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Date: **APR 05 2012** Office: CALIFORNIA SERVICE CENTER FILE:

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 service center director 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.

On the Form I-129 visa petition the petitioner stated that it is a law office with four employees. To employ the beneficiary in what it designates as a law clerk/associate position, the petitioner endeavors to classify her 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 record contains a Form G-28 Notice of Entry of Appearance in which the petitioner acknowledged another Sacramento attorney as its counsel. The record does not reflect that the petitioner's counsel of record participated in the appeal. However, the petitioner has not dismissed counsel and counsel has not withdrawn her appearance. A copy of this decision will, therefore, be furnished to the petitioner's counsel of record.

The director denied the petition, finding that the petitioner failed to establish that it would employ the beneficiary in a specialty occupation position. On appeal, the petitioner asserted that the director's basis for denial was erroneous, and contended that the petitioner satisfied all evidentiary requirements. In support of these contentions, the petitioner submitted a brief and additional evidence.

The AAO bases its decision upon its review of the entire record of proceeding, which includes: (1) the petitioner's Form I-129 and the supporting documentation filed with it; (2) the service center's request for additional evidence (RFE); (3) the response to the RFE; (4) the director's denial letter; and (5) the Form I-290B and the petitioner's brief and attached exhibits in support of the appeal.

Section 101(a)(15)(H)(i)(b) of the Act provides a nonimmigrant classification for aliens who are coming temporarily to the United States to perform services in a specialty occupation. The issue before the AAO is whether the petitioner has provided evidence sufficient to establish that it would be employing the beneficiary in a specialty occupation position.

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.

Thus, it is clear that Congress intended this visa classification only for aliens who are to be employed in an occupation that requires the theoretical and practical application of a body of highly

specialized knowledge that is conveyed by at least a baccalaureate or higher degree in a specific specialty.

Consistent with section 214(i)(1) of the Act, the regulation at 8 C.F.R. § 214.2(h)(4)(ii) states that a specialty occupation means an occupation “which [(1)] requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which [(2)] requires the attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.”

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, 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 a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(ii)(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.

With the visa petition, counsel provided a letter, dated March 17, 2009, from the petitioner.¹ The petitioner stated:

I seek to employ [the beneficiary] as a Law Clerk/Associate. Her responsibilities will include the research and analysis of law sources to prepare drafts of briefs or legal arguments for final review and signature by me as attorney of record. She will identify relevant information required to prepare cases in addition to assisting and directing clients in organizing supporting documentation. [The beneficiary] will conduct research and investigate facts and relevant laws to assist me as attorney of record in determining the best course of action. With attorney guidance, she will prepare appropriate forms for case filings and respond to discovery requests from opposing counsel. In addition, [the beneficiary] will conduct information meetings with clients to gather relevant information for the preparation of their cases. These duties differ substantially from those of a legal assistant or paralegal in that she is expected to make legal judgments and counsel clients under attorney supervision.

The petitioner did not specify the nature or illustrate the complexity of the legal judgments the beneficiary would make in the proffered position or of the counseling she would provide to clients under attorney supervision.

The petitioner also stated, “The position of Law Clerk/Associate requires . . . a law degree.” In her own letter, dated March 31, 2009, the petitioner’s counsel reiterated that list of duties and that the proffered position requires a law degree.

Finding the evidence insufficient to demonstrate that the petitioner would employ the beneficiary in a specialty occupation position, the service center, on July 31, 2009, issued an RFE in this matter. The service center requested, *inter alia*, evidence that the petitioner would employ the beneficiary in a specialty occupation. The service center also requested that the petitioner “explain why the work

¹ The petitioner, is the Law Offices of [REDACTED]. The letter was written by [REDACTED] who is presumably the owner of that law firm. In this decision, “the petitioner” is used to refer either to [REDACTED] or the firm, interchangeably.

to be performed requires the services of a person who has a college degree or its equivalent in the occupational field.”

In response, counsel submitted (1) a letter, dated June 22, 2009, from the Assistant Dean for Career Development of the University of the [REDACTED]; (2) a list entitled Specific Duties and Responsibilities; (3) a letter, dated June 15, 2009, from the Assistant Director for Graduate Programs of the University of the [REDACTED]; and (4) copies of vacancy announcements.

In his June 22, 2009 letter, the law assistant dean stated:

The position of “law clerk/associate” is reserved for individuals who hold both a baccalaureate degree and a degree in law. Normally, this job title is given to a person who has completed his or her legal studies but has not yet passed the state’s bar examination. The “law clerk/associate” performs legal tasks and functions under the supervision of a licensed attorney.

