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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



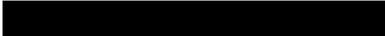
U.S. Citizenship and Immigration Services

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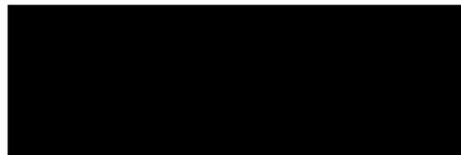


FILE:  Office: CALIFORNIA SERVICE CENTER Date: **MAR 02 2011**

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:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The director of the California 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 is a charter school management company. It seeks to employ the beneficiary as a law clerk/researcher 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 director denied the petition concluding that the petitioner failed to establish that the proffered position is a specialty occupation and that the petitioner failed to demonstrate that there exists a reasonable and credible offer of employment.

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

The first issue that the AAO will consider is whether the position qualifies as a specialty occupation. To meet its burden of proof in this regard, the petitioner must establish that the employment it is offering to the beneficiary meets the following statutory and regulatory requirements.

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 one 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 term "specialty occupation" is further defined at 8 C.F.R. § 214.2(h)(4)(ii) as:

An occupation which 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 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, the position must also 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. Federal 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 illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation.

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. Applying this standard, USCIS regularly approves H-1B petitions for qualified aliens 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, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.

In this matter, the petitioner seeks the beneficiary’s services as a law clerk/researcher. The initial letter from the petitioner submitted with the petition stated that the beneficiary would be responsible for legal research assignments, analyzing legal issues, drafting and preparing legal documents, and assisting legal counsel.

His duties would include the following:

- Research laws, investigate facts, and present evidence to support cases;
- Analyze law sources to prepare legal documents;
- Draft and prepare legal memoranda, briefs, and appeals; and
- Work closely with the Operations Manager and outside legal counsel to ensure that the company is aware of new requirements and is operating within the confines of the law.

The petitioner stated that this position requires at least a bachelor's degree in legal studies or a related field. The petitioner submitted an O*NET Online summary report for Law Clerks.

The petitioner submitted copies of the beneficiary's credentials indicating that the beneficiary has a U.S. Master of Laws degree.

The director issued an RFE on May 11, 2010 requesting evidence to demonstrate that the proffered position is a specialty occupation.

In response to the RFE, the petitioner described the position duties as follows:

- Analyze law sources, interpret laws, provide legal analyses, and develop case strategies (35% of time);
- Research laws, investigate facts, and assist legal counsel (30% of time);
- Draft and prepare legal memoranda, briefs, and appeals as well as applications and affidavits (25% of time); and
- Ensure retention of clients, execute public relations plans to reach potential clients, assist with the schools' business growth plans (10% of time).

The organizational chart submitted by the petitioner in response to the RFE indicates that the beneficiary would work in the petitioner's legal department, which includes the beneficiary and another law clerk/researcher. Both of these positions are supervised by the head of the petitioner's legal department (not yet hired) who in turn is supervised by the petitioner's Operations Manager.

The petitioner also submitted four expert opinion letters. The first letter is from [REDACTED], [REDACTED] bases his assessment of the proffered position on the position description provided by the petitioner as follows:

The Law Clerk/Researcher shall have day-to-day tasks surrounding legal research assignments, the analysis of complex legal issues, the drafting and preparation of legal memoranda, briefs, and appeals as well as assisting legal counsel with additional research projects and related duties. [The beneficiary] shall provide legal analyses on issues specific with regard to and charter schools issues, as well as prepare applications for employees and clients. He will also develop case strategies with assistance from the school's Directors and Business Managers regarding legal arguments, as well as be responsible for interpreting laws, rulings and regulations.

then concludes as follows:

Based upon these duties, it is evident that the holder of the position will contribute to the preparation and formulation of the legal strategies and documents that govern and protect the employer's most important and integral products (such as the proprietary, trademarked educational services and programs discussed in the first paragraph above), service agreements (with individual schools and other educational entities), and teacher-training processes. The holder of the position will also perform research to support the launch of new scholastic properties, including properties in heavy regulated, underprivileged and urban environments (where the majority of its existing properties are located).

