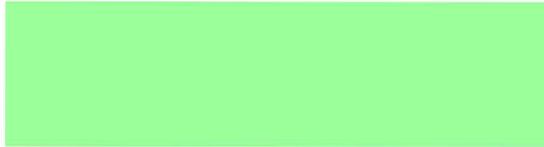




U.S. Citizenship  
and Immigration  
Services

(b)(6)

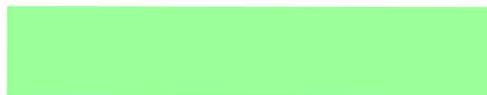


DATE: **OCT 21 2014**

OFFICE: TEXAS SERVICE CENTER

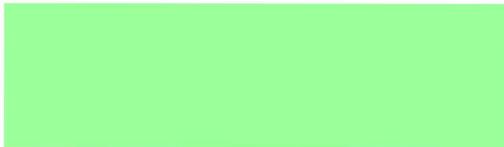
FILE: 

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 petitioner appealed the matter to the Administrative Appeals Office (AAO). We dismissed the appeal on February 4, 2014. The petitioner filed a motion to reopen and reconsider this decision and we granted the motion to reconsider and affirmed our previous decision on June 3, 2014. The matter is again before us as a second motion to reopen and reconsider. The motion will not be reopened, but the motion to reconsider will be granted. Our previous decision will be affirmed, and 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).<sup>1</sup>

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. On appeal, we affirmed the director’s conclusion that the beneficiary did not meet the experience requirements of the labor certification. On June 3, 2014, we granted the petitioner’s motion to reconsider and affirmed our previous decision.

We conduct appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). We consider all pertinent evidence in the record, including new evidence properly submitted upon appeal or motion.

The regulation at 8 C.F.R. § 103.5(a)(2) states, 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 has not presented any 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. Because the petitioner has not provided any evidence with this motion that was not submitted originally, the instant filing will not be considered a proper basis for a motion to reopen.

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.

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<sup>1</sup> 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.

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), (2). *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).

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 with the petitioner, as follows:

- As a Database Administrator 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);
- 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. The record contains the beneficiary’s pay statements that indicate the petitioner hired him on May 30, 2006, the date he began his Optional Practical Training (OPT). However, we noted in our prior decisions that the petitioner had not established that the beneficiary continued his employment in OPT from July 18, 2006 through February 2007.<sup>2</sup> The petitioner has not provided any evidence to corroborate the beneficiary’s employment with the petitioner in OPT from July 18, 2006 through February 2007. However, even assuming that the beneficiary was employed with the petitioner as a Database Administrator during this entire time of OPT, the beneficiary would still not have enough experience to meet the terms of the labor certification, as shown in the table below.

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 follows:

<b>Position</b>	<b>Dates</b>	<b>Length of time</b>
Database Administrator in OPT	May 2006 to February 2007	8 months
Database Administrator <sup>3</sup>	October 1, 2007 to July 31, 2010	2 years, 10 months
Systems Engineer	August 1, 2010 to September 11, 2011	1 year, 1 month
<b>Total period of time</b>		4 years, 7 months

Therefore, even if we accept the beneficiary’s employment with the petitioner during the entire time of OPT as counsel asserts, the beneficiary would still be five months short of the required five years of experience.

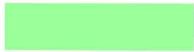
In our previous decisions, we concluded that the beneficiary’s current employment with the petitioner as a Project Manager Client Services could not constitute qualifying experience to meet the terms of the labor certification because not only does the current position have the same job title as the position offered, but also the job duties of the current position are “substantially comparable” to the position offered.<sup>4,5</sup>

<sup>2</sup> The record contains paystubs in the record that were issued to the beneficiary on June 30, 2006, and July 17, 2006.

<sup>3</sup> In June 3, 2014 decision, we noted that the beneficiary’s tax returns for 2008 and 2009 state that the beneficiary was employed as a Systems Engineer in these years whereas the labor certification and the experience letters in the record state that the beneficiary was employed as a Database Administrator in 2008 and 2009. The petitioner did not resolve this discrepancy on either motion and this discrepancy remains unresolved. This issue must be addressed in any further filings.

