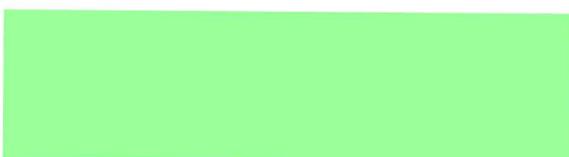


(b)(6)

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



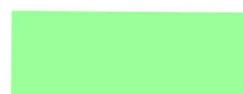
U.S. Citizenship
and Immigration
Services



DATE: **FEB 04 2014**

OFFICE: TEXAS SERVICE CENTER

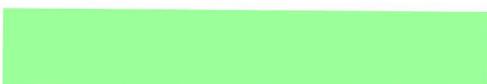
FILE:



IN RE:

Petitioner:

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:



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 matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

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.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

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.²

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)(1), (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).

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).

Where the job requirements in a labor certification are not otherwise unambiguously 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 also states that the beneficiary qualifies for the offered position based on the following 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).
- As a Project Manager Client Services for the petitioner from September 12, 2011 until the present time.

The labor certification lists additional experience gained from 1999 to 2001. As this experience was gained before the beneficiary earned his bachelor’s degree in December 2005, it is not post-baccalaureate experience required for classification as an advanced degree professional pursuant to 8 C.F.R. § 204.5(k)(2). Therefore, this experience will not be considered.

The regulation at 8 C.F.R. § 204.5(g)(1) states:

Evidence relating to qualifying experience or training shall be in the form of letter(s) from current or former employer(s) or trainer(s) and shall include the name, address, and title of the writer, and a specific description of the duties performed by the alien or of the training received.

In an experience letter, dated June 24, 2013, the petitioner states that the beneficiary began working there as a Database Administrator from June 2006 to February 2007 pursuant to his Optional Practical Training (OPT). This employment under OPT was not listed on the labor certification. In *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted. On November 14, 2013, the AAO sent the petitioner a request for evidence and notice of intent to dismiss (NOID) and requested that the petitioner provide evidence of the beneficiary's OPT and his pay during this time to verify the dates of the beneficiary's employment in OPT and that he was employed full-time. The AAO also specifically requested that the petitioner provide evidence of the beneficiary's job duties while in OPT to demonstrate that the position in OPT was not one that is substantially comparable to the position offered.³

In response to the AAO's NOID, counsel for the petitioner submitted a copy of a payroll statement that states the beneficiary was hired on May 30, 2006, as well as pay statements that the petitioner issued to the beneficiary on June 30, 2006, and July 17, 2006. The petitioner did not provide statements of the beneficiary's pay from July 18, 2006 through February 2007. These documents do not establish that the beneficiary's OPT employment with the petitioner extended until February 2007 as the petitioner claims.⁴

The petitioner submitted an undated, unsigned document stating that the beneficiary qualifies for the instant position based on experience as a Systems Engineer and as a Database Administrator. The petitioner previously submitted a document signed by the petitioner's Chief Financial Officer (CFO), dated April 11, 2013, that appears to include this same information. These documents conflict with the beneficiary's tax returns for 2008 and 2009, which state that he was employed by the petitioner as a Systems Engineer in 2008 and 2009.⁵ The April 11, 2013 document signed by the petitioner's CFO states that the beneficiary was employed as a Database Administrator from October 1, 2007 to July 31, 2010. The petitioner has not provided any independent, objective evidence demonstrating

³ Representations made on the certified ETA Form 9089, which is signed by both the petitioner and the beneficiary under penalty of perjury, clearly indicate that the beneficiary's experience with the petitioner or experience in an alternate occupation cannot be used to qualify the beneficiary for the certified position. See 20 C.F.R. §§ 656.17(h), (i).

⁴ In response to the AAO's NOID, counsel for the petitioner submitted a copy of the beneficiary's Form I-20 which states that the duration of employment for OPT was authorized until January 1, 2007, and a copy of the beneficiary's Employment Authorization Card with an expiration date of OPT of February 10, 2007. However, these documents demonstrate that the beneficiary was authorized for employment through February 2007, not that the petitioner employed him during the entire period.

