



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

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

MATTER OF B-L-

DATE: MAY 9, 2016

APPEAL OF CALIFORNIA SERVICE CENTER DECISION

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

The Petitioner, a law firm, seeks to temporarily employ the Beneficiary as a part-time “law clerk” under the H-1B nonimmigrant classification for specialty occupations. *See* Immigration and Nationality Act (the Act) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H)(i)(b). The H-1B program allows a U.S. employer to temporarily employ a qualified foreign worker in a position that requires both (a) the theoretical and practical application of a body of highly specialized knowledge and (b) the attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum prerequisite for entry into the position.

The Director, California Service Center, denied the petition. The Director concluded that the Petitioner did not establish that the proffered position qualifies as a specialty occupation in accordance with the applicable statutory and regulatory provisions.

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred by finding that the proffered position is not a specialty occupation

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

I. LAW

Section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), defines the term “specialty occupation” as an occupation that requires:

- (A) theoretical and practical application of a body of highly specialized knowledge, and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The regulation at 8 C.F.R. § 214.2(h)(4)(ii) largely restates this statutory definition, but adds a non-exhaustive list of fields of endeavor. In addition, the regulations provide that the proffered position must meet one of the following criteria to qualify as a specialty occupation:

- (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- (2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A). U.S. Citizenship and Immigration Services (USCIS) has consistently interpreted the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proposed position. *See Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (describing “a degree requirement in a specific specialty” as “one that relates directly to the duties and responsibilities of a particular position”); *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

II. PROFFERED POSITION

With its initial filing, the Petitioner submitted a document entitled “Law Clerk Job Description.” According to this document, the Beneficiary will be responsible for:

- Assisting attorney in preparing legal documents including but not limited to: immigration application packages, bankruptcy petition packages, and tax return/controversy packages.
- Maintaining attorney calendar by planning and scheduling client meetings, conferences, teleconferences, and travel; recording and monitoring court appearance dates, pleadings, and filing requirements; monitoring evidence-gathering; anticipating changes in litigation or transaction preparation requirements.
- Maintaining and updating the in-house immigration form database.
- Writing support letters, declarations, affidavits, and annotated outlines as needed.
- Conducting legal research.
- Documenting and inputting attorney billable time and reimbursable expenses; preparing invoices; tracking payments.
- Maintaining office supplies by checking stocks; placing and expediting orders; evaluating new products.
- Welcoming guests and clients by greeting them in person or on the telephone; answering or directing inquiries to the appropriate location.

The Petitioner's job description states that a candidate for the position must (1) be in his/her final year of Juris Doctorate (J.D.) study, or (2) have a J.D. degree.¹

The Petitioner also submitted a signed employment agreement, in which the following duties and responsibilities were provided for the proffered position:²

- Answer the phone and provide reception services for the firm
- Maintain the firm's calendar by handling scheduling tasks for clients and cases
- Assist in performing legal research duties for the firm
- Assist in performing legal writing and document preparation duties for the firm
- Ensure adequate supplies for the office to maintain normal function
- Promptly inform Employer of any possible conflict of interest Employee may have with any new or existing clients.

In response to the Director's request for evidence (RFE), the Petitioner expanded the Beneficiary's job duties to include the following:

- Researching questions of law at the direction of the attorney.
- Preparing memoranda, motions, complaints, or responses based on research topics and the attorney's direction.
- Preparing draft documents for clients' cases
- Distilling legal options available to clients based on legal research and analysis of the facts of the situation into a clear and concise memorandum for the attorney.
- Reviewing and analyzing client files for completeness and providing recommendations for necessary evidence or other information to complete clients' files.

III. ANALYSIS

On appeal, the Petitioner asserts that the Director erred in its decision concluding that the Petitioner had not established eligibility for the H-1B petition to be approved. Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation.³ Specifically, the record (1) contains inconsistent information regarding the proffered position; and (2) does not establish that

¹ In response to the Director's request for evidence (RFE) and on appeal, however, the Petitioner stated that it requires the completion of a J.D. degree. The Petitioner did not explain the inconsistency.

