



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF CDB- INC.

DATE: MAR. 11, 2016

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

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

The Petitioner, a bio-pharmaceutical company, seeks to temporarily employ the Beneficiary as a “Senior Research Scientist” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 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 evidence of record is insufficient to establish that the Petitioner can support a position performing the claimed duties; therefore, the proffered position does not qualify as a specialty occupation. The Petitioner subsequently filed an appeal, which we dismissed. The matter is now before us on a combined motion to reopen and reconsider.

Upon *de novo* review, we will grant the motion in part for the purpose of withdrawing our decision. However, as the Petitioner has not overcome the Director’s finding that the proffered position qualifies as a specialty occupation, we will deny the remainder of the motion and dismiss the appeal.

**I. MOTION REQUIREMENTS**

**A. Overarching Requirement for Motions by a Petitioner**

The provision at 8 C.F.R. § 103.5(a)(1)(i) includes the following statement limiting a USCIS officer’s authority to reopen the proceeding or reconsider the decision to instances where “proper cause” has been shown for such action: “[T]he official having jurisdiction may, for proper cause shown, reopen the proceeding or reconsider the prior decision.”

Thus, to merit reopening or reconsideration, the submission must not only meet the formal requirements for filing (such as, for instance, submission of a Form I-290B that is properly completed and signed, and accompanied by the correct fee), but the Petitioner must also show proper cause for granting the motion. As stated in the provision at 8 C.F.R. § 103.5(a)(4), “Processing

motions in proceedings before the Service,” “[a] motion that does not meet applicable requirements shall be dismissed.”

#### B. Requirements for Motions to Reopen

The regulation at 8 C.F.R. § 103.5(a)(2), “Requirements for motion to reopen,” states: “A motion to reopen must [(1)] state the new facts to be provided in the reopened proceeding and [(2)] be supported by affidavits or other documentary evidence.”

This provision is supplemented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reopen:** The motion must state new facts and must be supported by affidavits and/or documentary evidence that establish eligibility at the time the underlying petition or application was filed.”<sup>1</sup>

Further, the new facts must possess such significance that, “if proceedings . . . were reopened, with all the attendant delays, the new evidence offered would likely change the result in the case.” *Matter of Coelho*, 20 I&N Dec. 464, 473 (BIA 1992); *see also Maatougui v. Holder*, 738 F.3d 1230, 1239-40 (10th Cir. 2013).

#### C. Requirements for Motions to Reconsider

The regulation at 8 C.F.R. § 103.5(a)(3), “Requirements for motion to reconsider,” states:

A motion to reconsider must [(1)] state the reasons for reconsideration and [(2)] be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must [(3)], [(a)] when filed, also [(b)] establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

These provisions are augmented by the related instruction at Part 4 of the Form I-290B, which states: “**Motion to Reconsider:** The motion must be supported by citations to appropriate statutes, regulations, or precedent decisions and must establish that the decision was based on an incorrect application of law or policy, and that the decision was incorrect based on the evidence of record at the time of decision.”

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<sup>1</sup> The regulation at 8 C.F.R. § 103.2(a)(1) states in pertinent part :

Every benefit request or other document submitted to DHS must be executed and filed in accordance with the form instructions, notwithstanding any provision of 8 CFR chapter 1 to the contrary, such instructions are incorporated into the regulations requiring its submission.

A motion to reconsider contests the correctness of the prior decision based on the previous factual record, as opposed to a motion to reopen which seeks a new hearing based on new facts. *Compare* 8 C.F.R. § 103.5(a)(3) and 8 C.F.R. § 103.5(a)(2).

Here, the Petitioner provided facts that could be considered “new” in support of its motion to reopen. We will grant the motion in part to withdraw our decision. However, as the Petitioner has not established that the proffered position is a specialty occupation, we will deny the remainder of the motion and dismiss the appeal.

## II. SPECIALTY OCCUPATION

### A. Legal Framework

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) states, in pertinent part, the following:

*Specialty occupation* means an occupation which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, a proposed position must meet one of the following criteria:

- (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.

