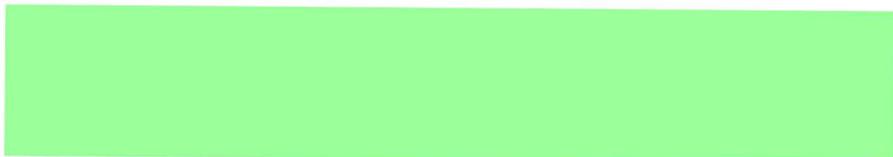


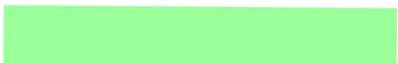


U.S. Citizenship  
and Immigration  
Services

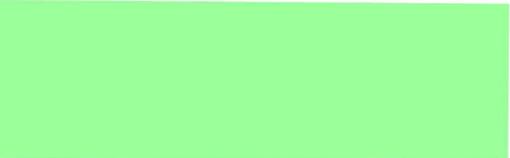
(b)(6)



DATE: **DEC 19 2013** OFFICE: NEBRASKA SERVICE CENTER FILE: 

IN RE: Petitioner:   
Beneficiary: 

PETITION: Immigrant Petition for Alien Worker as a Professional Pursuant to Section 203(b)(3)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)(A)(ii)

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

(b)(6)

**DISCUSSION:** The Director, Nebraska Service Center (the director), 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 a university. It seeks to permanently employ the beneficiary in the United States as a [REDACTED]. The petitioner requests classification of the beneficiary as a professional pursuant to section 203(b)(3)(A)(ii) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(ii). Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

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 December 24, 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, timely 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.<sup>1</sup> On appeal, counsel submits a brief, copies of case law and copies of documentation already in the record.

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).

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<sup>1</sup> 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: Bachelor’s degree in Physical Education, Sports Management or a related field.
- H.5. Training: None required.
- H.6. Experience in the job offered: 24 months.
- H.7. Alternate field of study: None accepted.
- H.8. Alternate combination of education and experience: None accepted.
- H.9. Foreign educational equivalent: Accepted.
- H.10. Experience in an alternate occupation: None accepted.
- H.14. Specific skills or other requirements: See Job Duties: CPR, First Aid and Soccer Coach License required. Valid driver’s license.

The record contains a copy of the beneficiary’s Bachelor of Science in Physical Education and Sports Studies diploma and transcripts from [REDACTED] completed in 2006; American Red Cross CPR certifications issued in 2010 and 2013; a [REDACTED] valid from February 24, 2006 to December 11, 2011; a [REDACTED] course for soccer coaching certification issued in 2003; a Certificate of Attendance for Emergency Aid Course in 1998; and an [REDACTED] sports coaching certificate from 1998. As such, the record does not establish that the beneficiary meets the specific requirement of a valid driver’s license.

The labor certification also states that the beneficiary qualifies for the offered position based on experience as a Center of Excellence Coach for 10 hours per week at the [REDACTED], from January 1, 1997 to January 1, 2000; Soccer Coach and Camp Director for 35 hours per week at [REDACTED], from May 1, 1998 to September 1, 1998, May 1, 1999 to September 1, 1999, and May 1, 2000 to September 1, 2000; Soccer Coach for 15 hours per week at [REDACTED] from December 1, 2006 to March 1, 2007; Center of Excellence Coach for 10 hours per week at the [REDACTED] from January 1, 2007 to October 18, 2007; and Head Men’s Soccer Coach with the [REDACTED]

(b)(6)

petitioner from January 18, 2007 to December 24, 2012, the date on which the labor certification was filed. No other experience is listed. The beneficiary signed the labor certification under a declaration that the contents are true and correct under penalty of perjury.

The regulation at 8 C.F.R. § 204.5(1)(3)(ii)(A) states:

Any requirements of training or experience for skilled workers, professionals, or other workers must be supported by letters from trainers or employers giving the name, address, and title of the trainer or employer, and a description of the training received or the experience of the alien.

The record contains an experience letter dated May 22, 2013, from [REDACTED] Senior Vice President, on [REDACTED] letterhead stating that the company employed the beneficiary as a Soccer Camp Coach/Director for [REDACTED] from June through August of 1998, 1999 and 2000. However, the letter does not provide the address of the employer, sufficiently specify the dates of employment or state the number of hours worked per week. The record also contains an experience letter dated June 16, 2013, from [REDACTED], Senior V.P. [REDACTED] on an unknown letterhead<sup>2</sup> stating that [REDACTED] employed the beneficiary as a Soccer Camp Coach/Director from June through August 1998, 1999 and 2000. The letter states that the beneficiary worked in excess of 30 hours per week. However, the letter does not provide the address of the employer or sufficiently specify the dates of employment. Moreover, the letters are inconsistent with the labor certification regarding the name of the qualifying employer and dates and weekly hours of the beneficiary's employment. The labor certification states that [REDACTED] employed the beneficiary for 35 hours per week from May 1 through September 1 of 1998, 1999 and 2000. It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988).