⁵ The beneficiary listed his occupation on his 2008 and 2009 Forms 1040 as "Systems Engineer."

that it employed the beneficiary as a Database Administrator in OPT beyond the period shown on the pay statements addressed above (i.e. from July 18, 2006 until February 10, 2007) as the petitioner asserts. Therefore, the petitioner has not established the full extent of the beneficiary's employment in OPT as the petitioner asserts and that this experience constitutes qualifying experience for the position offered.

Even if the AAO accepted the assertion that the beneficiary's experience in OPT extended until February 2007, which has not been established by the evidence in the record, the petitioner must establish that the beneficiary possessed the minimum five years of experience prior to the priority date on September 20, 2012 as required by the labor certification. 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 in the following positions:

- As a Database Administrator for the petitioner from May 2006⁶ 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 for the petitioner from August 1, 2010 to September 11, 2011 (one year and one month).
- As a Project Manager Client Services for the petitioner from September 12, 2011 until the present time.

This demonstrates that the beneficiary's employment as a Database Administrator and as a Systems Engineer only constitutes three years and eleven months of qualified experience in the job offered (without considering the beneficiary's alleged employment in OPT, as stated above).

As stated above, in response to the AAO's NOID, the petitioner submitted a copy of the beneficiary's tax returns for 2008 and 2009 which 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. Doubt cast on any aspect of the petitioner's evidence may lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Id.* The record does not contain the beneficiary's 2007 tax return and the petitioner did not submit any other

⁶ The letter dated January 17, 2003 states that the beneficiary began working for the petitioner in May 2006, and the letter dated June 24, 2013 states that the beneficiary began working there in June 2006. The record also contains a letter from the petitioner's CFO, dated April 11, 2013, stating that the beneficiary worked in OPT beginning on June 30, 2006. Counsel for the petitioner provided a payroll statement in response to the AAO's NOID demonstrating that the beneficiary began working there on May 30, 2006. However, nothing in the record demonstrates that the petitioner employed the beneficiary in OPT beyond July 17, 2006.

payroll statements for 2007. This calls into question whether the petitioner actually employed the beneficiary in 2007.

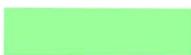
Part J.21 of the labor certification asks whether the beneficiary gained any of the qualifying experience in a position that was “substantially comparable” to the job opportunity requested. The petitioner indicated “No” in response to this question. Therefore, the AAO will not consider the beneficiary’s experience with the petitioner in the offered position from September 12, 2011 to the priority date as qualifying experience.⁷ The experience letters are not supported by independent, objective evidence of the beneficiary’s experience, and the inconsistencies regarding his job duties and the actual dates of employment raise doubts about the beneficiary’s actual experience. Therefore, the petitioner has not established that the beneficiary meets the experience requirements of the labor certification.

Even without the discrepancies noted above, the beneficiary’s work experience as claimed by the petitioner would not constitute five years of experience required by the labor certification. As stated above, the beneficiary was employed as a Database Administrator (even including the beneficiary’s OPT experience) for three years and six months and as a Systems Engineer for one year and one month, which constitutes four years and seven months of experience, which is five months short of the five years of experience required by the labor certification.

The AAO affirms the director’s decision that the petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the

⁷ The director stated that the beneficiary could not rely upon his experience as a Project Manager Client Services from September 12, 2011 until the priority date of September 20, 2012 to qualify for the instant position because this position is substantially comparable to the position offered. The DOL will only consider a beneficiary’s employment with the petitioner as constituting qualifying experience for the position offered if the beneficiary gained the experience in a position “not substantially comparable to the position for which certification is being sought.” See 20 C.F.R. § 656.17(i)(3). The regulation at 20 C.F.R. § 656.17(i)(5)(ii) states that “a ‘substantially comparable’ job or position means a job or position requiring performance of the same job duties more than 50 percent of the time.”

As stated above, the record contains a letter from the petitioner’s Chief Financial Officer, dated April 11, 2013, regarding the beneficiary’s experience while employed for the petitioner. This letter includes the percentage of duties for the beneficiary’s position as Project Manager Client Services beginning December 1, 2011, which 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, not only are the titles of the positions the same, but the changes between the duties of the beneficiary’s current position and that of the position offered are minimal. Therefore, the current position of Project Manager Client Services is substantially comparable to the position offered and the beneficiary may not use the experience gained in his current position before the priority date to qualify for the instant position.



priority date. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree under section 203(b)(2) of the Act.

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 appeal is dismissed.