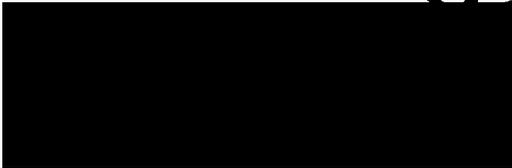




U.S. Citizenship
and Immigration
Services

DD



FILE: SRC 03 038 50428 Office: TEXAS SERVICE CENTER Date:

001 29 2004

IN RE: Petitioner:
Beneficiary:



PETITION: Petition for a Nonimmigrant Worker pursuant to Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

PUBLIC COPY

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The service center denied the nonimmigrant visa petition and the matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed. The petition will be denied.

The petitioner operates a small immigration-law firm and seeks to hire the beneficiary as a temporary law clerk, provided that Citizen and Immigration Services (CIS) classify him as a nonimmigrant worker in a specialty occupation pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The beneficiary, who holds an H-1B visa and works as a law clerk for another law firm, holds the equivalent of a four-year U.S. college degree in legal studies, according to the petitioner's credentials expert.

The director denied the petition because the petitioner had failed to establish that the proffered position was a specialty occupation.

The record of proceeding before the AAO contains: (1) Form I-129 and supporting documentation; (2) the director's request for additional evidence (RFE); (3) the petitioner's response to the director's request; (4) the director's denial letter; and (5) Form I-290B and supporting documentation. The AAO reviewed the record in its entirety before issuing its decision.

The Department of Labor's *Occupational Outlook Handbook* (the *Handbook*) 2002-2003 edition carries detailed analyses of various occupations but not for law clerks. However, the director determined that the job duties of the proffered position were substantially the same as those for paralegals and legal assistants as described in detail by the *Handbook*. Using the *Handbook's* analysis for paralegal workers, the director found no minimum requirement of a baccalaureate degree for a paralegal. The director found that the petitioner had failed to establish any of the four factors at 8 CFR § 214.2(h)(4)(iii)(A) and that the position was not a specialty occupation.

In response to the RFE, the petitioner had asserted that it was inappropriate for the director to equate the job duties of law clerk with those for paralegals or legal assistants. The petitioner further contends the director did not give due weight to CIS's previously granting the beneficiary H-1B status as a law clerk for another law firm, and faults the director for an overly rigid adherence to the Department of Labor's *Handbook* analysis. He also said the director should have deferred to the petitioner's desire to hire better-educated staff.

Section 214(i)(1) of the Immigration and Nationality Act (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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the 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.

CIS 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.

Evidence of the beneficiary’s duties are in part found on the Form I-129 and supporting letter submitted with the petition, which specifies that the beneficiary would assist in researching and preparing legal documents and assist with court appearances and meeting with clients, of whom the petitioner describes as South Asian-born. In his response to the director’s request for evidence, the petitioner elaborates that the beneficiary would read and research the law and complex documents, including those of opposing counsel. Further, the beneficiary would draft pleadings, documents and letters. The job would also entail clerical duties, such as “pasting the researched material” onto documents. A qualified candidate for the position would need a bachelor’s degree in a legal specialty, and would preferably be multilingual.

Counsel argues that the director is bound to give more weight to an earlier CIS decision that granted the beneficiary H-1B visa status as a law clerk for a different petitioner. The decision does not indicate whether the director reviewed the prior approval on behalf of the same beneficiary. This record of proceeding does not, however, contain all of the supporting evidence submitted to the service center in the prior case. In the absence of all of the corroborating evidence contained in that record of proceeding, the documents submitted by counsel are not sufficient to enable the AAO to determine whether the position offered in the prior case was similar to the position in the instant petition.

Each nonimmigrant petition is a separate proceeding with a separate record. *See* 8 C.F.R. § 103.8(d). In making a determination of statutory eligibility, CIS is limited to the information contained in the record of proceeding. *See* 8 C.F.R. § 103.2(b)(16)(ii). Although the AAO may attempt to hypothesize as to whether the prior case was similar to the proffered position or was approved in error, no such determination may be made without review of the original record in its entirety. If the prior petition were approved on evidence substantially similar to the evidence contained in this record of proceeding, however, the approval of the prior petition would have been erroneous. CIS is not required to approve petitions where eligibility has not been demonstrated, merely because of prior approvals that may have been erroneous. *See, e.g., Matter of Church Scientology International*, 19 I&N Dec. 593, 597 (Comm. 1988). Neither CIS nor any other agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery* 825 F.2d 1084, 1090 (6th Cir. 1987), *cert denied*, 485 U.S. 1008 (1988).

Furthermore, the AAO's 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 petition on behalf of the beneficiary, the AAO would not be bound to follow the contradictory decision of a service center. *Louisiana Philharmonic Orchestra v. INS*, 2000 WL 282785 (E.D. La.), *aff'd*, 248 F.3d 1139 (5th Cir. 2001), *cert. denied*, 122 S.Ct. 51 (2001).

