



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

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

MATTER OF J-M- CORP.

DATE: SEPT. 7, 2017

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a construction company, seeks to continue to temporarily employ the Beneficiary as a "civil engineer" 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 of the Vermont Service Center denied the petition, concluding that the Petitioner did not establish that the proffered position is a specialty occupation. On appeal, the Petitioner submits additional evidence and contends that the petition should be approved.

Upon *de novo* review, we will dismiss the appeal.<sup>1</sup>

## I. 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) 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:

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<sup>1</sup> We follow the preponderance of the evidence standard as specified in *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010).

- (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). We have consistently interpreted the term “degree” 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

The Petitioner stated in the H-1B petition that the Beneficiary will serve as a “civil engineer.” In its support letter, the Petitioner characterized the duties of the proffered position as follows (note: errors in the original text have not been changed):

We are currently seeking to employ a Civil Engineer to design structure to meet estimated load requirements, compute size, shape, strength, and type of structural members. The specific tasks of the job will vary, however in general the job’s requirements are as follows:

- Direct and participate in planning, designing, and supervising the construction of buildings;
- Review plans for erection of structures;
- Develop new materials that improve the performance;
- Recommend implementation of improved procedures;
- Research and analyze data, such as customer design proposal, specifications, and manual to determine feasibility of design or application;
- Inspect existing projects;
- Recommend repair and replacement of defective members or rebuilding of entire structure;

- Prepare unit design layouts and detail drawings for fabricating parts and assembling systems.<sup>2</sup>

The Petitioner stated that a bachelor's degree in civil engineering is required to perform the duties of the proffered position.

### 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 does not establish that the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.<sup>3</sup>

To establish eligibility, the Petitioner must describe the Beneficiary's specific duties and responsibilities in the context of its business operations, demonstrate that a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the duration of the employment period requested in the petition. *See Defensor*, 201 F.3d at 387 (A "common sense reading" of the regulations indicates an intention to fully implement the definition of "specialty occupation"); *see generally* 8 C.F.R. § 214.2(h)(4)(i)(A)(1), (iii)(B)(2), and (iv). Here, the duties provided for the Beneficiary are vague and do not convey the actual day-to-day tasks and the knowledge required to perform them.

For example, the Petitioner stated that the Beneficiary would "[d]irect and participate in planning, designing, and supervising the construction of buildings." However, the Petitioner does not sufficiently explain the Beneficiary's specific role and how such work will be performed within the scope of its business operations and the proffered position. While the Petitioner indicates that the Beneficiary's duties also include "review plans for erection of structures," "inspect existing projects," and "research and analyze data, such as customer design proposal, specifications, and manual to determine feasibility of design or application," the Petitioner did not submit any relevant documents to substantiate existing projects or design proposals. The Petitioner also stated that the Beneficiary would "[d]evelop new materials that improve the performance" and "recommend implementation of improved procedures." However, the Petitioner did not elaborate further, for instance, upon what types of "materials" the Beneficiary would be responsible for developing or submit samples of "improved procedures" such that we can ascertain whether performing these duties would require a bachelor's degree in a specific specialty, or the equivalent. Such vague descriptions do not reference the specifics of the project or the tasks the Beneficiary will complete over the requested employment period, nor do they convey the knowledge required to perform these duties.

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<sup>2</sup> As we will discuss later, additional details regarding the duties of the proffered position have been submitted in response to the Director's request for evidence (RFE). We reviewed the record in its entirety.