² The document was signed a few days before the H-1B petition was submitted and indicates that it constitutes the full understanding between the Petitioner and the Beneficiary.

³ Although some aspects of the regulatory criteria may overlap, we will address each of the criteria individually.

the job duties require an educational background, or its equivalent, commensurate with a specialty occupation.⁴

A. Labor Condition Application

We turn first to the labor condition application (LCA) submitted in support of the H-1B petition, in which the Petitioner designated the proffered position under the occupational category “Paralegals and Legal Assistants” corresponding to the Standard Occupational Classification code 23-2011. In the appeal brief, however, the Petitioner states that the duties and skills of the proffered position are significantly greater and go beyond what is expected of even the most skilled paralegals. It further explains that the position is clearly not equivalent to that of a paralegal. According to the Petitioner, the proffered position “sits somewhere between that of paralegal and lawyer.” The Petitioner reports that the position requires the completion of a J.D. degree because of the complexity of the job duties.

The U.S. Department of Labor’s (DOL) “Prevailing Wage Determination Policy Guidance” states that if a position is described as a combination of occupations, the Petitioner should select the relevant occupational category for the highest paying occupation.⁵ In this case, the prevailing wage for the occupational category “Lawyers” (SOC code 23-1011) is significantly higher than the prevailing wage for “Paralegals and Legal Assistants.” Therefore, we must question the Petitioner’s designation of the proffered position under the “Paralegal and Legal Assistants” occupational category. The Petitioner was required to provide, at the time of filing the H-1B petition, an LCA certified for the correct occupational classification in order for it to be found to correspond to the petition. To permit otherwise would result in a petitioner paying a wage lower than that required by section 212(n)(1)(A) of the Act, by allowing that petitioner to simply submit an LCA for a different occupational category at a lower prevailing wage than the one that it claims it is offering to the beneficiary.

Even assuming that the proffered position falls under the occupational category “Paralegals and Legal Assistants,” we further note that the Petitioner selected a Level II wage for the proffered position on the LCA. DOL guidance states that wage levels should be determined only after selecting the most relevant occupational code classification. Then, a prevailing wage determination is made by selecting one of four wage levels for an occupation based on a comparison of the employer’s job requirements to the occupational requirements, including tasks, knowledge, skills, and specific vocational preparation (education, training and experience) generally required for acceptable performance in that occupation. Factors to be considered when determining the wage level for a position include the complexity of the job duties, as well as the levels of judgment, supervision, and understanding required to perform the job duties.

⁴ The Petitioner submitted documentation to support the H-1B petition, including evidence regarding the proffered position and its business operations. While we may not discuss every document submitted, we have reviewed and considered each one.

⁵ For additional information, see U.S. Dep’t of Labor, Emp’t & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

A Level II (qualified) wage rate is appropriate for a position that involves moderately complex tasks that require limited judgment. An indication that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the Occupational Information Network (O*NET) Job Zones.

The occupational category "Paralegals and Legal Assistants," has been assigned an O*NET Job Zone 3, which groups it among occupations for which medium preparation is needed. More specifically, most occupations in this zone "require training in vocational schools, related on-the-job experience, or an associate's degree." See O*NET OnLine Help Center, at <http://www.onetonline.org/help/online/zones>, for a discussion of Job Zone 3. The designation of the proffered position at a Level II on the LCA suggests that the Petitioner's academic and/or professional experience requirements for the proffered position would be equate to training in a vocational school, related on-the-job experience, or an associate's degree as assigned for an occupation designated as O*NET Job Zone 3.

The Petitioner's assertion that the proffered position requires a significant level of responsibility and expertise, as well as the completion of a J.D. degree, do not appear to be reflected in the wage level chosen by it on the LCA.⁶ The statements regarding the claimed level of complexity, independent judgment and understanding required for the proffered position, as well as the requirements, appear to be materially inconsistent with the certification of the LCA for a Level II position. This conflict challenges the overall credibility of the petition in establishing the nature of the proffered position and in what capacity the Beneficiary will be employed. Therefore, we are precluded from finding that the proffered position is a specialty occupation. Nevertheless, assuming, *arguendo*, that the Petitioner adequately addressed the discrepancies discussed above, we will now analyze the evidence of record.