The director found that the proffered position was not a specialty occupation because the petitioner failed to establish any of the four criteria enumerated at 8 C.F.R. § 214.2(h)(4)(iii)(A). Citing the *Handbook*, the director, treating the proffered position as if for a paralegal, stated that although there are several ways to become a paralegal/legal assistant, employers usually require formal paralegal training obtained through an associate or bachelor's degree program or a certification program. The director noted that the *Handbook* explains that, increasingly, employers prefer graduates from four-year paralegal programs or college graduates who have completed paralegal certificate programs, and that some employers prefer to train paralegals on the job, hiring college graduates with no legal experience or promoting experienced legal secretaries.

On appeal, the petitioner contends that it has satisfied at least one criteria under 8 C.F.R. § 214.2(h)(4)(iii)(A). However, upon review of the record, the petitioner has established none of the four criteria outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, the proffered position is not a specialty occupation.

First, the AAO considers the criteria at 8 C.F.R. § 214.2 (h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree or its equivalent is the normal minimum requirement for entry into the particular position; a degree requirement is common to the industry in parallel positions among similar organizations; or a particular position is so complex or unique that it can be performed only by an individual with a degree. Factors often considered by CIS when determining these criteria include: whether the *Handbook* reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." See *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D.Minn. 1999)(quoting *Hird/Blaker Corp. v. Slattery*, 764 F. Supp. 872, 1102 (S.D.N.Y. 1991)).

The petitioner claims that it satisfies the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) on the ground that its submitted job openings for law clerk positions establish that a baccalaureate or a higher degree or its equivalent is normally the minimum requirement for entry into the occupation. The petitioner, moreover, cites the *Occupational Information Network (O*NET)* to state that law clerks include law school graduates and that they assist judges, magistrates, and lawyers in legal research and analysis.

The petitioner's claims are without substance. CIS looks beyond the title of the position and determines, from a review of the duties of the position and any supporting evidence, whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate degree in a specific specialty as the minimum for entry into the occupation as required by the Act. Thus, the title of the position - whether paralegal or law clerk - will not dictate whether a position qualifies as a specialty occupation under the first criterion.

The Department of Labor has replaced the *Dictionary of Occupational Titles (DOT)* with the *Occupational Information Network (O*Net)*. Both the *DOT* and *O*Net* provide only general information regarding the tasks and work activities associated with a particular occupation, as well as the education, training, and experience required to perform the duties of that occupation. The Department of Labor's *Handbook* provides a more comprehensive description of the nature of a particular occupation and the education, training, and experience normally required to enter into and advance within an occupation. Consequently, the AAO routinely consults the *Handbook* for its information about the duties and educational requirements of particular occupations.

The director determined the duties described in the *Handbook* for paralegals were similar to those in the proffered position. Under "Paralegal and Legal Assistants," the *Handbook* lists the job duties as including a number of lawyer-like functions, including identifying laws, decisions, articles and other written materials; analyzing and organizing information and putting them in written reports for attorneys to decide how to handle cases; drafting contracts, mortgages, trust instruments, preparing tax returns and planning estates; and, research judicial decisions on improper police arrests. A review of the *Handbook* reveals that the director correctly found that the proffered position resembles a paralegal, and that no evidence in the *Handbook* indicates that a baccalaureate or higher degree, or its equivalent, in a specific specialty is required for a paralegal position.

To charge, as the petitioner does, that CIS is too rigid in its reliance on the *Handbook* for evaluating job categories does not diminish the agency's task of applying the federal laws and regulations as written. Thus, the petitioner argues that it should suffice for the *O*NET* to say that a bachelor's degree is the "most significant source of training." Saying that does not satisfy the petitioner's burden of showing that a bachelor's degree tailored to a specialty occupation is an entry-level requirement for the occupation. As noted above, the statute requires that a bachelor's degree or higher in the specific specialty is the minimum for entry into the specialty occupation. The *O*NET* does not require a degree in a specific specialty for a law clerk position. The petitioner has failed to establish the first criterion. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

To establish the second criterion - that a degree requirement is common to the industry in parallel positions among similar organizations - the petitioner asserts that the submitted job postings demonstrate that a bachelor's degree is common in the industry in parallel positions among similar organizations. The petitioner also asserts that the *Handbook* establishes the industry standard in that the *Handbook* reports that employers usually require formal legal studies training obtained through bachelor's degree programs, and that increasingly, employers prefer to hire graduates of four-year programs or college graduates. Thus, the petitioner asserts that the *Handbook* treats law clerks and lawyers as distinct from paralegals, and that "most of these occupations [including law clerks] require a four-year bachelor's degree, but some do not." The petitioner's quotation from the *Handbook* does not establish an industry-wide standard of a bachelor's in a specific specialty as a minimum for entry into the occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The petitioner contends that CIS should also take into account information from other job services, such as the state employment office, and cites the *On-line Wage Library* information provided in the record. That information indicates that the law clerk position may require a four-year degree, but not always, and further does not specify the specialized degree that might be required. Thus, this information does not establish that a bachelor's degree in a specific specialty is a minimum requirement for entry into the occupation.