The record contains invitations for training and application acceptance letters and employment contracts between [REDACTED] and the beneficiary, as well as an introduction letter for the beneficiary to [REDACTED]. However, this documentation does not meet the requirements of 8 C.F.R. § 204.5(g)(1) that such a letter be submitted by the qualifying employer. Alternatively, the petitioner has not established the need for secondary evidence with any documentary evidence that evidence cannot be obtained from the qualifying employer; and does not submit affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2).

The record contains an experience letter dated May 31, 2013, from [REDACTED] Operations Director & Owner, on [REDACTED] letterhead stating that the company employed the beneficiary as a Soccer Coach from December 2006 to March 2007. However, the letter does

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<sup>2</sup> The letterhead has various emblems and badges including [REDACTED]

not describe the beneficiary's duties in detail, sufficiently specify the dates of employment or state how many hours worked per week. Without a detailed job description the AAO is unable to determine if the experience was in the proffered position as is required by the labor certification.

The record contains an experience letter dated May 23, 2013, from [REDACTED], Academy Manager, on [REDACTED] letterhead stating that the company employed the beneficiary in the community scheme from January 1997 to June 2000. The letter states that the beneficiary also worked in the Center of Excellence under the guidance of the Academy Manager. However, the letter does not state the title of the beneficiary's position(s), describe the beneficiary's duties in detail, sufficiently specify the dates of employment or state the numbers of hours worked per week. The letter is inconsistent with the labor certification regarding the beneficiary's dates of employment. The labor certification states that the beneficiary was employed from January 1, 1997 to January 1, 2000. *Matter of Ho*, 19 I&N Dec. at 591-92.

The record also contains two undated letters from [REDACTED], Assistant Football in the Community Officer, on [REDACTED] letterhead stating that the company employed the beneficiary as a part-time coach beginning February 1997. However, the letter does not describe the beneficiary's duties in detail or sufficiently specify the dates and hours of employment.

The record contains a letter dated July 17, 2007, from [REDACTED], stating that the beneficiary began to work for [REDACTED] as a Coach in the Community Department after a successful two week work experience stint in February 1997. He states that the beneficiary worked his way up through the Coaches ladder, gaining a position as a Center of Excellence Coach before leaving in June 2000. While he states that the beneficiary worked a minimum of 30 hours per week between February 1997 and June 2000, those hours not only reflect coaching duties, but also office responsibilities which may not be experience in the proffered position. The letter fails to clearly state the title(s) and duties of the beneficiary's position(s), provide the address of the employer and the title of the signatory or sufficiently specify the dates of employment. The record contains a general club letter dated February 24, 2007, on [REDACTED] letterhead stating that the beneficiary recently returned from coaching in America and has a role with the under 9s and, given his youth, provides them with youth coaching policy. The record also contains Minutes for the [REDACTED] stating that the beneficiary was present at the meeting. The letter from [REDACTED] the general club letter and the minutes do not meet the requirements of 8 C.F.R. § 204.5(g)(1) that such a letter be submitted by the qualifying employer. Alternatively, the petitioner has not established the need for secondary evidence with any documentary evidence that evidence cannot be obtained from the qualifying employer; and does not submit affidavits from two persons to establish the fact of the beneficiary's employment as required by 8 C.F.R. § 103.2(b)(2). Further, the letter from Mr. [REDACTED] is inconsistent with the labor certification regarding the beneficiary's dates and hours of employment. The labor certification states that the beneficiary was employed for 10 hours per week from January 1, 1997 to January 1, 2000. *Matter of Ho*, 19 I&N Dec. at 591-92.

The record contains 2000-01 and 2006-07 HM Revenue and Customs Office P60s End of Year Certificates, indicating that the beneficiary received wages from [REDACTED] in 2000-

2001 and 2006-2007 and Inland Revenue P45s Details of Employee Leaving Work indicating that the beneficiary finished working for [REDACTED] on July 31, 2000 and on April 6, 2007. However, such evidence does not establish the duties performed by the beneficiary, the date on which the beneficiary commenced employment or the hours per week worked.

The record contains an experience letter dated May 24, 2013, from [REDACTED] HR Generalist on [REDACTED] letterhead stating that the University employed the beneficiary as an Assistant Soccer Coach from October 2005 to April 2006 and as Head Coach since July 2007. However, the letter does not sufficiently specify the dates of employment or number of hours worked per week. Further, the description of duties in the letter relate only to the beneficiary's position with the University as of July 2007 and the experience as an Assistant Soccer Coach is 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. Additionally, the beneficiary's title implies that his experience as an Assistant Soccer Coach was not experience in the proffered position as is required by the labor certification.

Moreover, 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.<sup>3</sup> Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

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<sup>3</sup> 20 C.F.R. § 656.17 states:

(h) *Job duties and requirements.* (1) The job opportunity's requirements, unless adequately documented as arising from business necessity, must be those normally required for the occupation

.....

(4)(i) Alternative experience requirements must be substantially equivalent to the primary requirements of the job opportunity for which certification is sought; and

(i) If the alien beneficiary already is employed by the employer, and the alien does not meet the primary job requirements and only potentially qualifies for the job by virtue of the employer's alternative requirements, certification will be denied unless the application states that any suitable combination of education, training, or experience is acceptable.

