons for denial and for dismissal of the appeal, the evidence submitted on motion will not be considered "new" and will not be considered a proper basis for a motion to reopen.

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[1] Section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees, whose services are sought by an employer in the United States.

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

The motion to reconsider qualifies for consideration under 8 C.F.R. § 103.5(a)(3) because the petitioner's counsel asserts that the director and the AAO made an erroneous decision through misapplication of law or policy.

The beneficiary must meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971).

In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise clearly prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position has the following minimum requirements:

H.4. Education: Master's degree in Computer Science.
H.5. Training: None required.
H.6. Experience in the job offered: 24 months.
H.7. Alternate field of study: "Computer Engineering, Information Systems or Equivalent."
H.8. Alternate combination of education and experience: Accepted.
H.8-A. If yes, specify the alternate level of education required: Bachelor's degree.
H.8-C. If applicable, indicate the number of years experience acceptable in question 8: "5."
H.9. Foreign educational equivalent: Accepted.
H.10. Experience in an alternate occupation: None accepted.
H.14. Specific skills or other requirements: [Blank.]

The labor certification states that the beneficiary qualifies for the offered position based on his experience as a Database Administrator for the petitioner from October 1, 2007 to July 31, 2010 (two years and ten months); as a Systems Engineer for the petitioner from August 1, 2010 to September 11, 2011 (one year and one month); and as a Project Manager Client Services for the petitioner from September 12, 2011 until the present time.

On motion, the petitioner asserts that the beneficiary has been working for the petitioner from May 2006 to present. Specifically, the petitioner states that the pay statements submitted indicate the beneficiary's hire date of May 30, 2006, the date he began his Optional Practical Training (OPT). We noted in our prior decision that the petitioner had not established that the beneficiary continued his employment in OPT from July 18, 2006 through February 2007.[3] The petitioner has not provided independent, objective evidence to corroborate the beneficiary's employment with the petitioner in OPT from July 18, 2006 through February 2007.

The record contains two experience letters from the petitioner's Executive Vice President, dated January 17, 2013 and June 24, 2013, which state that the company employed the beneficiary as a Database Administrator from May 2006 to February 2007 in OPT (eight months) and from October 1, 2007 to July 31, 2010 (two years and ten months); as a Systems Engineer from August 1, 2010 to September 11, 2011 (one year and one month); and as a Project Manager Client Services from September 12, 2011 until the present time. Even including the beneficiary's alleged period of time employed in OPT, this employment constitutes a period of time of four years and seven months, which is five months short of the required five years of experience.

In our prior decision, we noted that the beneficiary's tax returns for 2008 and 2009 state that the beneficiary was employed as a Systems Engineer for these years. The labor certification and the experience letters in the record state that the beneficiary was employed as a Database Administrator for 2008 and 2009. The petitioner did not resolve this discrepancy on motion.

Additionally, the petitioner has not provided any independent, objective evidence that would establish that the beneficiary's previous employment with the petitioner was in a position not "substantially comparable" to the position offered. We referenced in our prior decision the April 11, 2013 letter from the petitioner's Chief Financial Officer, which stated the percentage of duties for the beneficiary's current position as Project Manager Client Services, as well as the proffered position of Project Manager Client services. This letter demonstrates that the beneficiary would be spending 70% of his time in the position offered doing duties that he also performed in his current position as Project Manager Client Services. Therefore, the beneficiary's experience as a Project Manager Client Services is substantially comparable to the position offered and the beneficiary may not use the experience gained in this position before the priority date as qualifying experience.

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[3] The record contains paystubs in the record that were issued to the beneficiary on June 30, 2006, and July 17, 2006.

On motion, counsel asserts that the beneficiary's experience gained with the petitioner was not in a substantially comparable job. However, no additional evidence was submitted to support this assertion. No additional evidence was submitted to address our finding that the petitioner's own letter of April 11, 2013 is contrary to counsel's assertion. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner's April 11, 2013 letter describes the percentage of time that the beneficiary would spend on particular job duties in the position offered as Project Manager Client Services, in pertinent part, as follows:

Job duties	**Percentage of time**
Overall planning and management of litigation discovery projects in which challenging ESI tasks are the norm. Project management.	40%
Meet with Clients to discuss project requirements and subsequently draft specification documents that are incorporated into a statement of work for client approval. Perform day-to-day interface with customers.	20%
Work closely with engineering teams – either from the Data Processing department and/or the Support department – to ensure specifications are met while providing status updates to the client.	10%

This letter also states that the percentage of time that the beneficiary would spend in job duties in the current position as Project Manager Client Services, in pertinent part, as follows:

Job duties	**Percentage of time**
Overall planning and management of litigation discovery projects, including civil/criminal litigations and government investigations, in which challenging ESI tasks are the norm. Project management. Ability to assume responsibility for projects from beginning to end while determining appropriate tasks.	40%
Meet with Clients to discuss project requirements and subsequently draft specification documents that are incorporated into a statement of work for client approval. Conduct planning meetings with clients to explore and craft case plans and document review strategies.	20%
Work closely with engineering teams – either from the Data Processing department and/or the Support department – to ensure specifications are met while providing status updates to the client.	10%

The similarities between these job duties demonstrate that the beneficiary would be performing 70% of the same job duties in the position offered as he is in his current position. Accordingly, the beneficiary's experience as a Project Manager Client Services with the petitioner is substantially comparable to the position offered and the beneficiary may not rely upon this experience to qualify for the instant position.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

ORDER: The motion to reconsider is granted. The petition remains denied.