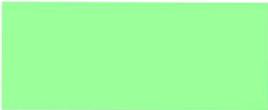


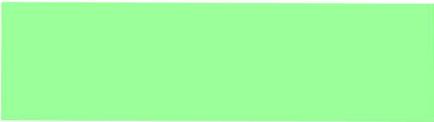


U.S. Citizenship  
and Immigration  
Services

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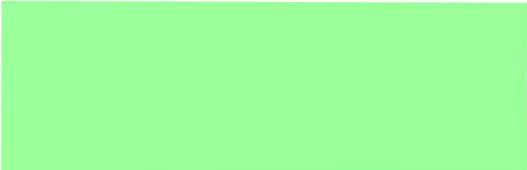


DATE: **JUN 03 2014** OFFICE: NEBRASKA SERVICE CENTER FILE: 

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

**DISCUSSION:** The Director, Nebraska Service Center (the director), denied the employment-based immigrant visa petition and a subsequent appeal was dismissed by the Administrative Appeals Office (AAO). The matter is now before us on motion to reopen and motion to reconsider. The motions will be granted; our previous decision will be affirmed in part and withdrawn in part. The appeal will again be dismissed.

The petitioner describes itself as a university. It seeks to permanently employ the beneficiary in the United States as a Head Coach-Men's Soccer. 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 duties of the offered position by the priority date. On appeal we affirmed the director's decision. We also concluded that the petitioner had failed to establish its ability to pay the proffered wage as of the priority date.

The motion to reopen qualifies for consideration under 8 C.F.R. § 103.5(a)(2) because the petitioner is providing new facts with supporting documentation not previously submitted. 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.

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.<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).

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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).

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 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 Coaching License required. Valid driver’s license.

The labor certification states at Line H.11 that the job of head coach involves the following duties:

Will 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 the student-athletes; developing a schedule for competition; and directing Assistant Coaching staff. Must follow University coaching guidelines and expectations including the rules and regulations of the National Association of Intercollegiate Athletics (NAIA) and Midlands Collegiate Athletic Conference (MCAC). CPR, First Aid and Soccer Coaching 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] Nebraska, completed June 3, 2006; [REDACTED] CPR certifications issued in 2010 and 2013; a Nebraska Operators License valid from February 24, 2006 to December 11, 2011; a certificate from the [REDACTED] showing the beneficiary's completion of a two week course for soccer coaching in March 2003; a "[REDACTED]" confirming the beneficiary's completion of a "Science" (Sports Studies) program at [REDACTED] in February 2000; a Certificate of Attendance for [REDACTED] in 1998; and an [REDACTED] sports coaching certificate from 1998. The record does not establish that the beneficiary meets the specific requirement of a valid driver's license.

The labor certification states that the beneficiary qualifies for the offered position based on the following experience listed at Section K. of the Form 9089:

- Employment as a Center of Excellence Coach for 10 hours per week at the [REDACTED] U.K., from January 1, 1997 to January 1, 2000;
- Employment as a Soccer Coach and Camp Director for 35 hours per week at [REDACTED] Kansas, from May 1, 1998 to September 1, 1998, May 1, 1999 to September 1, 1999, and May 1, 2000, to September 1, 2000;
- Employment as a Soccer Coach for 15 hours per week at [REDACTED] U.K. from December 1, 2006, to March 1, 2007;
- Employment as a Center of Excellence Coach for 10 hours per week at the [REDACTED] U.K., from January 1, 2007, to October 18, 2007; and,
- Employment as Head Men's Soccer Coach with the petitioner from January 18, 2007, to December 24, 2012, the date on which the labor certification was filed.

No other experience is listed on the labor certification. 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(l)(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] Corporation from June through August of 1998, 1999 and 2000. The record also contains an experience letter dated June 16, 2013, from [REDACTED] Senior V.P. [REDACTED] Corporation, 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. On motion, the petitioner submitted a new letter from Mr. [REDACTED] dated January 5, 2014, restating the information from the previous letters and affirming that the beneficiary was employed by [REDACTED] on a full-time basis.

The letters from the senior vice president of [REDACTED] Corporation do not provide the address of the employer and are inconsistent with the labor certification regarding the name of the employer and dates of employment.<sup>2</sup> 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 petitioner states on motion that the statements made on the labor certification were “based on [the beneficiary’s] recollection and were provided in good faith.” However, the new letter from Mr. [REDACTED] does not address the discrepancies which we noted in our previous decision.