(ii) *Actual minimum requirements.* DOL will evaluate the employer's actual minimum requirements in accordance with this paragraph (i).

(1) The job requirements, as described, must represent the employer's actual minimum requirements for the job opportunity.

(2) The employer must not have hired workers with less training or experience for jobs substantially comparable to that involved in the job opportunity.

experience in an alternate occupation, are not applicable. In response to question J.21, which asks, “Did the alien gain any of the qualifying experience with the employer in a position substantially comparable to the job opportunity requested?,” the petitioner answered “no.” The petitioner specifically indicates in response to question H.6 that 24 months of experience in the job offered is required and in response to question H.10 that experience in an alternate occupation is not acceptable. In general, if the answer to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable<sup>4</sup> and the terms of the ETA

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(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 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.

(4) In evaluating whether the alien beneficiary satisfies the employer’s actual minimum requirements, DOL will not consider any education or training obtained by the alien beneficiary at the employer’s expense unless the employer offers similar training to domestic worker applicants.

(5) For purposes of this paragraph (i):

(i) The term “employer” means an entity with the same Federal Employer Identification Number (FEIN), provided it meets the definition of an employer at § 656.3.

(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.

<sup>4</sup> A definition of “substantially comparable” is found at 20 C.F.R. § 656.17:

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

Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1. that his position with the petitioner was in the proffered position and the job duties are the same duties as the position offered. Therefore, the experience gained with the petitioner was in the position offered and is substantially comparable as he was performing the same job duties more than 50 percent of the time. According to DOL regulations, therefore, the petitioner cannot rely on this experience for the beneficiary to qualify for the proffered position. Additionally, as the terms of the labor certification supporting the instant I-140 petition do not permit consideration of experience in an alternate occupation, and the beneficiary's experience with the petitioner was in the position offered, the experience may not be used to qualify the beneficiary for the proffered position.

On appeal, counsel contends that the director added an additional term to the employer's stated minimum requirements on the labor certification by requiring experience coaching Men's soccer, rather than accepting experience coaching Women's and Children's soccer. However, the experience letters in the record reflect that none of the beneficiary's experience meet the job description of "Head Coach" for a university-level soccer team as stated on the labor certification. Specifically, the proffered position requires an individual to "provide leadership and organization for all aspects of the men's soccer program including, monitoring both the academic and social development of the student-athletes; observing, evaluating and recruiting student-athletes; developing a schedule for competition; and directing assistant coaching staff." While some of the experience letters indicate that the beneficiary gained some experience as a lead coach, the descriptions of the positions' duties as stated on the labor certification and in the experience letters do not reflect the level of experience required for the proffered position. While counsel contends that the petitioner's intent was to accept coaching experience such as that possessed by the beneficiary and that the director failed to provide an opportunity to present such evidence, on appeal counsel has failed to submit any evidence to support a finding that this intent was clearly expressed to the DOL or to U.S. workers. Without documentary evidence to support the claim, the assertions of counsel will not satisfy the petitioner's burden of proof. The assertions of counsel do not constitute evidence. *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter Of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). To determine whether a beneficiary is eligible for an employment based immigrant visa, USCIS must examine whether the alien's credentials meet the requirements set forth in the labor certification. In evaluating the beneficiary's qualifications, USCIS must look to the job offer portion of the labor certification to determine the required qualifications for the position. 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). If the petitioner intended to accept experience in an occupation other than "Head Coach-Men's Soccer," the petitioner could have indicated on the Form 9089 in section H.10 that experience in an alternate occupation was acceptable.

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

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descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

priority date. Therefore, the beneficiary does not qualify for classification as a professional worker under section 203(b)(3)(A) of the Act.

Beyond the decision of the director,<sup>5</sup> the petitioner has also failed to establish its ability to pay the proffered wage. The petitioner must demonstrate its continuing ability to pay the proffered wage from the priority date and continuing until the beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Evidence of ability to pay “shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.” *Id.*

The record before the director closed on July 25, 2013 with the receipt by the director of the petitioner’s submissions in response to the director’s request for evidence. As of that date, the petitioner’s 2012 federal income tax return was the most recent return available. However, the record does not any contain the petitioner’s annual reports, federal tax returns, or audited financial statements for 2012.<sup>6</sup>

The petitioner’s failure to provide complete annual reports, federal tax returns, or audited financial statements for each year from the priority date is sufficient cause to dismiss this appeal. While additional evidence may be submitted to establish the petitioner’s ability to pay the proffered wage, it may not be substituted for evidence required by regulation.

Accordingly, the petitioner has also failed to establish its continuing ability to pay the proffered wage to the beneficiary since the priority date.

The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision. 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.

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<sup>5</sup> An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9<sup>th</sup> Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

<sup>6</sup> The record includes a 2012 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary. The Form W-2 reflects that the beneficiary was paid less than the proffered wage. The record also includes the petitioner’s accountant’s report and consolidated financial statements for June 30, 2012 and 2011. This report does not cover the priority date of December 24, 2012. Therefore, the petitioner must submit evidence of its ability to pay the proffered wage from the priority date onward with any further filings.