B. First Criterion

We now look to the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(I), which requires that a baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. To inform this inquiry, we recognize DOL's *Occupational Outlook Handbook (Handbook)* as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.⁷

⁶ A petitioner must distinguish its proffered position from others within the occupation through the proper wage level designation to indicate factors such as complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties. Through the wage level, the petitioner reflects the job requirements, experience, education, special skills/other requirements and supervisory duties.

⁷ All of our references are to the 2016-2017 edition of the *Handbook*, which may be accessed at the Internet site <http://www.bls.gov/ooh/>. We do not, however, maintain that the *Handbook* is the exclusive source of relevant information. That is, the occupational category designated by the Petitioner is considered as an aspect in establishing the general tasks and responsibilities of a proffered position, and USCIS regularly reviews the *Handbook* on the duties and educational requirements of the wide variety of occupations that it addresses. To satisfy the first criterion, however, the burden of proof remains on the Petitioner to submit sufficient evidence to support a finding that its particular position would normally have a minimum, specialty degree requirement, or its equivalent, for entry.

The Petitioner designated the position under the occupation “Paralegals and Legal Assistants” on the LCA, therefore, we reviewed the subchapter of the *Handbook* entitled “How to Become a Paralegal or Legal Assistant.” The *Handbook* reports in relevant part: “Most paralegals and legal assistants have an associate’s degree in paralegal studies, or a bachelor’s degree in another field and a certificate in paralegal studies.”⁸ It further specifies, “There are several paths a person can take to become a paralegal. Candidates can enroll in a community college paralegal program to earn an associate’s degree.” It also states that “many employers prefer, or even require, applicants to have a bachelor’s degree.” According to the *Handbook*, “Employers sometimes hire college graduates with no legal experience or legal education and train them on the job.”

The *Handbook* does not support the Petitioner’s assertion that a bachelor’s degree in a specific specialty is required for entry into this occupation. Rather, the *Handbook* indicates that there are various paths to enter into this occupation, such as obtaining an associate’s degree in paralegal studies or a college degree in an unrelated field. The *Handbook* reports that employers sometimes hire individuals who have earned a degree but have no legal experience/education. This passage of the *Handbook* does not indicate that there are any specific degree requirements for these jobs.

In support of the petition, the Petitioner submitted a printout of the North Dakota Supreme Court Rule 5.3 “Responsibilities Regarding Nonlawyer Assistants” and highlights the “Comments” section. The printout provides “guidelines” that are “helpful in evaluating the education, training or experience of a qualified legal assistant.” Thus, contrary to the Petitioner’s assertion, the printout does not state that any of the specified credentials are required for these positions, but rather are intended to be helpful guidelines. Nevertheless, we reviewed the submission and note that, similar to the *Handbook*’s excerpt, the printout indicates that there are numerous paths for these positions, including work experience alone, completion of a certifying examination, an associate’s degree, or a bachelor’s degree.

The Petitioner has not provided documentation from a probative source to substantiate its assertion regarding the minimum requirement for entry into this particular position. Thus, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).

C. Second Criterion

The second criterion presents two, alternative prongs: “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[.]” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (emphasis added). The first half casts its gaze upon the common industry practice, while the alternative prong narrows its focus to the Petitioner’s specific position.

⁸ For additional information regarding the occupational category “Paralegals and Legal Assistants,” see U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook, 2016-17 ed.*, Paralegals and Legal Assistants, available at <http://www.bls.gov/ooh/legal/print/paralegals-and-legal-assistants.htm> (last visited Apr. 27, 2016).

(b)(6)

Matter of B-L-

1. First Prong

To satisfy this first prong of the second criterion, the Petitioner must establish that the “degree requirement” (i.e., a requirement of a bachelor’s or higher degree in a specific specialty, or its equivalent) is common to the industry in parallel positions among similar organizations.