In addition to the discrepancies noted above, Mr. [REDACTED]’ description of the beneficiary’s job duties as a soccer camp coach are not equivalent to the duties of the job of head coach as described by the petitioner in the labor certification. Therefore, the beneficiary’s claimed employment for [REDACTED] cannot be considered as part of the 24 months of experience in the offered job as required by the labor certification.

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. On motion, the petitioner submits a new employment letter from Mr. [REDACTED] dated January 3, 2014. Mr. [REDACTED] states that the beneficiary worked part-time for him from December 15, 2006, through March 9, 2007, as a soccer coach. However, neither letter from Mr. [REDACTED] states how many hours the beneficiary worked per week. The most recent letter states that the beneficiary’s duties “included coaching competitive soccer games and co-leading a strong team of five other coaches in coaching youth teams throughout the county of [REDACTED].” Mr. [REDACTED]’s description of the beneficiary’s job

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<sup>2</sup> The labor certification states that the beneficiary worked for [REDACTED] from May 1 through September 1 of 1998, 1999 and 2000. Meanwhile, the letters submitted to corroborate this employment state that the beneficiary’s employer was [REDACTED] Corporation and that he worked from June through August in 1998, 1999, and 2000.

duties as a part-time soccer coach are not equivalent to the duties of the job of head coach as described by the petitioner in the labor certification. Therefore, the beneficiary's claimed employment for [REDACTED] cannot be considered as part of the 24 months of experience in the offered job as required by the labor certification.

The record contains experience letters dated January 6, 2013, and May 23, 2013, from [REDACTED] Academy Manager, on [REDACTED] letterhead stating that the company employed the beneficiary as a part-time youth football coach from January 1997 to June 2000. The letters state that the beneficiary progressed from work as a "Football in the Community Coach," to a "Centre of Excellence Coach," to an assistant coach, and finally as "Head Coach at our Under 10 age group." Mr. [REDACTED] did not specify the dates or duration of the beneficiary's tenure as a head coach and he did not suggest that the beneficiary's job duties as a part-time head coach of a U10 soccer team are equivalent to the duties of the job of head coach as described by the petitioner in the labor certification.<sup>3</sup> Therefore, the beneficiary's claimed employment for [REDACTED] cannot be considered as part of the 24 months of experience in the offered job as required by the labor certification.

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>4</sup> Specifically, the petitioner indicates that questions J.19 and J.20, which ask about

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<sup>3</sup> As detailed above, the labor certification describes the duties of the offered job of head coach as: "Will 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 the student-athletes; developing a schedule for competition; and directing Assistant Coaching staff. Must follow University coaching guidelines and expectations including the rules and regulations of the National Association of Intercollegiate Athletics (NAIA) and Midlands Collegiate Athletic Conference (MCAC). CPR, First Aid and Soccer Coaching License required. Valid driver's license."

<sup>4</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.

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

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(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.

(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.

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>5</sup> and the terms of the ETA 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 Form 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.

Other than the beneficiary's experience with the petitioner, which may not be considered, 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 head 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. The petitioner states on motion that USCIS failed to afford the petitioner the opportunity to present job advertisements and recruitment efforts to discern the petitioner's intention as communicated to potential applicants. 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 motion 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 during the recruitment for the position. 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

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<sup>5</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 descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

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 ETA 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 meets the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a professional worker under section 203(b)(3)(A)(ii) of the Act.

Beyond the decision of the director,<sup>6</sup> the AAO also determined that the petitioner has failed to establish its continuing ability to pay the proffered wage as required in 8 C.F.R. § 204.5(g)(2). Specifically, the AAO noted that the 2012 Internal Revenue Service (IRS) Form W-2, Wage and Tax Statement, issued by the petitioner to the beneficiary reflects that the beneficiary was paid less than the proffered wage and that the record did not any contain the petitioner’s annual reports, federal tax returns, or audited financial statements for 2012 to establish that the petitioner possessed the ability to pay the difference between the proffered wage and the wage actually paid to the beneficiary.

On motion, the petitioner provides copies of its audited financial statements from 2012 and 2013. These statements reflect sufficient net current assets to pay the difference between the proffered wage and the wage actually paid to the beneficiary for 2012 and 2013. Accordingly, this portion of the AAO’s previous decision will be withdrawn.

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>6</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).