Like the *On-line Wage Library*, the *O*NET* information does not support the petitioner's specialty occupation claim. The *O*NET* is not a persuasive source of information regarding whether a particular job requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. The SVP rating cited in the *O*NET* is meant to indicate only the total number of years of vocational preparation required for a particular position. It does not describe how those years are to be divided among training, formal education, and experience, and it does not specify the particular type of degree, if any, that a position would require.

The advertisements submitted by the petitioner that require the applicants to have completed some law school are not parallel to the petitioner's position. The position offered by the petitioner does not require any law school; the duties of the proffered position do not have the same level of complexity as the job duties presented in the advertisements requiring one or two years of law school.

With respect to the submitted job opening ads, some of the openings state that a bachelor's degree is "preferred"; however, a mere preference is not synonymous to a requirement. Other postings accept a bachelor's degree, a paralegal certificate, or an associate's degree. None of the openings require a bachelor's degree in a specific specialty. Thus, these advertisements do not establish that a degree requirement in a specific specialty is common in the industry. Furthermore, the *Handbook's* findings explicitly substantiate that a bachelor's degree is not usually required for a paralegal job: employers accept certification programs and associate and bachelor's degree programs. Although some employers may prefer to hire graduates of four-year paralegal programs or college graduates, this does not establish that that requirement of a bachelor's degree at a minimum is common to the industry. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

No evidence is in the record that would show the proffered position is so complex or unique that only an individual with a degree can perform it, and thus the petitioner has failed to establish either of the criteria at 8 C.F.R. §§ 214.2(h)(4)(iii)(A)(2) or (4). The AAO notes that the job duties for law clerk set forth in the petitioner's supporting documentation are very similar to those for paralegal in the *Handbook*.

As to the fourth criterion under the regulations, the petitioner claims that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. According to the petitioner, the paralegal will assist and work side-by-side with him on legal matters and be "capable of argumentative writing."

The AAO finds that the petitioner's claims are not sufficient in establishing the fourth criterion. The petitioner's description of the issues that will be addressed by the paralegal, and the role of the paralegal *vis-à-vis* counsel and others, is analogous to the role of the paralegal as described in the *Handbook*. Thus, the nature of the specific duties is not so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's degree.

Thus, the petitioner has not met the second or the fourth criterion's requirements.

The AAO now turns to 8 C.F.R. § 214.2(h)(4)(iii)(A)(3) – the employer normally requires a degree or its equivalent for the position. The petitioner asserts that it has a history of employing university-educated

professionals for paralegal/legal assistant positions, and cites that it has hired a law school graduate. That the petitioner may have recently hired a law school graduate to perform some law clerk duties does not suffice to establish that the employer has a history of hiring bachelor's candidates in the position.

When the petitioner asserts that CIS should have deferred to his views on his staff needs as an employer, he cites *In the Matter of Unico American Corp. v. Watson*, Westlaw 11002594 (C.C. Cal., 1991). There, the judge granted summary judgment to an insurance company seeking to hire a published author of computer science with a master's in nuclear engineering as a management information system (MIS) computer programmer. The company had petitioned to hire the beneficiary as a temporary worker of distinguished merit and ability. The AAO had found that the proffered position did not require the service of a professional in the field of computer science. The judge found in favor of the employer, basing his decision in part on the "sophisticated data proceeding needs, procedures and equipment, and admonished the government for "second guessing the business judgement [sic] of a successful company." *Id.* at. 6. Unlike the company in *Unico*, however, the petitioner does not establish that the beneficiary would be performing tasks any more complex or unique than is performed by the typical paralegal.

The AAO is not persuaded that the position is a specialty occupation simply because the petitioner claims that a degree is required. The director correctly stated that the petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. CIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. *Cf. Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). 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 attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation as required by the Act.¹ To interpret the regulations any other way would lead to absurd results: if CIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388. As already related, the responsibilities and duties of the proffered position would not require a bachelor's degree.

As related in the discussion above, the petitioner has failed to establish that the proffered position is a specialty occupation. Accordingly, the AAO shall not disturb the director's denial of the petition.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed. The petition is denied.

¹ The court in *Defensor v. Meissner* observed that the four criteria at 8 C.F.R. 214.2(h)(4)(iii)(A) present certain ambiguities when compared to the statutory definition, and "might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition." *See id.* at 387.