The position of “law clerk” likewise requires at least a baccalaureate degree, but such positions are often given to law students before they have earned their law degrees.

The law school assistant director stated the same in almost identical language. Neither the law school dean nor the law school assistant director distinguished the duties of a law clerk/associate from the duties of a law clerk or, for that matter, from the duties of a paralegal.

The Specific Duties and Responsibilities list grouped the previously described duties of the proffered position into categories and assigned each category a percentage of the beneficiary’s total work time that it is expected to encompass. That list is unsigned and unattributed. Who generated that list and those percentages is unclear. That list of duties does not include “making legal judgments” or “counsel[ing] clients,” which are the two duties that the petitioner indicated distinguish the proffered position from a position for a paralegal or a legal assistant. Further, the list did not explain why any of those individual duties would require a minimum of a bachelor’s degree or the equivalent in a specific specialty.

The vacancy announcements submitted were printed from popular job search websites. The AAO observes that additional vacancy announcements were provided on appeal. For the sake of simplicity and brevity, both sets of vacancy announcements will be described here.

One of the vacancy announcements submitted was placed by the [REDACTED] for an “Associate Attorney” to work in the [REDACTED]. That announcement states that the position is open to a recent graduate, presumably from law school, who either has or has not yet passed the bar.

Another vacancy announcement was placed by the Law Offices of [REDACTED] for a law clerk to work in [REDACTED]. That announcement states that the position requires a master of law degree.

An announcement for a Law Clerk I position that was placed by the District Court for [REDACTED] 17th Judicial District indicates that the position requires a juris doctorate degree, and that new graduates as well as experienced attorneys will be considered.

An announcement placed by the United States Department of Justice for entry-level attorneys states:

Eligibility is generally limited to graduating law students and recent law school graduates who entered judicial clerkships, graduate law programs, or qualifying fellowships within 9 months of law school graduation and who meet additional eligibility requirements.

Another vacancy announcement was placed by the [REDACTED] law firm for a law clerk to work in Sacramento, California. It states that the "Desired Class Level" is "LLM" (Master of Laws degree), but states no minimum educational requirement.

An announcement placed by the [REDACTED] firm in Bakersfield, California for an "Associate" states that the position is open to a "Recent Graduate w/o Bar" or a "Recent Graduate with Bar."

The final vacancy announcement provided was placed by the Seventh Judicial District Court of Nevada for a Law Clerk to work in Ely, Nevada. It states that the position is open to a "Recent Graduate w/o Bar" or a "Recent Graduate with Bar."

In her own letter, dated June 29, 2009, counsel asserted that a common practice in the legal profession is to hire a law clerk who has graduated law school but not yet passed the bar examination with the expectation that the law clerk will assume an attorney position upon passing the bar examination. She observed that such law clerk positions do not require appearance in court as a representative of a client or any other activity that would require passage of the bar examination and licensing as an attorney. Counsel asserted that the evidence presented demonstrates that such a position requires a juris doctorate degree. Counsel stated that 80% of the beneficiary's time would be devoted to conducting legal research and preparing legal pleadings and orders. Counsel provided no argument to demonstrate that any of the duties of the position, in themselves, require such a degree.

The director denied the petition on September 22, 2009, finding, as was noted above, that the petitioner had satisfied none of the criteria set forth at 8 C.F.R. § 214.2(h)(4)(iii)(A), and therefore had not established that the proposed position qualifies for classification as a specialty occupation. In that decision, the director found that the duties of the proffered position as described in the petitioner's letter are the duties of a paralegal as described in the U.S. Department of Labor's (DOL) *Occupational Outlook Handbook (Handbook)*.

On appeal, the petitioner provided a letter, dated June 26, 2009, from [REDACTED] a Sacramento, California attorney, who stated that as a law student and recent law graduate she was employed as a law clerk and that she had employed several law clerks in her practice. She stated that a law clerk “. . . is *always* a law student, or a law school graduate who is awaiting results from the state bar exam.” She further stated, “I have never heard of, or seen, any ‘law clerk’ who was anything other than a current law school student or law school graduate.”

In the brief on appeal, the petitioner cited the *Handbook* for the proposition that law clerk positions require a minimum of a bachelor’s degree. As to the specific specialty that degree must be in, the petitioner stated, “However, understandably, the requirement of study in a specific field is dependent on the specific field of practice in which [the] law clerk will work.”

