



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

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

MATTER OF L-O-O-W-KTK-

DATE: FEB. 23, 2017

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 “foreign counsel” 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, California Service Center, denied the petition. The Director concluded that the Petitioner had not established that (1) the Beneficiary has the appropriate licensure; (2) the proffered position qualifies as a specialty occupation; and (3) the Petitioner has complied with requirements governing the labor condition application (LCA).

The matter is now before us on appeal. In its appeal, the Petitioner submits additional evidence and asserts that the Director erred in her findings and conclusions.

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

I. SPECIALTY OCCUPATION

We will first address whether the proffered position qualifies as a specialty occupation.

A. Legal Framework

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). We have 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).

B. Proffered Position

In the H-1B petition, the Petitioner indicated that it is an immigration law office seeking to employ the Beneficiary in the position of “foreign counsel.” The LCA submitted in support of the petition is certified for a position, also titled “foreign counsel,” which correspond to the Standard Occupational Classification (SOC) code and title 23-1011, “Lawyers,” from the Occupational Information Network (O*NET).

In its support letter, the Petitioner stated that it “seeks to hire [the Beneficiary] as Foreign Counsel to the company, due to her unique combination of education and expertise in international and Chinese business law, as well as her knowledge and experience in U.S. immigration law.” The Petitioner provided the following description of the proffered position’s duties (verbatim):

As Foreign Counsel, [the Beneficiary’s] specific responsibilities will include:

- Under supervision of firm’s principal attorney, analyze and plan case strategy for U.S. employment-based immigration cases to be filed on behalf of

- international investors, companies, and individuals and asylum cases to be filed on behalf of persecuted individuals
- Conduct legal research on a variety of business law, international law, Chinese law, asylum law, and immigration law issues
 - Under supervision of firm's principal attorney, draft, review, and negotiate legal and corporate documents including business entity formation paperwork, business contracts, employment contracts, business plans, immigration petitions, asylum applications, memorandums, briefs, motions, RFE responses, and appeals
 - Under supervision of firm's principal attorney, communicate with foreign clients to gather information, convey advice, and build business relationships
 - Liaise with client representatives (lawyers, accountants, etc.) and other professionals (country condition experts, doctors, etc.) to gather information for business and asylum immigration cases

In the same letter, the Petitioner referenced the American Bar Association's (ABA) Model Rule 5.5(d), which permits foreign lawyers to work in the United States under certain circumstances. The Petitioner further stated: "There is no entry in the *Occupational Outlook Handbook* ('OOH') or [O*NET] for the occupation of Foreign Counsel. It is a position that is a hybrid of the occupations of Lawyer and Judicial Law Clerk."

In response to the Director's request for evidence (RFE) which requested evidence that the Beneficiary possesses the appropriate licensure for a foreign lawyer position, the Petitioner responded that "[t]he beneficiary is not a member of a recognized legal profession in a foreign jurisdiction." The Petitioner then stated that "the duties of the offered position of Foreign Counsel closely resemble that of a Post-Graduate Law Clerk. The position is virtually identical to an unlicensed lawyer (foreign counsel) (OES/SOC Code: 23-1011, OES/SOC Title: Lawyers;) and/or a judicial law clerk (OES/SOC Code: 23-1012, OES/SOC Title: Judicial Law Clerks)." On appeal, the Petitioner reiterates its belief that the duties of the proffered position "are most similar to those of a Judicial Law Clerk or Lawyer." The Petitioner further emphasizes that "the position is one that involves all the typical duties of a Lawyer."

According to the Petitioner, the proffered position requires a law degree, i.e., a J.D., LL.M, or bachelor of law degree, but does not require a law license.

C. Analysis

We find that the evidence of record does not establish the substantive nature of the proffered position.

On one hand, the Petitioner asserts that the proffered position is a lawyer position. The Petitioner identified the proffered position on the H-1B petition and LCA as a "foreign *counsel* (emphasis added)," and designated the position on the LCA under the SOC code and title 23-1011, "Lawyers."

The Petitioner even stated that the position “is virtually identical to an unlicensed lawyer (foreign counsel),” and that it “is one that involves all the typical duties of a Lawyer.” Additionally, the Petitioner referenced the ABA Model Rule 5.5(d) pertaining to foreign “lawyers.”