<sup>3</sup> The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

Nor is it apparent that the Petitioner had secured work for the Beneficiary to perform prior to the filing of this petition. As mentioned, the record does not contain evidence of “existing projects” for the Beneficiary to “inspect” that “existed” prior to the petition’s filing date, and the evidence of record does not sufficiently establish that the Petitioner had secured definite, non-speculative employment for the Beneficiary at the time of the filing of the H-1B petition.<sup>4</sup>

Further, the Petitioner has not established that the proffered position corresponds to the occupational category of civil engineers. At the time of filing, the Petitioner indicated that the proffered wage is \$36,000. While the Petitioner stated that the proffered position is a full-time civil engineer position, we note that the prevailing wage for an entry-level civil engineer in the area of employment at that time was significantly higher, at \$54,558 per year.<sup>5</sup> At page 3 of the LCA, the Petitioner agreed, *inter alia*, that it would “pay nonimmigrants at least the local prevailing wage or the employer’s actual wage, *whichever is higher . . .*” (emphasis added). The proffered wage does not correspond to the prevailing wage for the occupational category of civil engineers in the area of employment, and thus undermines the Petitioner’s claim that the proffered position is a civil engineer position.<sup>6</sup>

U.S. Immigration and Customs Enforcement (ICE) agents conducted a site visit subsequent to the filing of this petition. The ICE agents interviewed the company’s owners, including [REDACTED]

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<sup>4</sup> The agency made clear long ago that speculative employment is not permitted in the H-1B program. For example, a 1998 proposed rule documented this position as follows:

Historically, the Service has not granted H-1B classification on the basis of speculative, or undetermined, prospective employment. The H-1B classification is not intended as a vehicle for an alien to engage in a job search within the United States, or for employers to bring in temporary foreign workers to meet possible workforce needs arising from potential business expansions or the expectation of potential new customers or contracts. To determine whether an alien is properly classifiable as an H-1B nonimmigrant under the statute, the Service must first examine the duties of the position to be occupied to ascertain whether the duties of the position require the attainment of a specific bachelor’s degree. See section 214(i) of the Immigration and Nationality Act (the “Act”). The Service must then determine whether the alien has the appropriate degree for the occupation. In the case of speculative employment, the Service is unable to perform either part of this two-prong analysis and, therefore, is unable to adjudicate properly a request for H-1B classification. Moreover, there is no assurance that the alien will engage in a specialty occupation upon arrival in this country.

Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,419-20 (proposed June 4, 1998) (to be codified at 8 C.F.R. pt. 214). While a petitioner is certainly permitted to change its intent with regard to non-speculative employment, e.g., a change in duties or job location, it must nonetheless document such a material change in intent through an amended or new petition in accordance with 8 C.F.R. § 214.2(h)(2)(i)(E).

<sup>5</sup> The Petitioner is required to submit a certified labor condition application (LCA) to demonstrate that it will pay an H-1B worker the higher of either the prevailing wage for the occupational classification in the “area of employment” or the actual wage paid by the employer to other employees with similar experience and qualifications who are performing the same services. See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 545-546 (AAO 2015).

For more information regarding the prevailing wage for civil engineers, see [http://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=\[REDACTED\]&year=8&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=[REDACTED]&year=8&source=1) (last visited Sept. 6, 2017).

<sup>6</sup> It also raises questions as to whether the LCA corresponds to and supports the petition, as required under 20 C.F.R. § 655.705(b).

\_\_\_\_\_ of \_\_\_\_\_ (Company JDC),<sup>7</sup> the Beneficiary's current employer, regarding this petition and the Petitioner's former attorney.<sup>8</sup> However, the agents' report contains several assertions from the owners which undermine the reliability of the job description submitted with this petition. For example, the record reflects that the owners stated that the nature of their company's work is seasonal, that the Beneficiary was working as a brick layer or stone mason on a seasonal basis, and that the company does not require the services of a civil engineer as claimed in the H-1B petition.<sup>9</sup>

