

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

PS LIFESTYLE LLC)
55 Public Square)
Suite 1180)
Cleveland, OH 44113,)

Plaintiff,)

v.)

U.S. CITIZENSHIP AND)
IMMIGRATION SERVICES,)
c/o Office of the General Counsel)
245 Murray Lane, SW)
Mail Stop 0485)
Washington, DC 20528-0485,)

L. Francis CISSNA,)
Director, U.S. Citizenship and Immigration)
Services, in his Official Capacity,)
c/o Office of the General Counsel)
245 Murray Lane, SW)
Mail Stop 0485)
Washington, DC 20528-0485,)

Defendants.)

Civil Action No.

**COMPLAINT FOR DECLARATORY
RELIEF AND REVIEW OF
AGENCY ACTION UNDER THE
ADMINISTRATIVE PROCEDURE ACT**

INTRODUCTION

1. Plaintiff PS Lifestyle LLC (PS Lifestyle) challenges the Defendants’ arbitrary and unlawful decision to deny an “H-1B” nonimmigrant petition, with a request for a change of status and extension of stay (hereafter “H-1B petition”), that it filed on behalf of Ms. Anu Varghese so that it could continue to employ her as its Director of Business Development. PS

Lifestyle is an Ohio Limited Liability Company that operates salons and spas in senior communities across the United States and provides amenity services to seniors, their families and the communities in which the seniors live.

2. The H-1B visa classification allows highly skilled and educated foreign workers to work for U.S. employers in “specialty occupations”—that is, positions requiring the theoretical and practical application of a body of highly specialized knowledge, for which a bachelor’s or higher degree in a specific specialty is required.

3. The position for which PS Lifestyle filed the H-1B petition, Director of Business Development, falls within the ever-growing occupation of business intelligence analyst. The Director of Business Development is responsible for gathering, organizing, analyzing, and reporting on sales and market data. Specifically, she produces financial and market intelligence for PS Lifestyle, develops models for identifying data patterns and trends, and employs this business intelligence for the benefit of PS Lifestyle and its senior community partners. PS Lifestyle requires that this employee have at least a master’s degree in Business Administration, Finance, or a similar field, and related professional experience.

4. In support of its petition, PS Lifestyle submitted a detailed job description, including specific duties and percentages of time to be spent on each, and supporting evidence consisting of a scholarly academic article and an online source of occupational information developed under U.S. Department of Labor sponsorship, which demonstrated that the job is within a specialty occupation within the meaning of the Immigration and Nationality Act (INA).

5. In denying PS Lifestyle’s H-1B petition, Defendants disregarded substantial probative evidence detailing the job duties, their complexity and the correlation between the

duties and PS Lifestyle's requirement that its Director of Business Development hold at least a master's degree in Business Administration, Finance, or a similar field.

6. Defendants acted in an arbitrary and capricious manner and contrary to law in denying PS Lifestyle's H-1B petition. As such, the Court should vacate the denial and approve the H-1B petition.

JURISDICTION

7. This case arises under the INA, 8 U.S.C. § 1101 *et seq.* and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). This Court also has authority to grant declaratory relief under 28 U.S.C. §§ 2201-02, and relief under the APA. There exists between the parties an actual and justiciable controversy over which Plaintiff seeks declaratory relief to protect its legal rights. The United States has waived its sovereign immunity under 5 U.S.C. § 702.

VENUE

8. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(A), because this is a civil action in which the Defendants, respectively, are an agency of the United States and an officer of the United States acting in his official capacity, and they reside in this District.

EXHAUSTION OF REMEDIES

9. Defendant U.S. Citizenship and Immigration Services' (USCIS) November 27, 2018 denial of Plaintiff PS Lifestyle's H-1B petition constitutes final agency action under the APA. *See* 5 U.S.C. §§ 551(13); 701(b)(2); 704. Neither the INA nor implementing regulations at 8 C.F.R. § 103.3(a) require an administrative appeal of the denial. Accordingly, Plaintiff has no administrative remedies to exhaust.

