



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

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

MATTER OF M-M-3 INC.

DATE: JUNE 1, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

The Petitioner, a “management consulting” firm, seeks to temporarily employ the Beneficiary as a “budget analyst” 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 had not demonstrated that the proffered position qualifies for treatment as a specialty occupation position.

The matter is now before us on appeal. In its appeal, the Petitioner asserts that the Director erred in denying the visa petition.

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

I. SPECIALTY OCCUPATION

A. 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).

B. The Proffered Position

The Petitioner stated on the Form I-129, Petition for a Nonimmigrant Worker, that the Beneficiary will serve as a “budget analyst.” On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner stated that the Beneficiary will serve as a “market research analyst,”¹ and designated the proffered position under the occupational category “Market Research Analysts and Marketing Specialists” corresponding to Standard Occupational Classification (SOC) code 13-1161.²

¹ The Petitioner did not explain why it referred to the proffered position as a “budget analyst” on the Form I-129 and as a “market research analyst” in the LCA.

² The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. The “Prevailing Wage Determination Policy Guidance” issued by the DOL provides a description of the wage levels. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that he will be closely supervised and his work closely monitored and reviewed for accuracy; and (3) that he will receive specific instructions on required tasks and expected results. U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf. A prevailing wage determination starts

In an addendum to the Form I-129 visa petition, the Petitioner provided the following duty description for the position:

Identify lucrative markets for the services and products offered by the business clients of the Petitioner; Devise methods and procedures to conduct their research effectively; Based on the various researches and their results prepare detailed reports regarding market potential for each service/product offered by the business clients of the Petitioner; Prepare reports based on market analysis for the business clients engaged in sale of product or services; Suggest improvised methods of marketing by drawing comparison with competitors and recommending better marketing strategy which is may [*sic*] carry more appeal to the client/customer base of both the Petitioner and its business clients; Highlight the realistic return for certain marketing measures; Gather information on competitors, prices, sales and methods of marketing and then use such results to develop a better marketing strategy for business clients of Petitioner; Use research results and statistics to prepare comprehensive marketing packages for business clients; Work together with Budget Analyst to ensure that the recommendations are suitable to the budgetary limitations of an given client; Conduct research to help the Petitioner determine the variations of demand among various markets having specific needs in terms of products and services; Include recommendations for improvisations of an existing organizational structure with the goal to enhance profitability; Assist the Petitioner in developing promotional plans to capture new clients; and Prepare and give presentations when necessary.

C. 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 contains unresolved inconsistencies that undermine the Petitioner's claims regarding the nature and scope of the proffered position.³

First, we find that the Petitioner used alternating references to the proffered position as "budget analyst," "market research analyst," "management accountant," and "financial manager." The Petitioner referred to the position as a "budget analyst" in the Form I-129; a "market research analyst" in the LCA; a "management accountant" in one of the letters; and a "financial manager" on appeal. However, these four job titles describe separate positions located within different

with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. *Id.*

³ 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.

occupational categories. Further, as we will discuss later, these occupations have differing prevailing wage requirements.

Moreover, the organizational chart references two “financial/budget analysts,” one “market research analyst,” and one “management accountant” positions; but it is not clear which position the Beneficiary would fill. The Petitioner’s response to the request for evidence (RFE) complicates matters further, as it states that the Beneficiary (who, again, according to the Form I-129 would work as a “budget analyst”), would “work as a team with Budget Analyst.”

Next, we observe that many of the Petitioner’s assertions indicate that the Beneficiary would have high-level responsibilities. For example, the Petitioner claims on appeal that proffered position is the company’s “backbone” and that it is “crucial for the Company,” and has referenced the “complex” nature of the job duties repeatedly. However, such duties and responsibilities appear inconsistent with the Level I (entry) wage-level selected here. In designating the proffered position at a Level I wage level, the Petitioner has indicated that the proffered position is a comparatively low, entry-level position relative to other positions within the occupational category, and that he would perform routine tasks that require limited, if any, exercise of judgment. The Petitioner’s designation of the proffered position as a Level I, entry-level position is inconsistent with these and other stated duties and responsibilities, and raises questions regarding the substantive nature of the proffered position.⁴

Further, we note that the duty description states that the Beneficiary would perform his analysis for the Petitioner’s clients, but the Petitioner has not provided sufficient evidence to support its claims. In the RFE, the Director requested additional evidence to show that the Petitioner would have specialty occupation work available for the Beneficiary throughout the entire period of employment requested in the H-1B petition.