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); *see also COIT Independence Joint Venture v. Fed. Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary *and* sufficient conditions for meeting the definition of specialty occupation would result in particular positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

As such and consonant with section 214(i)(1) of the Act and the regulation at 8 C.F.R. § 214.2(h)(4)(ii), U.S. Citizenship and Immigration Services (USCIS) consistently interprets 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 proffered 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”). Applying this standard, USCIS regularly approves H-1B petitions for qualified individuals who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, directly related to the duties and responsibilities of the particular position, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

To determine whether a particular job qualifies as a specialty occupation, USCIS does not simply rely on a position’s title. The specific duties of the proffered position, combined with the nature of the petitioning entity’s business operations, are factors to be considered. USCIS must examine the ultimate employment of the individual, and determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F. 3d 384. The critical element is not the title of the position or an employer’s self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the

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attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

#### B. The Proffered Position

On the Form I-129, Petition for a Nonimmigrant Worker, the Petitioner stated that it is a five-employee bio-pharmaceutical company established in [REDACTED]. The Petitioner seeks to employ the Beneficiary in a full-time “Senior Research Scientist” position.

The labor condition application (LCA) submitted to support the visa petition states that the proffered position is a “Senior Research Scientist” position that corresponds to Standard Occupational Classification (SOC) code and title 19-2031, “Chemists,” from the Occupational Information Network (O\*NET). The LCA further states that the position is a Level II position.

In a letter of support dated April 1, 2014, the Petitioner described the duties of the proffered position, as follows (verbatim):

- Propose, design, and identify synthetic routes for the preparation of novel organic molecules that have the potential to be used as API’s.
- Conduct organic synthesis and purify the obtained products using column chromatography. Analyze organic compounds to determine their structures and chemical properties via FT-IR, UV-Vis, NMR, GC/MS, and LC/MS.
- Be responsible for the development of process technology. Engage in development from small-scale synthesis to the development of the commercial synthetic route. Participate on project team and collaborate with scientists from Analytical R&D and other disciplines to further develop synthetic routes into synthetic processes.
- Participate in the preparation of technical transfer documents for manufacture internally or at third parties.
- Guide new research associates. Help maintain clean, safe laboratory facility. Follow good laboratory practices.

In the support letter, the Petitioner also explained that it has a division, [REDACTED]<sup>2</sup> which provides quality compounds and performs services such as “contract research for target identification, building blocks, compound synthesis, biochemical and cellular analysis, preclinical animal tests, and clinical studies.”

The Petitioner also stated that “[i]n order to perform the duties described above, the applicant must have at least a Master Degree in Chemistry or another closely related field.”

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<sup>2</sup> The Petitioner also refers to [REDACTED] throughout the record of proceedings as [REDACTED]. For the sake of consistency, we will refer to the division as [REDACTED].

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The Petitioner also submitted its offer letter to the Beneficiary entitled “RE: The position of Senior Research Scientist, in the division of [REDACTED] at [the Petitioner].” This letter describes the offered position as a “full-time academic professional position [which] involves a variety of research and development activities in organic synthesis and drug development.” The letter further states that “[t]he function of this position is to act as a group leader of [REDACTED] to identify, decide and direct the research and development projects that aim for synthesis of novel organic molecules . . . . As the senior research scientist in [REDACTED] it is necessary to recruit, train, and mentor junior-level scientists and research assistants in near future.” The letter asserts that [REDACTED] is one of its seven company “divisions,” and more specifically, that it is the “Research & Development division . . . which focuses on developing of novel organic molecules for biological application.” The same letter states that “[t]he position requires a candidate with a Ph.D. in Chemistry or Biochemistry with at least 5 years of synthesis research experience in internationally renowned universities or academic institutes.”