Given that the petitioner nowhere states or otherwise provides documentation that the beneficiary will be responsible in assisting the petitioner with legal issues relating to trademarks and intellectual property, the AAO does not find [REDACTED] conclusion to be based on any evidence depicted in the record.

The other three letter writers, [REDACTED] who is [REDACTED] [REDACTED] who is the [REDACTED] and [REDACTED] who is [REDACTED] do not work in the field of law. Consequently, they are not qualified to write about whether the proffered position would normally require at least a bachelor's degree or its equivalent in law or a related field. Additionally, these three letters are virtually identical, drawing into question whether the letters were in fact written by the individuals who signed them. Although the letter writers state that they have assisted employees to fill similar positions to the one proffered here, they do not provide any concrete examples of such instances where they helped fill such positions with persons holding at least a bachelor's degree or the equivalent in legal studies or a related field.

Therefore, none of these four letters are probative for these proceedings. The AAO may, in its discretion, use as advisory opinion statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the AAO is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm. 1988).

The petitioner also submitted copies of advertisements placed for law clerks. The AAO notes that these advertisements were not placed by businesses parallel to the petitioner. Additionally, the law clerk positions in these advertisements require either that the candidate be a law student, have a J.D. degree, or have a bachelor's degree generally.

The director denied the petition on July 1, 2010. The director found that the proffered position is most similar to that of a Paralegal or Legal Assistant as described in the *Handbook*. The director noted that the *Handbook* does not indicate that the occupation of Paralegal or Legal Assistant is a specialty occupation.

On appeal, counsel for the petitioner argues that the proffered position is not a Paralegal or Legal Assistant, but instead is a Law Clerk/Researcher.

To make its determination whether the employment described qualifies as a specialty occupation, the AAO turns to the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) and (2): a baccalaureate or higher degree in a specific specialty or its equivalent is the normal minimum requirement for entry into the particular position; and a degree requirement in a specific specialty 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 in a specific specialty. Factors considered by the AAO when determining these criteria include: whether the Department of Labor's *Occupational Outlook Handbook (Handbook)*, on which the AAO routinely relies for the educational requirements of particular occupations, reports the industry requires a degree in a specific specialty; whether the industry's professional association has made a degree in a specific specialty 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. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The *Handbook's* (2010-11 online edition) position description of paralegals and legal assistants is as follows:

Although lawyers assume ultimate responsibility for legal work, they often delegate many of their tasks to paralegals. In fact, paralegals—also called legal assistants—are continuing to assume new responsibilities in legal offices and perform many of the same tasks as lawyers. Nevertheless, they are explicitly prohibited from carrying out duties considered to be within the scope of practice of law, such as setting legal fees, giving legal advice, and presenting cases in court.

One of a paralegal's most important tasks is helping lawyers prepare for closings, hearings, trials, and corporate meetings. Paralegals might investigate the facts of cases and ensure that all relevant information is considered. They also identify appropriate laws, judicial decisions, legal articles, and other materials that are relevant to assigned cases. *After they analyze and organize the information*, paralegals may prepare written reports that attorneys use in determining how cases should be handled. If attorneys decide to file lawsuits on behalf of clients, *paralegals may help prepare the legal arguments, draft pleadings and motions to be filed with the court*, obtain affidavits, and assist attorneys during trials. Paralegals also organize and track files of all important case documents and make them available and easily accessible to attorneys.

In addition to this preparatory work, paralegals perform a number of other functions. For example, they help draft contracts, mortgages, and separation agreements. They also may assist in preparing tax returns, establishing trust funds, and planning estates. Some paralegals coordinate the activities of other law office employees and maintain financial office records.

Computer software packages and the Internet are used to search legal literature stored in computer databases and on CD-ROM. In litigation involving many supporting documents, paralegals usually use computer databases to retrieve, organize, and index various materials. Imaging software allows paralegals to scan documents directly into a database, while billing programs help them to track hours billed to clients. Computer software packages also are used to perform tax computations and explore the consequences of various tax strategies for clients.