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 previously discussed, the Petitioner has not established that its proffered position is one for which the *Handbook*, or other authoritative source, reports a requirement for at least a bachelor’s degree in a specific specialty, or its equivalent. Thus, we incorporate by reference the previous discussion on the matter. Also, there are no submissions from the industry’s professional association indicating that it has made a degree a minimum entry requirement. Furthermore, the Petitioner did not submit any letters or affidavits from similar firms or individuals in the Petitioner’s industry attesting that such firms “routinely employ and recruit only degreed individuals.”

In support of this criterion, the Petitioner submitted copies of job announcements placed by other employers. However, upon review of the documents, we find that the Petitioner’s reliance on the job announcements is misplaced. First, we note that some of the job postings do not appear to involve organizations similar to the Petitioner. For example, the Petitioner is a two-person law firm, whereas the advertising organizations include:

- U.S. District Court in [REDACTED], North Dakota;
- [REDACTED] in Minnesota;
- [REDACTED];
- [REDACTED] - a contracting company to the Security and Exchange Commission;
- [REDACTED] - a contracting company to the Department of Justice;
- An unidentified international news and information publisher; and
- [REDACTED] – an information solutions and services company with 15,000 employees and 120 offices worldwide.

Furthermore, some of the postings appear to be for staffing agencies and/or provide little or no information regarding the hiring employers. The Petitioner did not supplement the record of proceeding to establish that the advertising organizations are similar to it.

When determining whether the Petitioner and the organization share the same general characteristics, such factors may include information regarding the nature or type of organization.

and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered). It is not sufficient for the Petitioner to claim that an organization is similar and in the same industry without providing a legitimate basis for such an assertion.

Moreover, many of the advertisements do not appear to be for parallel positions. For example, some of the positions appear to be for more senior positions than the proffered position. Moreover, some of the postings do not include the duties and responsibilities for the advertised positions. Thus, it is not possible to determine important aspects of the jobs, such as the day-to-day responsibilities, complexity of the job duties, supervisory duties (if any), independent judgment required or the amount of supervision received. Therefore, the Petitioner has not sufficiently established that the primary duties and responsibilities of the advertised positions are parallel to the proffered position.⁹

As the documentation does not establish that the Petitioner has met this prong of the regulations, further analysis regarding the specific information contained in each of the job postings is not necessary.¹⁰ That is, not every deficit of every job posting has been addressed.

Thus, the Petitioner has not satisfied the first alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

2. Second Prong

We will next consider the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), which is satisfied if the Petitioner shows that its particular position is so complex or unique that it can be performed only by an individual with at least a bachelor's degree in a specific specialty, or its equivalent.

We reviewed the Petitioner's statements regarding the proffered position; however, in the appeal brief, the Petitioner does not assert that it satisfies this prong of the second criterion. Further, the Petitioner has not sufficiently developed relative complexity or uniqueness as an aspect of the proffered position. Thus, the Petitioner has not satisfied the second alternative prong of 8 C.F.R. § 214.2(h)(4)(iii)(A)(2).

⁹ It must be noted that even if all of the job postings indicated that a requirement of a bachelor's degree in a specific specialty is common to the industry in parallel positions among similar organizations (which they do not), the Petitioner has not demonstrated what statistically valid inferences, if any, can be drawn from the advertisements with regard to determining the common educational requirements for entry into parallel positions in similar organizations. *See generally* Earl Babbie, *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").

¹⁰ The Petitioner did not provide any independent evidence of how representative the job postings are of the particular advertising employers' recruiting history for the type of job advertised. As the advertisements are only solicitations for hire, they are not evidence of the actual hiring practices of these employers.

D. Third Criterion

The third criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A) entails an employer demonstrating that it normally requires a bachelor's degree in a specific specialty, or its equivalent, for the position.