On appeal, \_\_\_\_\_ submits an affidavit and contends that the "information that was uncovered by ICE is not true." \_\_\_\_\_ asserts that "[the Beneficiary] has been employed as a Civil Engineer the entire H-1B duration." \_\_\_\_\_ further states that the Beneficiary "worked at my mother's company . . . . [The Beneficiary's] job title and position were the same." However, \_\_\_\_\_ affidavit does not persuade us that the ICE agents erred when they reported that the owners had told them the Beneficiary was employed as a bricklayer. *See United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926) ("The presumption of regularity supports the official acts of public officers, and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties."). To the contrary, records made by public officials in the ordinary course of their duties are generally deemed to evince "strong indicia of reliability." *See Felzcerek v. I.N.S.*, 75 F.3d 112, 116 (2d Cir. 1996). Accordingly, absent evidence to the contrary, we must presume that as public officials, the ICE agents properly discharged their duties in making the contested report.

Further, the record contains discrepancies that undermine \_\_\_\_\_ claims regarding the Beneficiary's claimed position and stated duties as a civil engineer. For example, a payroll summary<sup>10</sup> indicates the Beneficiary earns a weekly salary of \$400, and that as of August 1, he had earned a total of \$7,600 in 2016.<sup>11</sup> However, this amount was significantly below the prevailing wage for an entry-level civil engineer in the area at that time.<sup>12</sup>

<sup>7</sup> On appeal, Company JDC asserts that \_\_\_\_\_ is an affected party in this proceeding under 8 C.F.R. § 103.3(a)(1)(iii)(B) because the Petitioner has ceased business operations and Company JDC is "a successor company that absorbed all assets, liabilities, and employees, including the Beneficiary." We further note that Company JDC is related to the Petitioner through familial relationship; \_\_\_\_\_ is the son of this petition's signatory.

<sup>8</sup> The Petitioner's former attorney was convicted, disbarred, and incarcerated for visa fraud.

<sup>9</sup> According to the Department of Labor's *Occupational Outlook Handbook (Handbook)*, brick layers build and repair walls, floors, partitions, fireplaces, chimneys, and other structures with brick, terra cotta, precast masonry panels, concrete block, and other masonry materials. Bureau of Labor Statistics, U.S. Dep't of Labor, *Occupational Outlook Handbook*, Masonry Workers (2016-17 ed.). The owners' statement that the Beneficiary is performing these duties is problematic for multiple reasons. First, because the *Handbook* confirms that brick layer positions do not normally require a bachelor's degree in a specific specialty, or the equivalent, it does not support the proffered position as a specialty occupation. Moreover, the Petitioner filed this petition for a civil engineering position – not a brick laying position. The duties of the two positions are not interchangeable, and the inconsistency raises questions regarding the overall credibility of this petition. The owners' statement that the Beneficiary was working on a part-time basis raises similar credibility concerns, as this petition was filed for a full-time position.

<sup>10</sup> The payroll summary indicates that the Beneficiary was hired in May 2015, two months *after* the site visit, thus further undermining any claim to continuous employment pursuant to the terms and conditions of the H-1B petition.

<sup>11</sup> We observe that the individual poverty threshold in 2016 was \$11,880. Annual Update of the HHS Poverty Guidelines, 81 Fed. Reg. 4036 (Jan. 25, 2016). We do not know whether the Beneficiary's 2016 income exceeded this

In addition, the record on appeal contains an exhibit described as “copies of work related to company and beneficiary.” The exhibit contains a document titled “Fire Sprinkler Report.” However, it appears to have been prepared by another company, [REDACTED] and multiple pages of the report are stamped and signed by another individual with the title of “professional engineer.”<sup>13</sup> Therefore, it is not clear how this report demonstrates the Beneficiary’s work and role as a civil engineer.