Paralegals are found in all types of organizations, but most are employed by law firms, *corporate legal departments*, and various government offices. In these organizations, they can work in many different areas of the law, including litigation, personal injury, corporate law, criminal law, employee benefits, intellectual property, labor law, bankruptcy, immigration, family law, and real estate. As the law becomes more complex, paralegals become more specialized. Within specialties, functions are often broken down further. For example, paralegals specializing in labor law may concentrate exclusively on employee benefits. In small and medium-size law firms, duties are often more general.

The tasks of paralegals differ widely according to the type of organization for which they work. Corporate paralegals often assist attorneys with employee contracts, shareholder agreements, stock-option plans, and employee benefit plans. They also may help prepare and file annual financial reports, maintain corporate minutes' record resolutions, and prepare forms to secure loans for the corporation. *Corporate paralegals often monitor and review government regulations to ensure that the corporation is aware of new requirements and is operating within the law.* Increasingly, experienced corporate paralegals or paralegal managers are assuming additional supervisory responsibilities, such as overseeing team projects.

The duties of paralegals who work in the public sector usually vary by agency. In general, litigation paralegals analyze legal material for internal use, maintain reference files, conduct research for attorneys, and collect and analyze evidence for agency hearings. They may prepare informative or explanatory material on laws, agency regulations, and agency policy for general use by the agency and the public. Paralegals employed in community legal-service projects help the poor, the aged, and others who are in need of legal assistance. They file forms, conduct research, prepare documents, and, when authorized by law, may represent clients at administrative hearings.

(Emphasis added.)

The *Handbook's* description of law clerks is brief, stating only “[a]ssist lawyers or judges by researching or preparing legal documents. May meet with clients or assist lawyers and judges in court. Excludes lawyers, and paralegal and legal assistants.” According to the O*NET Online summary report, law clerks:

- Search for and study legal documents to investigate facts and law of cases, to determine causes of action and to prepare cases.
- Review and file pleadings, petitions and other documents relevant to court actions.
- Prepare affidavits of documents and maintain document files and case correspondence.
- Prepare drafts of judicial opinions and decisions.
- Research and analyze law sources to prepare drafts of briefs or arguments for review, approval, and use by attorney.
- Serve copies of pleas to opposing counsel.
- Schedule meetings between legal professionals.
- Store, catalog, and maintain currency of legal volumes.
- Communicate and arbitrate disputes between parties.
- Deliver or direct delivery of subpoenas to witnesses and parties to action.

The primary role of a law clerk is to assist lawyers or judges by researching or preparing legal documents. Given that the proffered duties as described by the petitioner in response to the RFE entail researching or preparing legal documents only 25% of the time, the AAO disagrees with counsel that the proffered position is that of a law clerk. Although some of the duties of a law clerk and a paralegal overlap, the advertisements submitted by the petitioner for law clerk positions indicate that law clerk positions are usually filled by people who are currently in law school or who have a J.D. degree, which is not the case here. Additionally, the petitioner does not currently employ any attorneys nor does the petitioner provide sufficient detail with respect to how or to what extent the beneficiary would assist outside legal counsel. Therefore, the petitioner has failed to demonstrate that the proffered position is that of a law clerk.

Given that the AAO has determined that (1) the proffered position is not a law clerk and (2) the description of duties falls under the *Handbook's* description of paralegal's duties, which include analyzing and organizing information, preparing legal arguments, and reviewing and monitoring regulations, the AAO instead finds that the proffered position best fits under the *Handbook's* section on paralegals. Regarding the minimum requirements for paralegals and legal assistants, the *Handbook* states that "[m]ost entrants have an associate's degree in paralegal studies, or a bachelor's degree in another field and a certificate in paralegal studies. Some employers train paralegals on the job." Because the *Handbook* indicates that entry into a paralegal or legal assistant occupation does not normally require a bachelor's or higher degree or its equivalent in a specific specialty, the *Handbook* does not support the proffered position as being a specialty occupation. Moreover, to the extent that they are described in the record, the duties comprising the proffered position appear to fall within the general functions normally performed by paralegal or legal assistants, but the nature and level of education and/or equivalent training and experience required to perform those functions are not self-evident. The petitioner provides no documentary evidence distinguishing any aspect of the proffered position from paralegal or legal assistant positions not requiring the application of at least a bachelor's degree level of a body of highly specialized knowledge in a specific specialty. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm. 1972)).

