



U.S. Citizenship  
and Immigration  
Services

Non-Precedent Decision of the  
Administrative Appeals Office

MATTER OF EZB-

DATE: JULY 19, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

PETITION: FORM I-129, PETITION FOR A NONIMMIGRANT WORKER

The Petitioner, a biotechnology research and development company, seeks to extend the Beneficiary's temporary employment as a "pharmaceutical researcher" under the H-1B nonimmigrant classification for specialty occupations. See Immigration and Nationality Act (the Act) section 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner does not have specialty occupation work available for the Beneficiary.

The matter is now before us on appeal. In its appeal, the Petitioner submits a brief and asserts that the Director erred in finding that the Petitioner does not have work available in a specialty occupation.

Upon *de novo* review, we will dismiss the appeal.

I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

## II. PROFFERED POSITION

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “pharmaceutical researcher.” In response to the Director’s request for evidence (RFE), the Petitioner provided the following job duties for the position (verbatim):

- work on the design and development of PAPS Synthesis and Purification kits, including a second generation kit for the production of stable isomerically pure 3’ – phosphoadenosine 5’-phosphosulfate (3’-PAPS);
- conduct research to design and develop synthesis and purification protocols and biochemical reagents associated with our PAPS kits;
- ensure compliance with established research protocols; SOPS, and other pertinent regulatory agency requirements;
- monitor critical study phases and work with other team members and/or subcontractors to ensure that work is completed according to the study plan and within the established timeframes.

*The beneficiary will spend about 55% of his time performing the above duties.*

- study the structure, design, functions and application of our PAPS kits and related protocols and reagents to determine potential problems that can be addressed in future improvements;
- design experiments and develop testing methodologies for product characterization and problem solving;
- periodically review study data and prepare summaries and study reports for management's review;
- schedule and evaluate pilot product trials and develop related development specifications;
- ensure proper disposition of test articles, formulated samples, and study specimens;

*The beneficiary will spend about 25% of his time performing the above duties.*

- study current literature to assist in determining new and improved synthesis methods for PAPS by incubating ATP and a carrier-free [35S]-Na<sub>2</sub>S<sub>04</sub> with ATP sulfurylase from *Saccharomyces cerevisiae*;
- identify new research opportunities and propose specific research projects on sulfotransferases, sulfatases and other PAPS-binding proteins that may be of interest to the company;
- design and develop new research projects related to PAPS synthesis and purification protocols and reagents;
- develop research plans and strategies for new products, manage technical timelines, analyze results, mitigate risks, and make recommendations on assigned projects;
- manage the assigned product development process from concept to commercialization.

*The beneficiary will spend about 15% of his time performing the above duties.*

- prepare and review documents for product registrations;
- assist in quality assurance audits and client/agency visits;
- keep updated with recent developments in the field of biomedical/pharmaceutical research.

*The beneficiary will spend about 5% of his time performing the above duties.*

According to the Petitioner, the position requires a bachelor's degree or the equivalent in pharmacy, chemistry, biochemistry, biotechnology, one of the life sciences, or a related field.

### III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation. Specifically, the record (1) does not describe the position's duties with sufficient detail; and (2) does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.

In establishing the position as a specialty occupation, the Petitioner must describe the specific duties and responsibilities to be performed by the Beneficiary in the context of its business operations. USCIS looks at the nature of the business offering the employment and the description of the specific duties of the position as it relates to the particular employer, as described in the Form I-129, Petition for a Nonimmigrant Worker, and the documents filed in support of the petition. It is only in this manner that the agency can determine the exact position offered, the location of employment, the proffered wage, and other salient aspects of the proposed employment.

Thus, a crucial aspect of this matter is whether the Petitioner has adequately described the duties of the proffered position within the context its operations, such that USCIS may discern the nature of the position and whether the position indeed requires the theoretical and practical application of a body of highly specialized knowledge attained through at least a baccalaureate degree in a specific discipline. We find that the Petitioner has not done so here.

For example, the Petitioner has described the duties comprising the proffered position in relatively abstract terms that lack sufficient detail and concrete explanation to establish the substantive nature of the work to be performed. Specifically, the Petitioner indicated that 55% of the Beneficiary's job duties include "work on the design and development of PAPS Synthesis and Purification kits," "conduct research to design and develop synthesis and purification protocols and biochemical reagents" and "monitor criterial study phases and work with other team members . . . to ensure that work is completed." However, the Petitioner did not further elaborate on the specific tasks, methodologies, and applications of knowledge that would be required in furtherance of these overarching duties.