The Petitioner responded, as follows:

[USCIS] has raised its concern about in House Employment and availability of projects/specialty work for the Beneficiary.

It appears that [USCIS] is under the impression that the Beneficiary will be working for third parties and perhaps the Petitioner’s role is like a job shop. This is an

⁴ The issue here is that the Petitioner’s designation of this position as a Level I, entry-level position undermines its claim that the position is relatively higher than other positions *within the same occupation*. Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation. In certain occupations (doctors or lawyers, for example), an entry-level position would still require a minimum of a bachelor’s degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor’s degree in a specific specialty or its equivalent. That is, a position’s wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.

(b)(6)

Matter of M-M-3 Inc.

incorrect impression. The Beneficiary will be employed directly by the Petitioner and will be solely on Petitioner's pay roll and shall be solely the Petitioner's employee.

The Petitioner also submitted a March 28, 2012, letter, in which the Petitioner and another company with common ownership, [REDACTED] agreed that the Petitioner would provide the Beneficiary's services to the other company. The Petitioner stated, in its September 9, 2014, letter, that the other company is in the same business as the Petitioner.⁵

However, the Petitioner provided no evidence to substantiate that this other company has any work available for the Beneficiary. The Petitioner has not demonstrated that it has any work to which to assign the Beneficiary and has not, therefore, demonstrated the substantive nature of the work, if any, to which it would assign the Beneficiary if the H-1B petition were approved.

Based on all of the inconsistencies listed above, we find that the Petitioner did not establish the substantive nature of the work to be performed by the Beneficiary. "[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. The Petitioner has not provided sufficient evidence to overcome the inconsistencies.

The inability to establish the substantive nature of the work to be performed by the Beneficiary precludes a finding that the proffered position is a specialty occupation under 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 4.⁶

⁵ On the visa petition, Petitioner described its "Type of Business" as "Primarily Management Consulting: Plans, develops and implements Marketing Campaigns for Businesses." While this assertion is acknowledged, we note that a general Internet search indicates that both of these companies' addresses are sandwich shops.

⁶ Even if the proffered position were established as being that of an entry-level market research analyst or budget analyst performing routine tasks requiring limited, if any, exercise of judgment, a review of the U.S. Department of Labor's (DOL's) *Occupational Outlook Handbook (Handbook)* does not indicate that, simply by virtue of such an occupational classification, such a position would qualify as a specialty occupation in that the *Handbook* does not state a normal minimum requirement of a U.S. bachelor's or higher degree in a specific specialty, or its equivalent, for entry into positions located within either occupational category. See U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., "Budget Analysts," <http://www.bls.gov/ooh/business-and-financial/budget-analysts.htm> and "Market Research Analysts," <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm> (May 25, 2016). As such, absent evidence that the position satisfies one of the alternative criteria available under 8 C.F.R. § 214.2(h)(4)(iii)(A), the instant petition could not be approved for this additional reason.

(b)(6)

Matter of M-M-3 Inc.

The Petitioner has not demonstrated that the proffered position qualifies for treatment as a specialty occupation position. The appeal will be dismissed on this basis.

II. BENEFICIARY'S QUALIFICATIONS

As the Petitioner did not demonstrate that the proffered position is a specialty occupation, we need not fully address other issues evident in the record. That said, we wish to identify additional issues to inform the Petitioner that these matters should be addressed in any future proceedings.⁷

Evidence in the record shows that the Beneficiary earned a master's degree in business administration, with no further concentration, from ██████████ in 2010. The record contains insufficient evidence pertinent to any other degree he may possess.

A general degree in business administration alone is insufficient to qualify the Beneficiary to perform the services of a specialty occupation, unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field. *See Matter of Ling*, 13 I&N Dec. 35 (Reg'l Comm'r 1968) (finding that "'Business administration' is a broad field, a field which contains various occupations and/or professions, all of which are related to the world of business but each requiring a different academic preparation and experience peculiar to its needs"). The Petitioner must demonstrate that the Beneficiary obtained knowledge of the particular occupation in which [he/she] will be employed. *Id.* Thus, even if the Petitioner had demonstrated that the proffered position requires at least a bachelor's degree in a specific specialty, or its equivalent, the petition could not be approved, because the Petitioner has not demonstrated that the Beneficiary has taken courses or gained knowledge considered to be a realistic prerequisite to any specific specialty within the field of business.⁸ The Petitioner has not, therefore, shown that the Beneficiary is qualified to work in any specialty occupation position. This is an additional reason why the instant visa petition may not be approved.