To merit approval of the petition under this criterion, the record must establish that a petitioner's imposition of a degree requirement is not merely a matter of preference for high-caliber candidates but is necessitated by performance requirements of the position. While a petitioner may assert that a proffered position requires a specific degree, that statement alone without corroborating evidence cannot establish the position as a specialty occupation. Were USCIS limited solely to reviewing a petitioner's claimed self-imposed requirements, then any individual with a bachelor's degree could be brought to the United States to perform any occupation as long as the Petitioner created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty, or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 388. Evidence provided in support of this criterion may include, but is not limited to, documentation regarding the Petitioner's past recruiting and hiring practices, as well as information regarding employees who previously held the position.

Here, the Petitioner does not assert that it has previously employed an individual for the proffered position, and the evidence of record does not demonstrate the Petitioner's hiring history for the position at issue. Therefore, the Petitioner has not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(3).

E. Fourth Criterion

The fourth criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A) requires a petitioner to establish that the nature of the specific 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 in a specific specialty, or its equivalent.

In support of this criterion, the Petitioner provided a description of the proffered position and information regarding its business operations. However, we note that the Petitioner has provided inconsistent information regarding the duties of the proffered position. While the initial job description and employment agreement consisted of numerous administrative tasks (i.e., answering the phone and providing receptive services, maintaining attorney calendar, preparing invoices, maintaining office supplies, evaluating new products, welcoming guests), the duties provided in response to the RFE elevated the responsibilities of the proffered position to that requiring analysis of facts and law. Notably, the Petitioner did not provide any information with regard to the order of importance and/or frequency of occurrence (e.g., regularly, periodically or at irregular intervals) with which the Beneficiary will perform the duties. As a result, the Petitioner did not establish the primary and essential functions of the proffered position.

While there is no provision in the law for specialty occupations to include non-qualifying duties, we view the performance of duties that are incidental¹¹ to the primary duties of the proffered position as acceptable when they are unpredictable, intermittent, and of a minor nature. Generally, tasks beyond such incidental duties, however, e.g., predictable, recurring, and substantive job responsibilities, must be specialty occupation duties or the proffered position as a whole cannot be approved as a specialty occupation. Here, the record of proceeding does not provide information regarding the percentages of time the beneficiary would spend on non-specified duties for the Petitioner's business.

Moreover, while the Petitioner may believe that the proffered position meets this criterion of the regulations, it has not sufficiently demonstrated how the position as described requires a specialty degree (or its equivalent). For instance, the Petitioner did not submit information relevant to a detailed course of study leading to a specialty degree and did not establish how such a curriculum is necessary to perform the tasks. While a few related courses may be beneficial in performing certain duties of the position, the Petitioner has not demonstrated how an established curriculum of such courses is required.

This is further evidenced by the LCA submitted by the Petitioner in support of the instant petition for a position falling under the "Paralegals and Legal Assistants" occupational category at a Level II (qualified) wage.¹² The record does not establish that this position is significantly different from other positions in the occupational category such that it refutes the *Handbook's* information that a bachelor's degree in a specific specialty, or its equivalent is not required.

In addition, the Petitioner claims that the Beneficiary is qualified for the position, and references her qualifications. However, the test to establish a position as a specialty occupation is not the education or experience of a proposed beneficiary, but whether the position itself requires at least a bachelor's degree in a specific specialty, or its equivalent. The Petitioner has not demonstrated in the record that its proffered position is one with duties sufficiently specialized and complex to satisfy 8 C.F.R. § 214.2(h)(4)(iii)(A)(4).

IV. CONCLUSION

Because the Petitioner has not satisfied one of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it has not demonstrated that the proffered position qualifies as a specialty occupation. The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, that burden has not been met.

¹¹ The two definitions of "incidental" in *Webster's New College Dictionary* 573 (Third Edition, Hough Mifflin Harcourt 2008) are "1. Occurring or apt to occur as an unpredictable or minor concomitant . . . [and] 2. Of a minor, casual, or subordinate nature. . . ."

¹² We incorporate our earlier discussion and analysis regarding the duties of the proffered position, and the designation of the proffered position in the LCA as a Level II position (the second lowest of four assignable wage-levels) relative to others within the same occupational category.

Matter of B-L-

ORDER: The appeal is dismissed.

Cite as *Matter of B-L-*, ID# 16426 (AAO May 9, 2016)