A review of the proffered duties reflects that the position could be appropriately classified under the “Lawyers” occupational classification. The proffered job duties of (1) analyzing and planning case strategy for U.S. employment-based immigration cases, (2) drafting, reviewing, and negotiating legal and corporate documents, and (3) communicating with foreign clients to convey advice, largely appear to correspond to the duties typically performed by lawyers as described in O*NET. In fact, the Petitioner specifically highlights the position’s “similar relevant tasks” to O*NET-listed duties for lawyers including (1) preparing and drawing up legal documents, (2) managing or advising clients on legal transactions, and (3) advising clients concerning business transactions or other legal rights and obligations.¹ The proffered duties also appear consistent with the typical job duties of lawyers as described in the U.S. Department of Labor’s (DOL) *Occupational Outlook Handbook (Handbook)*, which summarizes this occupation’s duties as to “advise and represent individuals . . . on legal issues and disputes.”²

But, despite these apparent similarities, we cannot determine that the proffered position falls under the “Lawyers” occupational classification. First, the Petitioner’s job descriptions are deficient in critical areas, such as what exactly the Beneficiary will do when negotiating legal documents or conveying advice to clients. Second, the Petitioner specifically denies that the position is a lawyer position.

Here, the Petitioner maintains that the proffered position is “virtually identical to an unlicensed lawyer” position, but does not involve the practice of law nor require a law license. But the Petitioner has not sufficiently answered the question of *why*. In other words, the Petitioner has not sufficiently explained what recognizable job position an “unlicensed lawyer” is, and what job duties such a position would perform that are different from duties typically performed by lawyers which require a law license.

The *Handbook* states that “[t]o practice law in any state, a person must be admitted to its bar under rules established by the jurisdiction’s highest court.” In the State of California where the Petitioner’s offices are located, the services of providing legal counsel and advice, and preparing legal documents, are activities normally classified as the practice of law requiring an active law license. *See, e.g., Birbrower, Montalbano, Condon & Frank, P.C., v. Superior Court*, P.2d. 1, 5 (Cal.

¹ For more information about the typical duties of lawyers as described in O*NET, see the O*NET Details Report for 23-1011.00, “Lawyers,” <https://www.onetonline.org/link/details/23-1011.00> (last visited Feb. 22, 2017). This report states that lawyers perform job duties such as “[a]nalyze the probable outcomes of cases,” “[a]dvice clients . . . [of] legal rights and obligations,” “[i]nterpret laws, rulings and regulations for individuals,” “[p]repare, draft, and review legal documents,” and “[n]egotiate settlements of civil disputes. *Id.*

² U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Lawyers,” <https://www.bls.gov/ooh/legal/print/lawyers.htm> (last visited Feb. 22, 2017). We recognize both O*NET and the *Handbook* as authoritative sources on the duties of the wide variety of occupations that they address.

1998)(quoting *People v. Merchants' Protective Corp.*, 209 P. 363, 365 (Cal. 1922)). See also Cal. Bus. & Prof. Code Ann. § 6125 (West) (no person shall practice law unless the person is an active member of the bar). The proffered duties, which specifically involve drafting and negotiating legal and corporate documents, and communicating with foreign clients to convey advice, could be consistent with the practice of law under these general definitions.³

Moreover, the Petitioner has not cited to any provisions under California or federal law recognizing the position of an unlicensed foreign lawyer. *But see* Cal. R. Ct. 988(d) (defining a “registered foreign legal consultant” as a person who (1) “is admitted to practice and is in good standing as an attorney or counselor of law or the equivalent in a foreign country”; and (2) is currently registered with the State Bar as a Registered Foreign Legal Consultant). The Petitioner relies upon ABA Model Rule 5.5(d) pertaining to foreign lawyers. However, this model rule specifically states that foreign lawyers who provide legal services must be “admitted [to the bar] in another United States jurisdiction or in a foreign jurisdiction.” ABA Model Rule 5.5(e) further states that “the foreign lawyer must be a member in good standing of a recognized legal profession in a foreign jurisdiction, the members of which are admitted to practice as lawyers or counselors at law or the equivalent.” The Petitioner has not demonstrated that an “unlicensed foreign lawyer” position is one that is legally recognizable. The Petitioner must support its assertions with relevant, probative, and credible evidence. See *Matter of Chawathe*, 25 I&N Dec. 369, 376 (AAO 2010).