The petitioner stated, “The position offered to the beneficiary qualifies as a specialty occupation because the minimum requirement for the position is a baccalaureate degree and the job duties are the duties of a law clerk.” The petitioner asserted that the proffered position qualifies as a specialty occupation position pursuant to several of the alternative criteria of 8 C.F.R. § (h)(4)(iii)(A).

The AAO recognizes the *Handbook*, relied upon by the petitioner, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.²

To determine whether a particular job qualifies as a specialty occupation, however, USCIS does not simply rely on a position’s title. The specific duties of the proffered position are 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.

The current version of the *Handbook* does not contain an in-depth analysis of law clerk positions. A summary description of law clerk positions indicates that they “[a]ssist lawyers or judges by researching or preparing legal documents [and] [m]ay meet with clients or assist lawyers and judges in court.” It does not otherwise describe the duties of law clerk positions and does not describe the educational requirements of such positions except to say, “most significant source of postsecondary education or training: Bachelor’s degree.”

However, the *Handbook* does contain a detailed analysis of the job duties of “Paralegals and Legal Assistants” in the section of the same name. It describes the duties of those positions as follows:

² The *Handbook*, which is available in printed form, may also be accessed on the Internet, at <http://www.stats.bls.gov/oco/>. The AAO’s references to the *Handbook* are to the 2010 – 2011 edition available online.

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.

The paralegal or legal assistant, then, although not permitted to represent a client in court or elsewhere, performs many of the other duties of an attorney, including the duties listed in the description of the duties of the proffered position.

The petitioner asserted that the proffered position differs from a paralegal or legal assistant position in that it includes making legal judgments and counseling clients, but under supervision of an attorney. Due to the nature and complexity of those judgments and given that counseling has not been demonstrated, nor even alleged, the AAO finds that assertion, absent any evidence, to be an insufficient basis to distinguish the position proffered in the instant case from a paralegal or legal assistant position. The description of the duties of the proffered position is entirely consistent with the *Handbook's* description of the duties of a paralegal or legal assistant, and the AAO finds that the positions are substantially identical.³

³ This finding is further corroborated by the fact that the petitioner designated the position as a law clerk, and not as an associate, attorney position, on the certified Labor Condition Application (LCA) submitted in support of the petition. Moreover, O*Net Online now only associates law clerks with either judicial law clerks (23-1012.00) or paralegals and legal assistants (23-2011.00). See O*Net Online, <http://www.onetonline.org/find/result?s=23-2092&g+Go> (last visited March 26, 2012). As the current position, as described by the petitioner, is clearly not a judicial law clerk position, it follows that the proper classification of this occupation is paralegal or legal assistant.

The *Handbook* describes the educational requirements of paralegal and legal assistant positions as follows:

There are several ways to become a paralegal. The most common is through a community college paralegal program that leads to an associate degree. Another common method of entry, mainly for those who already have a college degree, is earning a certificate in paralegal studies. A small number of schools offer bachelor's and master's degrees in paralegal studies. Finally, some employers train paralegals on the job.

Associate's and bachelor's degree programs usually combine paralegal training with courses in other academic subjects. Certificate programs vary significantly, with some taking only a few months to complete. Most certificate programs provide intensive paralegal training for individuals who already hold college degrees.

The *Handbook* makes clear that paralegal and legal assistant positions do not require a minimum of a bachelor's degree or the equivalent in a specific specialty. As the AAO has found that the duties of the proffered position are substantially identical to those of a paralegal, the AAO finds that the *Handbook* does not support the assertion that the duties of a law clerk/associate, as described by the petitioner, require a minimum of a bachelor's degree or the equivalent in a specific specialty, or that the performance of those duties requires such a degree. The AAO will continue, however, to address the petitioner's claim that the proffered position, designated a law clerk/associate, differs from paralegal and legal assistant positions in that regard.

The record contains several conflicting claims pertinent to the categorical educational requirements of law clerk positions. The petitioner has asserted that the position requires a law degree. The petitioner submitted a letter from another attorney who stated that a law clerk does not necessarily need a law degree, but may, instead, be a law student. Finally, on appeal, the petitioner claimed that law clerk positions require a minimum of a bachelor's degree, and that the specific specialty in which that degree must be is dictated by the type of law practiced.