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 also factors to be considered. USCIS must examine the ultimate employment of the alien, 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 nor 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.

As the *Handbook* indicates no specific degree requirement for employment as a paralegal, and as it is not self-evident that, as described in the record of proceeding, the proposed duties comprise a position for which the normal entry requirement would be at least a bachelor's degree, or its equivalent, in a specific specialty, the AAO concludes that the performance of the proffered position's duties does not require the beneficiary to hold a baccalaureate or higher degree in a specific specialty. Accordingly, the AAO finds that the petitioner has not established its proffered position as a specialty occupation under the requirements of the first criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A).

Next, the AAO finds that the petitioner has not satisfied the first of the two alternative prongs of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). This prong alternatively requires a petitioner to establish that a bachelor's degree, in a specific specialty, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

Again, in determining whether there is such a common degree requirement, factors often considered by USCIS 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 at 1165 (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. at 1102).

As already discussed, the petitioner has not established that its proffered position is one for which the *Handbook* reports an industry-wide requirement for at least a bachelor's degree in a specific specialty. As discussed previously, the companies placing the advertisements submitted by the petitioner on appeal are not in the same industry as the petitioner. Additionally, the AAO does not find that the proffered position is that of a law clerk. As a result, the petitioner has not established that parallel firms routinely require at least a bachelor's degree in a specific specialty for the proffered position.

The petitioner also failed to satisfy the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which provides that "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." The

evidence of record does not refute the *Handbook's* information to the effect that there is a spectrum of degrees acceptable for paralegal positions, including degrees not in a specific specialty. The record lacks sufficiently detailed information to distinguish the proffered position as unique from or more complex than paralegal or other positions that can be performed by persons without at least a bachelor's degree in a specific specialty or its equivalent.

Additionally, as stated previously, the expert opinion letters submitted by counsel on appeal are not probative for these proceedings. Moreover, the letter writers do not list the reference materials on which they rely as a basis for their conclusion. It appears that the writers did not base their opinion on any objective evidence.

As the record has not established a prior history of recruiting and hiring for the proffered position only persons with at least a bachelor's degree in a specific specialty, the petitioner has not satisfied the third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of its position's duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a baccalaureate or higher degree. The AAO does not find that the proposed duties, as generically described by the petitioner, reflect a higher degree of knowledge and skill than would normally be required of paralegals not equipped with at least a bachelor's degree, or its equivalent, in a specific specialty. Further, the generalized array of proposed duties do not establish a job that would require the beneficiary to possess skills and qualifications beyond those of a paralegal. The AAO, therefore, concludes that the proffered position has not been established as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

For the reasons related in the preceding discussion, the petitioner has failed to establish that the proffered position qualifies as a specialty occupation under the requirements at 8 C.F.R. § 214.2(h)(4)(iii)(A).

The AAO will next consider whether the petitioner failed to demonstrate that it complied with the terms and conditions of H-1B employment. Specifically, the director found discrepancies in the petitioner's quarterly wage reports and Forms W-2 with respect to the wages paid by the petitioner.

On appeal, counsel for the petitioner asserts that there are no discrepancies in the petitioner's financial reports because the tax returns provided covered different periods of time and the petitioner's employees are located in different states, which is why the quarterly wage reports have varying amounts. The AAO finds the petitioner's explanations for any discrepancies found by the director to be reasonable in light of the corroborating evidence submitted. Consequently, the petitioner has demonstrated that the petitioner is likely to comply with the terms and conditions of employment with regard to the proffered wage. Therefore, this basis for the director's decision will be withdrawn.

The petition will be denied and the appeal dismissed. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

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