In response to the Director’s request for evidence (RFE), the Petitioner provided another description of the proffered duties, with the percentage of time spent on each duty, as summarized below:

- Design and execute reaction sequences for custom synthesis projects. Perform organic reactions, separations, purifications, and crystallizations. Conduct reaction optimization and scale-up demonstration. (50%) Minimum requirement to perform these duties is a Ph.D. in organic chemistry or relevant scientific discipline.
- Interpret experimental data and draw conclusions regarding presented material and nature of work. Write concise procedures and scientific reports to enable successful technology transfers. (20%)
- Guide and advise research associates (B.S./M.S.) on initiation and execution of laboratory experiments and various factors that may influence these experiments. (10%)
- Participate in group and project teams meetings and communicate results in a team-based environment. (10%)
- Contact key customers on a regular basis (visits and meetings). Gain and maintain in-depth knowledge of customers’ technical and business environment. (10%)

On appeal, the Petitioner states that it has given “a humble title” of “Research Scientist” to the proffered position. The Petitioner explains that it does not “want to put a new employee in a high position until he can prove his ability and determination.” The Petitioner also states that “[t]his position principally doesn’t require the beneficiary to do the bench work . . . . In general, the actual operation of instruments and performance of experiments will be done by our ~ 160 scientist team in China and our collaborators in U.S.”

The Petitioner summarizes the duties of the Beneficiary, as follows:

[The Beneficiary] is expected to evaluate the feasibility of the projects with clients, suggest solutions to clients, design the experiments to proceed the projects,

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instruct the technical team, oversee the performance of the projects in US and China, provide consultation and troubleshooting to techniques, analyze the final data and results, draft the final report or approve the final report before submitting it to clients. He'll play the most important key role to ensure our projects are performed under control, fully meeting our clients' need.

### C. Analysis

Upon review, we find the evidence of record insufficient to establish that the proffered position qualifies as 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 the Petitioner's 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 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 of the Petitioner's 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.

In the instant matter, the Petitioner has provided inconsistent descriptions of the proffered position. "[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. For instance, the Petitioner indicated on the Form I-129, LCA, and other initial evidence that the proffered position title is "Senior Research Scientist." The Petitioner initially also stated in the offer letter that the Beneficiary will be "a group leader of [redacted] and "[a]s the senior research scientist in [redacted], it is necessary to recruit, train, and mentor junior-level scientists and research assistants in near future, therefore the candidate must be a team player with good skills in communication and leadership." However, on appeal, the Petitioner states that it has given "a humble title" of "Research Scientist" to the proffered position. We observe that the proffered position is certified at a Level II wage rate, which indicates that the position is for an employee who has a good understanding of the occupation but who will only perform moderately complex tasks that require limited judgment.<sup>3</sup> Such a wage level does not correspond to a senior-level position as initially indicated.

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<sup>3</sup> See U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at [http://www.foreignlaborcert.doleta.gov/pdf/NPWHC\\_](http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_)

Moreover, the Petitioner indicated that a substantial part of the Beneficiary's time will be spent on laboratory work. In particular, the Petitioner stated that 50% of the Beneficiary's time will be spent on the duties of "[d]esign and execute reaction sequences for custom synthesis projects. Perform organic reactions, separations, purifications, and crystallizations. Conduct reaction optimization and scale-up demonstration." The Petitioner also initially listed duties including "[c]onduct organic synthesis and purify the obtained products using column chromatography. Analyze organic compounds to determine their structures and chemical properties via FT-IR, UV-Vis, NMR, GC/MS, and LC/MS," "[e]ngage in development from small-scale synthesis to the development of the commercial synthetic route," and "[f]ollow good laboratory practices." At the same time, however, the Petitioner claimed that "[t]his position principally doesn't require the beneficiary to do the bench work [i.e., laboratory work]," and that "the actual operation of instruments and performance of experiments" will generally be performed by the Petitioner's scientist team in China and U.S. collaborators. Furthermore, it is unclear what the Petitioner meant by characterizing the proffered position as an "academic" position.

In response to the RFE and on appeal, the Petitioner indicated that the Beneficiary will work directly with the company's customers and clients. For example, the Petitioner stated that the Beneficiary will spend 10% of his time on the duty of "[c]ontact key customers on a regular basis (visits and meetings). Gain and maintain in-depth knowledge of customers' technical and business environment." The Petitioner also states on appeal that the Beneficiary "is expected to evaluate the feasibility of the projects with clients, suggest solutions to clients, . . . [and will] play the most important key role to ensure our projects are performed under control, fully meeting our clients' need." However, the Petitioner's initial description of the proffered position did not include any duties specifically involving direct interaction with customers and clients.