III. NON-CORRESPONDING LCA

We will now address another additional, independent ground that precludes approval of this petition. Specifically, we find that the Petitioner did not submit an LCA that corresponds to the petition.

The Form I-129 states that the proffered position is a budget analyst position. Budget analysts are involved in cost analyses, fiscal allocations, preparation and review of budgets, and similar duties. They are addressed in O*NET at SOC 13-2031.00 and in the *Handbook* at <http://www.bls.gov/ooh/business-and-financial/budget-analysts.htm> (last visited May 26, 2016).

⁷ In reviewing a matter *de novo*, we may identify additional issues not addressed below in the Director's decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003) ("The AAO may deny an application or petition on a ground not identified by the Service Center.").

⁸ That the Petitioner found the Beneficiary's otherwise undifferentiated master's degree in business administration a sufficient educational preparation for the proffered position is yet another reason to find that the proffered position has not been demonstrated to be a specialty occupation position.

The LCA is certified for a position located within the “Market Research Analysts and Marketing Specialists” occupational category. Market research analysts are involved in gathering and interpreting market data, and in preparing and presenting reports pertinent to market data. O*NET addresses such positions at 13-1161.00. The *Handbook* addresses market research analyst positions at <http://www.bls.gov/ooh/business-and-financial/market-research-analysts.htm> (last visited May 26, 2016).

As noted, the Petitioner has also referred to the proffered position as that of a management accountant and a financial manager.

We find that the Petitioner did not select the most relevant O*NET occupational code classification.⁹ The “Prevailing Wage Determination Policy Guidance” states the following:

In determining the *nature of the job offer*, the first order is to review the requirements of the employer’s job offer and determine the appropriate occupational classification. The O*NET description that corresponds to the employer’s job offer shall be used to identify the appropriate occupational classification If the employer’s job opportunity has worker requirements described in a combination of O*NET occupations, the NPWHC should default directly to the relevant O*NET-SOC occupational code for the highest paying occupation. For example, if the employer’s job offer is for an engineer-pilot, the NPWHC shall use the education, skill and experience levels for the higher paying occupation when making the wage level determination.

The Petitioner stated in the LCA that the wage level for the proffered position is Level I (entry). The Level I prevailing wages for the four occupational categories the Petitioner has alternatively claimed the position to be are as follows:

Occupational Category	Level I prevailing wage at time of LCA certification
Market Research Analysts and Marketing Specialists	\$17.09 per hour (\$35,547 per year)
Budget Analysts	\$24.21 per hour (\$50,357 per year)
Accountants and Auditors	\$19.53 per hour (\$40,622 per year)
Financial Managers	\$34.97 per hour (\$72,738 per year)

⁹ 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_Guidance_Revised_11_2009.pdf.

The prevailing wage for all three occupational categories at a Level I wage are significantly higher than the prevailing wage for the “Market Research Analysts and Marketing Specialists” category selected by the Petitioner. Thus, according to DOL guidance, if the Petitioner believed its position was appropriately described as one of these other occupational categories, or was a combination of them, it should have chosen the relevant occupational code for the highest-paying occupation. However, the Petitioner chose the occupational category for the lower paying occupation for the proffered position on the LCA.

While DOL is the agency that certifies LCA applications before they are submitted to USCIS, DOL regulations note that the Department of Homeland Security (DHS) (i.e., its immigration benefits branch, USCIS) is the department responsible for determining whether the content of an LCA filed for a particular Form I-129 actually supports that petition. The regulations state, in pertinent part:

For H-1B visas . . . DHS accepts the employer’s petition (DHS Form I-129) with the DOL certified LCA attached. *In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the [LCA] is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements of H-1B visa classification.*

20 C.F.R. § 655.705(b) (emphasis added).

The regulation at 20 C.F.R. § 655.705(b) requires that USCIS ensure that an LCA actually supports the H-1B petition filed on behalf of the Beneficiary. Here, the Petitioner has not submitted a certified LCA that corresponds to the claimed duties of the proffered position. Therefore, the petition cannot be approved for this additional reason.

IV. PRIOR APPROVALS

We are aware that the instant visa petition is an extension petition. 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 556 (5th Cir. 2004). 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).

Matter of M-M-3 Inc.

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.

ORDER: The appeal is dismissed.

Cite as *Matter of M-M-3 Inc.*, ID# 17201 (AAO June 1, 2016)