The Petitioner attempts to distinguish the proffered position from a lawyer position by stating that the Beneficiary will perform her duties under the supervision of the firm’s principal attorney. We are not persuaded. In essence, the Petitioner has not demonstrated how the Beneficiary’s performance of legal duties under a licensed attorney’s supervision is any different from duties performed by an entry-level or junior-level attorney. The *Handbook* states, for example, that “[n]ewly hired attorneys usually start as associates and work with more experienced lawyers.” The Petitioner similarly asserts that the proffered position “is actually one reserved for junior apprentice judges or attorneys.” A junior-level attorney, however, is still an attorney.

We are also unpersuaded by the Petitioner’s characterization of the proffered position as a “hybrid” between “Lawyers” and “Judicial Law Clerks” positions. A “hybrid” position is one that *combines* duties of both professions. But as observed by the Director, the proffered position is not a judicial law clerk because it does not assist a judge.⁴ The Petitioner has not articulated why the proffered position nevertheless encompasses “Judicial Law Clerks” positions in light of this fundamental

³ California courts have also recognized that the determination of what constitutes the practice of law, and conversely the unauthorized practice of law, is not an easy endeavor. See *Baron v. City of L.A.*, 469 P.2d 353, 357-58 (Cal. 1970) (the process of ascertaining whether a particular activity constitutes the practice of law “may be a formidable endeavor”) (citing *Agran v. Shapiro*, 273 P.2d 619 (Cal. Ct. App. 1954)); *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007) (“[d]etermining whether particular assistance rendered in the preparation of legal forms constitutes the unauthorized practice is often especially challenging”). As such, conclusory statements that the proffered job duties do not comprise the practice of law, without more, are insufficient for these purposes.

⁴ Judicial law clerks “[a]ssist judges.” See O*NET Details Report for “Judicial Law Clerks,” <https://www.onetonline.org/link/details/23-1012.00> (last visited Feb. 22, 2017).

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deficiency. And as discussed above, the Petitioner has not elucidated what traits of the “Lawyers” profession that the proffered position shares but do not encompass the practice of law. We therefore do not agree with the Petitioner’s characterization of the proffered position as a “hybrid” position.

If the proffered position is not a position under the “Lawyers” occupational classification, then it could be a position under the “Paralegals and Legal Assistants” occupational classification corresponding to SOC code 23-2011. We observe, for example, similarities between the proffered job duties and the typical duties of paralegals and legal assistants who also draft legal documents, communicate with clients, and perform legal research, among other duties.⁵ We also observe the *Handbook’s* statement that “paralegals can be a less costly alternative to lawyers despite performing a wide variety of tasks once done by entry-level lawyers.”⁶ While the Petitioner maintains that the proffered position is not a paralegal or legal assistant position, it has not sufficiently explained why. For instance, the Petitioner indicates that paralegals and legal assistants do not commonly need legal writing skills,⁷ but has not cited to authoritative sources (such as O*NET or the *Handbook*) to support this assertion.

The Petitioner alternatively asserts that the proffered position should be classified as a “Post-Graduate Law Clerk,” which it claims is a distinct occupational classification notwithstanding the lack of a corresponding O*NET SOC code/title or relevant *Handbook* information on it. In order to “highlight the existence of this position, despite the omission from the [*Handbook*], O*NET or SOC,” the Petitioner cites to the Immigration Court/Board of Immigration Appeals’ practice manual which allows for “law graduates” to appear before these bodies. But the same practice manual states that a “law graduate” must be “without direct or indirect remuneration from the alien being represented,” something the Petitioner has neither asserted nor demonstrated about the proffered position.

The Petitioner additionally cites to an article on the website of [REDACTED] describing the duties of a “law clerk” as to “help lawyers and judges in law firms, courts, and other types of legal settings.” Upon close review of this article, however, we observe that it further states that “[t]he majority of individuals that wish to work as a law clerk will complete a bachelor’s degree and at least *one year of law school* (emphasis added).” This statement undermines the Petitioner’s assertion that a “law clerk” position such as the proffered position requires a (completed) law degree. Further undermining the Petitioner’s assertions, this article groups “law clerks” together with “legal assistants” and “paralegals.” The Petitioner has not cited to authoritative sources to support the existence of a distinct, non-judicial “Post-Graduate Law Clerk” occupational classification which is appropriate for the proffered position.