The Petitioner points to the Beneficiary’s licensure as a construction superintendent as evidence that he is employed as a civil engineer. However, because the requirements for obtaining this license do not appear to be H-1B program caliber, it is not clear that possession of such licensure would qualify individual to perform the duties of a specialty occupation. For example, one may qualify for the license with the following:

Have five (5) years of full-time experience within the last ten (10) years within the United States working with plans with a relevant construction trade in furtherance of the construction, vertical or horizontal enlargement, or the full demolition of a building or structure, and has completed a Department-approved 40-hour Site Safety Manger Course within one year prior to application date, and a 10-hour Occupational Safety and Health course in Construction Safety and Health or Hazard Recognition within two (2) years immediately preceding the date of application.<sup>14</sup>

The requirements do not indicate that the license requires at a least a bachelor’s degree in a specific specialty or its equivalent as a minimum for entry into the occupation.

Notably, following the site visit, the Director issued an RFE requesting, *inter alia*, a detailed statement regarding the Beneficiary’s duties and specific projects to which he would be assigned. However, the response to the RFE did not sufficiently address the Director’s concerns. For example, the Director had indicated that the “duties and responsibilities . . . are vague and do not establish the need for an individual who possess the minimum of a baccalaureate degree in a specific field of study.” In response, the following job description was submitted:

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level. Because the issue of inadmissibility is not before us we will not address it further, except to advise the Petitioner that it would be obliged to show that the Beneficiary and any accompanying family members are unlikely to become public charges in order to avoid inadmissibility pursuant to section 212(a)(4)(A) of the Act.

<sup>12</sup> For example, the prevailing wage for an entry-level civil engineer in the area of employment was \$62,171 per year. For more information, see [http://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=\[REDACTED\]&year=17&source=1](http://www.flcdatcenter.com/OesQuickResults.aspx?code=17-2051&area=[REDACTED]&year=17&source=1) (last visited Sept. 6, 2017).

A petitioner must offer wages that are at least the actual wage paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question or the prevailing wage for the position in the area of employment, whichever is greater. Section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A). Given the myriad deficiencies contained in the record of proceedings we will not explore this issue further.

<sup>13</sup> Any use of the title “Professional Engineer” or provision of professional engineering services within New York State requires licensure. See N.Y. Educ. L. § 7201, 7202, 7206.

<sup>14</sup> See The Rule of [REDACTED].

- Perform duties in planning, designing, and overseeing the construction and maintenance of building structures and developments. 45% of time devoted;
- Project management of construction site. 11% of time devoted;
- Constructions scheduling and document control. 11% of time devoted;
- Analyze reports and estimate projects costs. 11% of time devoted;
- Construction formation, including repairs, requests, change of orders and payment application to the managers. 11% of time devoted;
- Inspect project sites to monitor the progress and ensure conformance to design specification and safety or sanitation standards. 11% of time devoted.

Again, the description of the duties does not adequately convey the substantive nature of the Beneficiary's position. The abstract level of information provided about the proffered position and its constituent duties is exemplified by the assertion that the Beneficiary is responsible for "project management of construction site," "construction scheduling and document control," and "analyze reports and estimate project costs." The statements – as so generally described – do not illuminate the substantive application of knowledge involved or any particular educational attainment associated with such application. As discussed, in establishing a position as a specialty occupation, a petitioner must describe the specific duties and responsibilities to be performed by a beneficiary in the context of the petitioner's business operations, demonstrate a legitimate need for an employee exists, and substantiate that it has H-1B caliber work for the Beneficiary for the period of employment requested in the petition. Here, the descriptions lack sufficient detail and concrete explanation to establish the substantive nature of the work to be performed. Therefore, it is not evident that the proposed duties as described, and the position that they comprise, merit recognition of the proffered position as a specialty occupation.