In response to an RFE or on appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, the associated job responsibilities, or the requirements of the position. A petitioner must establish that the position offered when the petition was filed merits classification for the benefit sought. 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).

In addition to inconsistent position titles and descriptions, the Petitioner has also provided inconsistent educational requirements for the proffered position. The Petitioner initially indicated that the position requires a minimum of "a Master Degree in Chemistry or another closely related field." Subsequently, however, the Petitioner stated that the position requires "a Ph.D. in Chemistry or Biochemistry." While we acknowledge that the H-1B program only requires a minimum of a bachelor's or higher degree in a specific specialty (or its equivalent), it is nevertheless incumbent upon the Petitioner to resolve inconsistencies in the record. See *id.* at 591-92. Again, a petitioner

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may not change material aspects of the offered position in response to an RFE or on appeal. See *Matter of Michelin Tire Corp.*, 17 I&N Dec. 249; *Matter of Izummi*, 22 I&N Dec. at 176.

Not only are there inconsistencies with regard to the proffered position, but there are also inconsistencies with regard to the Petitioner's operations. The Petitioner has variously stated that it has 7 and 12 different "divisions" (not including its other "sister company"). According to the Petitioner's Form W-9, Request for Taxpayer Identification Number and Certification, the Petitioner listed only five different business names. According to the Petitioner's Assumed Name Certificates issued by the New York Department of State, the Petitioner has registered only four assumed names. The Petitioner has not submitted sufficient evidence documenting all of its claimed "divisions" and/or business names.

In fact, the evidence of record is not clear as to who the Petitioner actually is. The Petitioner's name, as identified on the Form I-129, LCA, and other supporting documents, differs from the Petitioner's name as referenced in other documents. More specifically, the Petitioner submitted several documents in which it referred to itself as [REDACTED]. The evidence of record reflects that [REDACTED] and the Petitioner are two separate companies, incorporated in [REDACTED] and [REDACTED] respectively. A corporation is a separate and distinct legal entity from its owners or stockholders. See *Matter of M-*, 8 I&N Dec. 24, 50-51 (A.G., BIA 1958); *Matter of Aphrodite Invs. Ltd.*, 17 I&N Dec. 530 (Comm'r 1980); *Matter of Tessel, Inc.*, 17 I&N Dec. 631 (Act. Assoc. Comm'r 1980).

Furthermore, the Petitioner submitted a company description explaining that [REDACTED] is a combination of two different companies: [REDACTED] and the Petitioner. However, the Petitioner's federal tax returns indicate that the Petitioner is not owned, in substantial part, by any foreign or domestic corporation, partnership, or other entity.<sup>4</sup> The Petitioner's tax returns do not support the claim that the Petitioner is owned by [REDACTED].

Finally, the Petitioner's offer letter to the Beneficiary states that he will work for [REDACTED] which is specifically characterized as a "division" of the Petitioner. The same letter then characterizes [REDACTED] as a division of [REDACTED] not the Petitioner. According to the Petitioner's Form W-9 and Assumed Name Certificates, neither [REDACTED] nor [REDACTED] is listed as one of the Petitioner's assumed business names. The Petitioner has not submitted adequate documentation and information clarifying the relationship between the Petitioning entity, [REDACTED] and any other pertinent entities.

As discussed above, the evidence of record contains numerous inconsistencies and deficiencies with respect to the proffered position and the Petitioner's operations. These inconsistencies and deficiencies preclude us from discerning the substantive nature of the proffered position. We are therefore precluded from finding that the proffered position satisfies any criterion at 8 C.F.R.

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<sup>4</sup> The Petitioner's tax returns also indicate that the Petitioner does not own, in substantial part, any foreign or domestic corporation, partnership, or other entity.

§ 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.

### III. CONCLUSION

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) (citing *Matter of Brantigan*, 11 I&N Dec. 493, 495 (BIA 1966)). Accordingly, the combined motion is denied in part and granted in part, and the appeal is dismissed.

**ORDER:** The motion to reopen is denied in part and granted in part.

**FURTHER ORDER:** The motion to reconsider is denied.

Cite as *Matter of CDB- Inc.*, ID# 15280 (AAO Mar. 11, 2016)