Further, the Beneficiary's duties as described in the record appear to require laboratory work, but the Petitioner does not have the requisite license to conduct such experiments. For example, the Beneficiary is required to "design experiments and develop testing methodologies," "schedule and evaluate pilot product trials and develop related development specifications," and "ensure proper disposition of test articles, formulated samples, and study specimens."

On appeal, the Petitioner states that "[USCIS] assumes that the company needs a permit to operate as a commercial office relating to chemical research and requests local zoning permits." The Petitioner further asserts "there is no evidence in the record that demonstrates that this company requires such a zoning permit." The Petitioner states that "[t]he research and development is done on a mathematical processes and when at times small amounts of chemicals are required it does not mean

*Matter of EZB-*

that the tests are performed on si[te] and are usually coordinated with the companies who produce the chemicals.” Notably, the Petitioner did not submit evidence such as contract with other companies. “[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence.” *Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

Further, the evidence in the record contradicts the Petitioner’s claims that it does not require such license. For example, the record contains a number of analysis reports as the Beneficiary’s work samples that appear involve laboratory work. Specifically, a report titled “Property Analysis Report” included remarks such as “sample also soluble in ethanol” and “melting point testing was failed due to very low melting point.” The Petitioner also submitted photographs and described them as “business property and operations . . . photos of our laboratory area, lab instruments and lab equipment.” In addition, the record also contains “Chemical Hygiene Responsibilities Manual” which has the Petitioner’s name on its cover page and outlines its procedures regarding handling of chemicals on its premises.

Moreover, the record contains an expired materials license issued by the U.S. Nuclear Regulatory Commission for [REDACTED] suggesting that the Petitioner once had a valid license. Therefore, if, in fact, the majority of the Beneficiary’s duties entail design, development, and research related to its PAPS kits as claimed, it appears that the Petitioner would be required to have a valid materials license.<sup>1</sup> However, the Petitioner did not provide a valid materials license; therefore, it has not submitted sufficient evidence that the Beneficiary would actually spend the majority of his time performing the proffered duties.<sup>2</sup> “[G]oing on record without supporting documentary evidence is

<sup>1</sup> Further, the Pennsylvania Department of Environmental Protection, which has jurisdiction over the Petitioner’s office as the Petitioner is located in Pennsylvania, states, in part:

Users of all byproduct, source and specific nuclear material are required to obtain a license from the department prior to obtaining those radioactive materials. This material is used in hospitals, colleges and industries for medical, research and industrial purposes. The department issues specific, general and reciprocity licenses for the use of radioactive material. The objective of the licensing program is to ensure radioactive material is used safely, disposed of properly and facilities are free from contamination when licensed operations are terminated.

See <http://www.dep.pa.gov/Business/RadiationProtection/RadiationControl/Radioactive-Materials-Licensing/Pages/default.aspx>. (last visited July 15, 2016).

<sup>2</sup> We further note that the Beneficiary’s tax returns indicate that the Beneficiary is listed as a proprietor for an internet sales business [REDACTED] and derived additional income from it. This raises additional questions whether the Beneficiary is actually employed in the proffered position. The record of proceedings does not indicate that the Beneficiary has a concurrent H-1B visa from [REDACTED]. In fact, the Petitioner states that the “beneficiary has not worked and will not work for any other companies while in H-1B status with our company.” However, the Beneficiary’s admission and continued stay in the United States is conditioned on the maintenance of the H-1B “nonimmigrant status in which the alien was admitted or to which it was changed under section 248” and compliance “with the conditions” of that status. Section 237(a)(1)(C)(i) of the Act, 8 U.S.C. § 1227(a)(1)(C)(i). It appears that the Beneficiary may be engaged in unauthorized employment, which constitutes a lack of maintenance and compliance with the conditions of his H-1B nonimmigrant status under section 237(a)(1)(C)(i) of the Act.

not sufficient for purposes of meeting the burden of proof in these proceedings.” *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm’r 1998) (citing *Matter of Treasure Craft of Cal.*, 14 I&N Dec. 190 (Reg’l Comm’r 1972)). Therefore, if the Petitioner is not licensed for the Beneficiary to perform the proffered duties, then no *bona fide* job offer exists to support the position as proffered in this petition.