⁵ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Paralegals and Legal Assistants,” <https://www.bls.gov/ooh/legal/print/paralegals-and-legal-assistants.htm> (last visited Feb. 22, 2017). For more information about “Paralegals and Legal Assistants,” also see the O*NET Details Report for this occupation, available at <https://www.onetonline.org/link/details/23-2011.00> (last visited Feb. 22, 2017).

⁶ U.S. Dep’t of Labor, Bureau of Labor Statistics, *Occupational Outlook Handbook*, 2016-17 ed., “Paralegals and Legal Assistants,” <https://www.bls.gov/ooh/legal/print/paralegals-and-legal-assistants.htm> (last visited Feb. 22, 2017).

⁷ The Petitioner states on appeal that 0% of paralegals need legal writing skills.

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In short, it is not evident whether the proffered position is a lawyer, paralegal, legal assistant, or another type of recognized, non-judicial legal position.⁸ Based on the inconsistencies and deficiencies in the evidence of record, we cannot determine the substantive nature of the proffered position. A crucial aspect of this matter is whether the Petitioner has adequately and consistently described the duties of the proffered position, such that USCIS may discern the nature of the position and whether the position indeed 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 Petitioner has not done so here.

Because the Petitioner has not established the substantive nature of the work to be performed by the Beneficiary, we are precluded from finding that the proffered position satisfies any criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A). It is the substantive nature of that work that determines (1) the normal minimum educational requirement for entry into 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.

We will briefly address the position evaluation by [REDACTED] associate professor at the [REDACTED]. This evaluation concludes that the proposed “Post-Graduate Law Clerk” position and its constituent duties require at least a bachelor’s degree in legal studies, or its equivalent, and therefore qualifies as a specialty occupation. However, we find that this evaluation makes only conclusory statements regarding the proffered position. It does not explain in detail why, for example, the proffered position does not include any duties that might be considered the practice of law such that a law license is necessary, or why it differs from a paralegal position. This evaluation does not provide additional, meaningful insight into the substantive nature of the proffered position.

We may, in our discretion, use opinion statements submitted by the Petitioner as advisory. *Matter of Caron Int’l, Inc.*, 19 I&N Dec. 791, 795 (Comm’r 1988). However, where an opinion is not in accord with other information or is in any way questionable, we are not required to accept or may give less weight to that evidence. *Id.* Consequently, we do not find this evaluation sufficiently probative towards satisfying any criterion outlined in 8 C.F.R. § 214.2(h)(4)(iii)(A).

⁸ Under the O*NET classification system, recognizable non-judicial legal professions include “Lawyers” (SOC code 23-1011), “Paralegals and Legal Assistants” (SOC code 23-2011), “Legal Secretaries” (SOC code 43-6012), and “Legal Support Workers, All Other” (SOC code 23-2099). Notably, the Petitioner did not select the occupational classification of “Legal Support Workers, All Other.”

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.

II. DIRECTOR'S OTHER GROUNDS

Because we cannot determine the substantive nature of the proffered position, we cannot determine whether the Beneficiary has the appropriate licensure. Differently stated, we cannot determine whether the Beneficiary needs a license to practice law because it is not evident whether the position being offered is a lawyer position requiring a law license.⁹ In any event, a beneficiary's credentials to perform a particular job are relevant only when the job is found to be a specialty occupation. As discussed in this decision, the Petitioner has not demonstrated that the proffered position qualifies as a specialty occupation

Furthermore, we cannot determine whether the Petitioner has complied with its obligations concerning the LCA. For instance, we cannot ascertain whether the submitted LCA, which is certified for a position under the "Lawyers" occupational classification, supports and corresponds to the instant petition in light of the inconsistent descriptions of the proffered position. We also cannot ascertain whether the Petitioner has met its wage obligations, which are inherently dependent upon the position's proper classification.

Therefore, we will not discuss the Director's other grounds for denial, i.e., that the record does not demonstrate (1) the Beneficiary is qualified for the proffered position; and (2) the Petitioner has complied with its LCA obligations.

III. CONCLUSION

The burden is on the Petitioner to show eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.

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⁹ The Petitioner acknowledges that the Beneficiary does not have a license to practice law in the United States or in a foreign country.