Moreover, while the record also contains contracts to demonstrate the projects that the Beneficiary will work on, as noted by the Director, they are not consistent with the other evidence in the record. The record contains the following contracts:

Client	Effective Date	Completion Date	Deposit	Total Amount
[REDACTED]	04/15/2015	12/01/2016	\$800,000	\$8,183,000
	02/05/2015	06/30/2016	\$250,000	\$2,621,000
[REDACTED]	02/05/2015	08/30/2016	\$450,000	\$4,199,400
[REDACTED]	05/05/2015	06/30/2016	\$521,000	\$5,214,000

Since these contracts became effective in early 2015, the deposits alone would have totaled more than \$2 million. However, a 2015 corporate tax return in the record for Company JDC indicates that its gross income was \$371,618, and the net income \$14,041. As noted by the Director, it is not clear why Company JDC only grossed \$371,618 when the contracts became effective in early 2015, and the total compensation from these contracts would have been over \$20 million. Further, the tax return indicates that Company JDC paid no salaries or wages in 2015, and it is not clear how it could



execute these contracts under such circumstances. In addition, Company JDC's statement to the Internal Revenue Service that it paid no salaries or wages in 2015 conflicts with its assertions that it was employing the Beneficiary as a civil engineer during that time as well as the evidence it submitted in support of those assertions.

The Petitioner must resolve these inconsistencies with independent, objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Given the significant questions raised as to whether the Beneficiary is actually employed as a civil engineer, whether he was ever employed in that capacity, and whether the Petitioner and Company JDC ever intended to employ him in that capacity, we are not persuaded that the job description provided in the H-1B petition is accurate or reliable.<sup>15</sup> Even if that were not the case, the owners' current and prior testimony diverges so sharply that it undermines their overall credibility. Again, unresolved material inconsistencies may lead us to reevaluate the reliability and sufficiency of other evidence submitted in support of the requested immigration benefit. *Id.*

Absent a reliable job description we cannot ascertain the substantive nature of the proffered position. Consequently, we are precluded from 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 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.<sup>16</sup>

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<sup>15</sup> The Petitioner's citations to the *Occupational Outlook Handbook's* entry for civil engineers therefore will not be considered.

<sup>16</sup> On appeal, Petitioner's owners cite *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), which provides certain remedies to victims of deficient legal representation in immigration matters. The owners all state that they have been victimized by prior counsel and her staff's "terrible incompetence, lies, and fraud perpetrated against us for many years."

However, we observe that *Lozada* is not relevant here. Both the Beneficiary and the Petitioner's signatory, [REDACTED] state in their affidavits that "[t]his petition was filed timely and properly," and therefore do not allege ineffective assistance of counsel regarding this petition. In fact, the Beneficiary states in his affidavit "as a result of [the attorney's] involvement in immigration visa fraud, I believe I am currently having issues adjusting my status." Further, according to the documentation provided by the Petitioner, prior counsel was convicted of fraud in 2014 and disbarred in January 2015, several months before the site visit. The Director's decision denying the petition was based on statements made by the Petitioner's owners in March 2015, not by statements made by prior counsel. Likewise, our decision also incorporates statements and document submitted after the site visit.



#### IV. CONCLUSION

The Petitioner has not established that the proffered position is a specialty occupation.<sup>17</sup>

**ORDER:** The appeal is dismissed.

Cite as *Matter of J-M- Corp.*, ID# 399755 (AAO Sept. 7, 2017)

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<sup>17</sup> We are not required to approve applications or 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); see also *Sussex Eng'g, Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987). Furthermore, we are not bound to follow a contradictory decision of a service center. *La. Philharmonic Orchestra v. INS*, No. 98-2855, 2000 WL 282785, at \*2 (E.D. La. 2000).

Because this issue precludes approval of the petition we need not address any of the additional issues we have observed in our *de novo* review of this matter. That said, we wish to identify an additional issue to inform the Petitioner that this matter should be addressed in any future proceedings. An individual applying for classification as an H-1B nonimmigrant worker must possess full state licensure to practice in the occupation, if such licensure is required to practice in the occupation. Section 214(i)(2) of the Act, 8 U.S.C. § 1184(i)(2). Though the Beneficiary's construction superintendent license is acknowledged, the record does not sufficiently establish that this document, alone, is sufficient to satisfy the licensure requirements for civil engineers providing professional engineering services in the State of New York.