The AAO observes that the petitioner's initial assertion, that the proffered position requires a law degree, is contradicted by the petitioner's own evidence, specifically, the June 26, 2009 letter asserting that one may hold a law clerk position if one is a law student, but does not have a law degree. The petitioner's own evidence entirely undermines the credibility of that initial claim.

The assertion in the June 26, 2009 letter, that a law clerk position may be held by either a law school student or law school graduate, may well be correct. It does not, however, demonstrate that such a position requires a minimum of a bachelor's degree or the equivalent *in a specific specialty*.

The petitioner's assertion on appeal, that a law clerk position requires a minimum of a bachelor's degree or the equivalent in a specific specialty related to the type of law to be practiced, is not supported by any corroborating evidence. The petitioner provided no evidence, for instance, that

law clerks in a corporate law practice must have a minimum of a bachelor's degree or the equivalent in the law of corporations or a closely-related field. The petitioner provided no evidence that law clerks in a practice specializing in Federal income taxation must have a minimum of a bachelor's degree or the equivalent in tax accounting, or some closely-related subject. More on point, as the petitioner's practice appears to be concentrated in family and domestic relations law, the petitioner provided no evidence that a law clerk position with such a firm normally requires a minimum of a bachelor's degree or the equivalent in a specific specialty directly related to that practice area.

Although the statements by the petitioner are relevant and have been taken into consideration, little weight can be accorded them in the absence of supporting corroborating evidence. An unsupported statement is insufficient to sustain the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r. 1998)(citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg. Comm'r. 1972)).

The petitioner has not demonstrated that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position and has not, therefore, demonstrated that the proffered position satisfies the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

Next, the AAO will consider 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.

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 1151, 1165 (D.Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

As was noted above, the AAO finds that the *Handbook* offers no support for the proposition that the petitioner's industry requires law clerks to have a minimum of a bachelor's degree or the equivalent in a specific specialty. The record contains no indication that any professional association of law clerk/associates has made a bachelor's degree in a specific specialty a requirement for entry.

The record contains a letter from another attorney, as noted above, stating that law clerk positions are only awarded to law school graduates or to law school students. As was also observed above, this does not demonstrate, nor even suggest, that such positions require a minimum of a bachelor's degree or the equivalent in any specific specialty.

The vacancy announcements suggest that a law clerk position may require a law degree. Although seven vacancy announcements are insufficient, of course, to show an industry-wide requirement,⁴ the AAO will assume, *arguendo*, that those announcements represent a valid cross section.

Those vacancy announcements do not, however, address the AAO's finding that the same job duties, if the position is designated "paralegal" or "legal assistant," do not require a law degree nor a minimum of a bachelor's degree or the equivalent in any specific specialty. This suggests that the law degree is required for law clerk positions for some reason other than that the position's duties require such a degree. The reason for that requirement might, for instance, be so that law clerk positions can be used to audition law students and law graduates for future attorney positions.

A petitioner must establish that the position realistically requires knowledge, both theoretical and applied, which is almost exclusively obtained through studies at an institution of higher learning. *C.f. Matter of Michael Hertz, Assoc.*, 19 I&N Dec. 558, 560 (Comm'r. 1988). The requirement of a degree for some other reason does not qualify a position as a specialty occupation. *See id.* That a law clerk position might require a law degree, although a position with identical duties does not, is insufficient to demonstrate that a law clerk position is a position in a specialty occupation.

The petitioner has not demonstrated that a requirement of a minimum of a bachelor's degree in a specific specialty or the equivalent is common to the petitioner's industry in parallel positions among similar organizations, and has not, therefore, demonstrated that the proffered position satisfies the criterion of the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

Next, the AAO will consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A), which is satisfied if the petitioner demonstrates that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree. Again, that the same duties, with a different job title, can be performed by an individual with less than a bachelor's degree-level of education strongly suggests that the position does not qualify as a specialty occupation.

⁴ Although the size of the relevant study population is unknown, the petitioner fails to demonstrate what statistically valid inferences, if any, can be drawn from seven job postings with regard to determining the common educational requirements for entry into parallel positions in similar law offices. *See generally* [REDACTED], *The Practice of Social Research* 186-228 (1995). Moreover, given that there is no indication that the advertisements were randomly selected, the validity of any such inferences could not be accurately determined even if the sampling unit were sufficiently large. *See id.* at 195-196 (explaining that "[r]andom selection is the key to [the] process [of probability sampling]" and that "random selection offers access to the body of probability theory, which provides the basis for estimates of population parameters and estimates of error").

