U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF M-M-, LLP

DATE: JULY 22, 2016

APPEAL OF VERMONT SERVICE CENTER DECISION

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

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

The Director, Vermont Service Center, denied the petition. The Director concluded that the Petitioner had not established 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 in her decision.

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

I. LAW

Section 214(i)(l) of the Act, 8 U.S.C. § 1184(i)(l), 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

In the H-1B petition, the Petitioner stated that the Beneficiary will serve as a "law clerk." In response to the Director's request for evidence (RFE), the Petitioner provided the following job duties for the position (verbatim):

- Research legal immigration issues affecting clients (25% of time)
- Draft memos for attorney review for filing (20%)
- Prepare immigration applications under attorney supervision (20%)
- Draft memos on various legal issues for internal firm use (15%)
- Analyze U.S. immigration laws and Chinese laws (10%)
- Attend Immigration Team and general staff meetings (10%)

According to the Petitioner, the position requires a juris doctorate degree or a master of laws degree.

III. ANALYSIS

Upon review of the record in its totality and for the reasons set out below, we determine that the Petitioner has not demonstrated that the proffered position satisfies any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) and, therefore, qualifies as a specialty occupation. Specifically, the record (1) provides inconsistent information regarding the position; and (2) does not establish that the job

duties require an educational background, or its equivalent, commensurate with a specialty occupation.[1]

On the labor condition application (LCA) submitted in support of the H-1B petition, the Petitioner designated the proffered position under the occupational category "Judicial Law Clerks" corresponding to the Standard Occupational Classification code 23-1012.[2] The U.S. Department of Labor's (DOL) *Occupational Outlook Handbook* states that judicial law clerks "[a]ssist judges in court or by conducting research or preparing legal documents. Excludes 'Lawyers' (23-1011) and 'Paralegals and Legal Assistants' (23-2011)."[3] However, the evidence of record does not support the assertion that the Beneficiary will be assisting a judge. Rather, the Beneficiary will be employed to assist attorneys and other legal staff at a law firm. Further, while the Petitioner states on appeal that "the proffered Law Clerk position is more sophisticated and complex than a Paralegal and Legal Assistant position and more closely resembles a Lawyer position"; however, attorneys and paralegals/legal assistants are specifically excluded from the "Judicial Law Clerks" occupational category.[4]

Moreover, if the duties of the proffered position involve more than one occupational category (i.e., "Paralegals and Legal Assistants" and "Lawyers"), the U.S. Department of Labor (DOL) provides guidance for selecting the most relevant category. More specifically, the "Prevailing Wage Determination Policy Guidance" by DOL states the following:

> In determining the *nature of the job offer*, the first order is to review the requirements of the employer's job offer and determine the appropriate occupational classification.

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

[2] The Petitioner classified the proffered position at a Level I wage (the lowest of four assignable wage levels). We will consider this selection in our analysis of the position. A prevailing wage determination starts with an entry level wage and progresses to a higher wage level after considering the experience, education, and skill requirements of the Petitioner's job opportunity. A Level I wage rate is generally appropriate for positions for which the Petitioner expects the Beneficiary to have a basic understanding of the occupation. This wage rate indicates: (1) that the Beneficiary will be expected to perform routine tasks that require limited, if any, exercise of judgment; (2) that she will be closely supervised and her work closely monitored and reviewed for accuracy; and (3) that she will receive specific instructions on required tasks and expected results. U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://flcdatacenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf.

[3] For additional information regarding the occupational category "Judicial Clerks," see U.S. Dep't of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-2017 ed., Judicial Clerks, available at http://www.bls.gov/oes/current/oes231012.htm (last visited July 21, 2016).

[4] The occupational categories "Judicial Law Clerks," "Paralegals and Legal Assistants," and "Lawyers" are distinct and separate occupational categories. On appeal, the Petitioner cannot offer a new position to the Beneficiary, or materially change a position's level of authority within the organizational hierarchy, the associated job responsibilities, or the requirements of the position. The Petitioner must establish that the position offered to the Beneficiary when the petition was filed merits classification for the benefit sought. *See Matter of Michelin Tire Corp.*, 17 I&N Dec. 248, 249 (Reg'l Comm'r 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'r 1998).

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

U.S. Dep't of Labor, Emp't & Training Admin., *Prevailing Wage Determination Policy Guidance*, Nonagric. Immigration Programs (rev. Nov. 2009), available at http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

If the Petitioner believed its position falls under more than one occupational category, it should have chosen the relevant occupational code for the highest paying occupation. For example, at the time the Petitioner's LCA was certified, the Level I prevailing wage for "Lawyers" in the area of intended employment was $73,466 per year, which is significantly higher than the prevailing wage for "Paralegals and Legal Assistants" – and for "Judicial Law Clerks."[5]

Under the H-1B program, a petitioner must offer a beneficiary wages that are at least the actual wage level paid by a petitioner to all other individuals with similar experience and qualifications for the specific employment in question, or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application. *See* section 212(n)(1)(A) of the Act, 8 U.S.C. § 1182(n)(1)(A).

As such, the Petitioner has not established (1) that it submitted a certified LCA that properly corresponds to the claimed occupation and duties of the proffered position; and (2) that it would pay the Beneficiary an adequate salary for her work, as required under the Act, if the petition were granted. These issues preclude the approval of the petition.

Moreover, the description of the Beneficiary's duties, as provided by the Petitioner, lack the specificity and detail necessary to support the Petitioner's contention that the position is a specialty occupation. While a generalized description may be appropriate when defining the range of duties that are performed within an occupation, such generic descriptions generally cannot be relied upon by the Petitioner when discussing the duties attached to specific employment for H-1B approval. In establishing such a position as a specialty occupation, the description of the proffered position must include sufficient details to substantiate that the Petitioner has H-1B caliber work for the

[5] For more information regarding the wages for "Lawyers" – SOC (ONET/OES Code) 23-1011, in the NY Metropolitan Statistical Area for the period 7/2014 – 6/2015, see http://www.flcdatacenter.com/OesQuickResults.aspx?code= &year=15&source=1 (last visited July 21, 2016).

Beneficiary. Here, the job description does not communicate (1) the actual work that the Beneficiary would perform on a day-to-day basis; (2) the complexity, uniqueness and/or specialization of the tasks; and/or (3) the correlation between that work and a need for a particular level education of highly specialized knowledge in a specific specialty.

The Petitioner, thus, has not established the substantive nature of the work to be performed by the Beneficiary. We are therefore precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A), because it is the substantive nature of that work that determines (1) the normal minimum educational requirement for the particular position, which is the focus of criterion 1; (2) industry positions which are parallel to the proffered position and thus appropriate for review for a common degree requirement, under the first alternate prong of criterion 2; (3) the level of complexity or uniqueness of the proffered position, which is the focus of the second alternate prong of criterion 2; (4) the factual justification for a petitioner normally requiring a degree or its equivalent, when that is an issue under criterion 3; and (5) the degree of specialization and complexity of the specific duties, which is the focus of criterion 4. Considering all of the evidence, we cannot conclude that the petition and LCA accurately reflect the substantive nature of the work to be performed by the Beneficiary.

IV. CONCLUSION

Accordingly, as the Petitioner has not established that it has satisfied any of the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A), it cannot be found 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.

ORDER: The appeal is dismissed.

Cite as *Matter M-M-, LLP*, ID# 17198 (AAO July 22, 2016)