<sup>4</sup> The regulation at 20 C.F.R. § 656.17(i)(3) states the following:

- (3) If the alien beneficiary already is employed by the employer, in considering whether the job requirements represent the employer’s actual minimums, DOL will review the training and experience possessed by the alien beneficiary at the time of hiring by the employer, including as a contract



On motion, counsel asserts that the beneficiary’s employment with the petitioner as a Project Manager Client Services qualifies him for the job offered. Counsel asserts that the beneficiary’s experience with the petitioner as a Project Manager Client Services was not in a substantially comparable job because “the beneficiary’s previous job duties are less than 50% similar to the proposed position.” Counsel states that the job duties of the job offered are “managerial in nature” and are at a higher level than the beneficiary’s current duties as a Project Manager Client Services. However, these assertions conflict with the description of these positions and the percentages of job duties as described in the April 11, 2013 letter from the petitioner’s Chief Financial Officer. The petitioner has not provided any additional evidence to support the assertion that the beneficiary’s previous job duties are less than 50% similar to the job offered. 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 April 11, 2013 letter from the petitioner’s Chief Financial Officer lists the percentage of duties for the beneficiary’s current position as Project Manager Client Services, as well as those of the proffered position of Project Manager Client services, as shown in the tables below:

Duties that overlap between the job offered and the current position:

Duties of the job offered	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%

employee. The employer can not require domestic worker applicants to possess training and/or experience beyond what the alien possessed at the time of hire unless:

- (i) The alien gained the experience while working for the employer, including as a contract employee, in a position not substantially comparable to the position for which certification is being sought, or
- (ii) The employer can demonstrate that it is no longer feasible to train a worker to qualify for the position.

<sup>5</sup> A definition of “substantially comparable” is found at 20 C.F.R. § 656.17(i)(5):

5) For purposes of this paragraph (i):

- (ii) 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. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

Work closely with engineering teams – either from the Data Processing department and/or the eZReview Support department – to ensure specifications are met while providing status updates to the client.	10%
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<b>Duties of the current position</b>	<b>Percentage of time<sup>6</sup></b>
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.	30%
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.	30%
Work closely with engineering teams – either from the Data Processing department and/or the eZReview Support department – to ensure specifications are met while providing status updates to the client.	10%

Duties that differ:

<b>Duties of the job offered</b>	<b>Percentage of time</b>
Utilize litigation support applications Concordance, FYI, Clearwell, iConect, Summation, LiveNote, CaseMap, Sanction and associated image viewing applications.	30%

<b>Duties of the current position</b>	<b>Percentage of time</b>
Manage or direct: document processing and creation of databases, advanced methods of search, workflow management during review, reporting tools, and production of documents.	20%
Tracking delivery schedules, ensuring proper quality	10%

<sup>6</sup> In our previous decision, dated June 3, 2014, we inadvertently stated the requirements regarding the “overall planning and management of litigation” as constituting 40% of the time and the requirements regarding “meeting with clients to discuss project requirements” as constituting 20% of the time. We have inserted the correct figures here. However, this would not have changed our previous decision because the total percentage of time that the beneficiary would spend on the job duties for these positions remains unchanged at 70%.

<p>assurance, and managing changes in work scope. Creating and maintaining proper tracking logs and reports. Generating invoicing paperwork for completed projects/tasks for billing. Web-based and on-site training for law firm and corporate customers.</p>	
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In summary, these charts indicate that the beneficiary will spend more time on project management (+10%) and less time meeting with clients (-10%) in the offered position. These charts also indicate that the beneficiary will take on new duties (utilizing litigation support applications) to take up 30% of his time, while also eliminating duties (managing or directing document processing and creation of databases, etc. and tracking delivery schedules, ensuring proper quality assurance, etc.) that currently take up 30% of his time.

Therefore, the record reflects that the beneficiary would be spending 70% of his time in the position offered doing duties that he also has performed in his current position as Project Manager Client Services. Thus, the beneficiary's current role 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.

Counsel asserts on motion that the beneficiary has a Bachelor's degree in Computer Information Systems from [REDACTED] and that he "needs to have 5 years of experience in fields which are different from the instant position." However, as demonstrated above, the petitioner has not established that the beneficiary possesses five years of experience that is not "substantially comparable" to the position offered as required by the labor certification. Counsel also notes that the position of Project Manager Client Services has an O\*Net SOC Code<sup>7</sup> of 11-3021 (Computer and Information Systems Manager); the position of Systems Engineer has an SOC Code of 15-1191; and the position of Database Administrator has an SOC Code of 15-1141. Counsel asserts that this demonstrates that the position offered is a different position than those of the beneficiary's previous employment experience. While this demonstrates that the beneficiary's positions as Systems Engineer and Database Administrator are different from the position offered, the beneficiary's experience in these positions does not add up to five years of experience. The beneficiary's current employment as Project Manager Client Services is the same as the position offered, and as shown above, this experience does not constitute qualifying experience for the job offered. Therefore, the petitioner has not established that the beneficiary meets the minimum experience requirements of the labor certification.

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<sup>7</sup> O\*NET is the current occupational classification system used by the DOL. Located online at <http://online.onetcenter.org>, O\*NET is described as "the nation's primary source of occupational information, providing comprehensive information on key attributes and characteristics of workers and occupations." O\*NET incorporates the Standard Occupational Classification (SOC) system, which is designed to cover all occupations in the United States. See <http://www.bls.gov/soc/socguide.htm>.

(b)(6)



*NON-PRECEDENT DECISION*

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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.