As such, even if the job announcements supported the finding that the position of law clerk for a four-person law firm required a bachelor's or higher degree in a specific specialty or its equivalent, it could not be found that such a limited number of postings that appear to have been consciously selected could credibly refute the statistics-based findings of the *Handbook* published by the Bureau of Labor Statistics that such a position does not require at least a baccalaureate degree in a specific specialty for entry into the occupation in the United States.

On appeal, the petitioner asserted that the proffered position is unique in that the beneficiary has first hand knowledge of both the Roman Dutch legal system and the common law legal system. Obviously, that the beneficiary has some specific knowledge or experience does not change the requirements of the proffered position. The beneficiary's personal qualifications determine whether the beneficiary is qualified to hold a position. They do not determine the requirements of a position, and whether a beneficiary may have a specific degree and/or whether he or she may be over-qualified for a position does not demonstrate that position qualifies as a specialty occupation.

Nevertheless, if the petitioner had stated that knowledge of those two legal systems is a minimum requirement of the proffered position, that may have had some relevance to whether the proffered position qualifies as a specialty occupation position. However, even if the petitioner had, on appeal, stated that as a requirement of the proffered position, rather than merely implying it to be, that assertion would not, given that it was first suggested at this late point in the proceeding, be considered.

On appeal, a petitioner cannot offer a new position to the beneficiary, or materially change a position's title, its level of authority within the organizational hierarchy, or the associated job responsibilities. The petitioner must establish that the position offered to the beneficiary when the petition was filed merits classification as a managerial or executive position. *Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg. Comm. 1978). A petitioner may not make material changes to a petition in an effort to make a deficient petition conform to USCIS requirements. *See Matter of Izummi*, 22 I&N Dec. 169, 176 (Assoc. Comm. 1998).

The petitioner has not demonstrated that the particular position proffered is so complex or unique that it can be performed only by an individual with a degree; and has not, therefore, demonstrated that the proffered position satisfies the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

The record contains no evidence of a previous history of recruiting and hiring to fill the proffered position, and the petitioner has not, therefore demonstrated that the proffered position qualifies as a position in a specialty occupation pursuant to the criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).⁵

⁵ To satisfy this criterion, the record must establish that the specific performance requirements of the position generated the recruiting and hiring history. A petitioner's perfunctory declaration of a particular educational requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the actual employment requirements and, on the basis of that examination, determine whether the position qualifies as a specialty occupation. *See generally Defensor v. Meissner*, 201 F.3d 384. In this pursuit, the critical element is not the title of the position, or the fact that an employer has routinely insisted on certain educational standards, but whether performance of 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 or its equivalent as the minimum for entry into the occupation as required by section 214(i)(1) of the Act. To interpret the regulation any other way would lead to absurd results: if USCIS were constrained to recognize a specialty occupation merely because the petitioner has an established practice of demanding certain educational requirements for the proffered position – and without consideration of how a beneficiary is to be specifically employed – then any alien with a bachelor's degree in a specific specialty could be brought into the United States to perform non-specialty occupations, so long as the employer required all such employees to have baccalaureate or higher degrees. *See id.* at 388.

Finally, the AAO will consider the alternative criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), which is satisfied if the petitioner demonstrates that 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. Again, the *Handbook* indicates that the duties of the proffered position are routinely performed by paralegals and legal assistants with less than a bachelor's degree level of education.

The petitioner has not demonstrated that 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 in a specific specialty or its equivalent. The petitioner has not, therefore, demonstrated that the proffered position meets the requirement of 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

The AAO finds that the director was correct in her determination that the record before her failed to establish that the beneficiary would be employed in a specialty occupation position, and it also finds that the evidence and argument submitted on appeal have not remedied that failure. Accordingly, the appeal will be dismissed and the petition denied on this basis.

As a final note, even if the proffered position were an entry-level associate position for an individual who has not yet passed the bar exam and even if that position were established as qualifying as a specialty occupation, the petition could still not be approved as it would no longer be supported by an LCA that corresponds to the petition. In that event, the petitioner would have been required to submit an LCA certified on or before the date the petition was filed for an entry-level (Level I) attorney position. See 8 C.F.R. § 103.2(b)(1) (requiring eligibility to be established at the time of filing), 20 C.F.R. § 655.705(b) (requiring USCIS to ensure a certified LCA corresponds to the position for H-1B nonimmigrant classification).

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. The appeal will be dismissed and the petition denied.

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