There are additional discrepancies in the record that undermine the Petitioner’s claims regarding the proffered position. Specifically, the Petitioner provided some documents as evidence of the Beneficiary’s work. However, the Director noted that at least one of the articles appears to be plagiarized. In response, the Petitioner stated that it was not claiming to be the developer of the method identified in the document or claiming intellectual property rights. Instead, the Petitioner asserted that the document was submitted as evidence of the Beneficiary testing and evaluating samples, which required him to duplicate steps developed by the other researchers verbatim. The Petitioner further claimed that “under intellectual property law, publication and dissemination of such research requires the author’s permission.” The Petitioner stated “printing it or using it to advance your research does not require such permission, unless you are publishing the results of your research.”

However, the Petitioner’s submission of a plagiarized document, without properly providing credit to the original writer, as “documentary examples of work product created or produced by the Beneficiary” undermines its credibility. Notably, the Petitioner did not acknowledge that it was not the Beneficiary’s original work product until the Director raised the issue in the NOID. Doubt cast on any aspect of the petitioner’s proof may, of course, 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 (BIA 1988).

In addition, the Petitioner asserts that its business activity also includes “research and testing of fine chemical products and textile dyes, as part of our company’s plans to commence trading activities in fine chemical products and textile dyes, which are currently being implemented as part of our company’s expansion strategy.” The Petitioner submitted invoices and prospective client letters. Petitioner states on appeal that it “is a research and development company and [we] will continually have new or different products that they will be researching and developing.” However, we note that some letters are dated from 2009; this petition is filed in 2014. It appears that the Petitioner’s plans to expand have been ongoing since 2009, and there is insufficient evidence to substantiate its plans for expansion. USCIS regulations affirmatively require a petitioner to establish eligibility for the benefit it is seeking at the time the petition is filed. *See* 8 C.F.R. § 103.2(b)(1). A visa petition may not be approved based on speculation of future eligibility or after the Petitioner or Beneficiary becomes eligible under a new set of facts. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg’l Comm’r 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm’r 1998).

Because of the discrepancies discussed above, we cannot determine the nature and scope of the Beneficiary's employment. The record lacks evidence sufficiently concrete and informative to demonstrate: (1) the actual work that the Beneficiary would perform; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty. "[I]t is incumbent upon the petitioner to resolve the inconsistencies by independent objective evidence." *Matter of Ho*, 19 I&N Dec. at 591. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Id.* at 591-92.

The Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, which therefore precludes a finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4.

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found that the proffered position qualifies for classification as a specialty occupation.

#### IV. PRIOR PETITIONS

Finally, the Petitioner claims that the present petition should be approved because USCIS previously approved an H-1B extension "for an identical type of employee" to the Beneficiary. The Director's decision does not indicate whether the prior approvals of the other nonimmigrant petitions were reviewed. If the previous nonimmigrant petitions were approved based on the same unsupported and contradictory assertions that are contained in the current record, the approvals would constitute material and gross error on the part of the Director. We are not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. See *Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988). It would be "absurd to suggest that [USCIS] or any agency must treat acknowledged errors as binding precedent." *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987).

A prior approval does not compel the approval of a subsequent petition or relieve the Petitioner of its burden to provide sufficient documentation to establish current eligibility for the benefit sought. Temporary Alien Workers Seeking Classification Under the Immigration and Nationality Act, 55 Fed. Reg. 2,606, 2,612 (Jan. 26, 1990) (to be codified at 8 C.F.R. pt. 214). A prior approval also does not preclude USCIS from denying an extension of an original visa petition based on a reassessment of eligibility for the benefit sought. See *Tex. A&M Univ. v. Upchurch*, 99 F. App'x

*Matter of EZB-*

556 (5th Cir. 2004). Furthermore, our authority over the service centers is comparable to the relationship between a court of appeals and a district court. Even if a service center director had approved the nonimmigrant petitions on behalf of a beneficiary, we would not be bound to follow the contradictory decision of a service center. See *La. Philharmonic Orchestra v. INS*, 44 F. Supp. 2d 800, 803 (E.D. La. 1999).

#### V. CONCLUSION

The burden is on the Petitioner to show 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.<sup>3</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of EZB-*, ID# 17615 (AAO July 19, 2016)

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<sup>3</sup> Since the identified bases for denial are dispositive of the Petitioner's appeal, we will not address any of the additional grounds of ineligibility we observe in the record of proceedings.