PARTIES

10. Plaintiff PS Lifestyle began in 2008 by transforming “beauty shops” in senior communities into professional salons and spas. The company learned from this experience that it had three customers for each service provided: the senior, the senior’s family, and the senior’s community. PS Lifestyle evolved to offer an innovative platform of branded service, product and media initiatives. These initiatives include over 650 salons and spas in senior communities, the only online system for friends and family to order products and services for senior community residents, publishing a pro-aging lifestyle magazine, and design and procurement services for senior community salons and spas. PS Lifestyle, which submitted the H-1B petition at issue here, employs approximately 1,300 workers in the United States.

11. Defendant USCIS is a component of the Department of Homeland Security, 6 U.S.C. § 271, and an “agency” within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is responsible for the adjudication of immigration benefits, including nonimmigrant visa petitions. USCIS denied the H-1B petition at issue here.

12. Defendant L. Francis Cissna is the Director of USCIS. In this role, he oversees the adjudication of immigration benefits, and establishes and implements governing policies. He has ultimate responsibility for the adjudication of Plaintiff PS Lifestyle’s H-1B petition and is sued in his official capacity.

LEGAL BACKGROUND

H-1B Petition Process

13. Section 101(a)(15)(H)(i)(b) of the INA provides for the admission into the United States of temporary workers sought by petitioning U.S. employers to perform services in a

specialty occupation. 8 U.S.C. § 1101(a)(15)(H)(i)(b). This nonimmigrant classification is commonly referred to as “H-1B.”

14. A “specialty occupation” is one that requires the “(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.” 8 U.S.C. § 1184(i).

15. The H-1B classification has several prerequisites a U.S. employer must meet before filing a nonimmigrant visa petition with USCIS. One of relevance is the statutory requirement that the employer file a Labor Condition Application (LCA) for certification by the U.S. Department of Labor (DOL). 8 U.S.C. § 1182(n)(1). The employer makes certain attestations in the LCA which are intended to ensure that the employment of an H-1B worker will not have an adverse effect on the wages and working conditions of similarly-situated U.S. workers. *See* 8 U.S.C. §§ 1182(n)(1)(A)-(D).

16. To demonstrate to DOL that it will pay the higher of the prevailing or actual wage (the required wage) for its job, the employer may obtain a prevailing wage from a DOL online wage library, using a Standard Occupational Classification (SOC) for the job, the job location and one of four wage levels depending on the employer’s education and experience requirements. At the time PS Lifestyle filed the LCA, the instructions directed it to enter the six or eight-digit SOC code for the occupation which most clearly describes the work to be performed. For PS Lifestyle, the closest SOC to its Director of Business Development job is 15-1199.08, Business Intelligence Analysts. While the DOL online wage library lists this SOC, it only provides wage levels for 15-1199, “Computer Occupations, All Other.” Consequently,

although PS Lifestyle entered SOC code 15-1199.08 into the DOL's online LCA filing system, DOL subsequently shortened the SOC code to 15-1199 when certifying the LCA.

17. When the U.S. employer files the H-1B nonimmigrant visa petition on the foreign national's behalf with USCIS, the employer must include the DOL-certified LCA. If the foreign national is already in the United States in a different nonimmigrant visa status—such as Ms. Varghese, who was in F-1 student status—the petitioning employer may designate in the petition that the foreign national is requesting a change of status to H-1B and an extension of her stay in the United States.

H-1B Lottery

18. Congress established a “cap” of 65,000 regular H-1B visa numbers per fiscal year (FY). *See* 8 U.S.C. § 1184(g)(1). An additional 20,000 H-1B visa numbers are available each FY without regard to the regular 65,000 “cap” if the beneficiary has a master's or higher degree from a U.S. university. *See* 8 U.S.C. § 1184(g)(5)(C). USCIS has characterized the 20,000 additional visa numbers as the H-1B “master's exemption.”

19. A U.S. employer whose petition is subject to the annual “cap” may file on the first business day of April for employment that begins on October 1 of that year (the first day of the next FY). If USCIS determines that it has received more than enough petitions to meet the H-1B numerical limits at any time within the first five business days of the filing period, it uses a computer-generated random selection process (lottery) to select H-1B petitions for adjudication from the petitions received during that time period.

H-1B Requirements

20. For an H-1B classification, USCIS determines whether the petitioning employer's job qualifies as a specialty occupation and whether the beneficiary is qualified to perform the job

duties required by the specialty occupation. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(A)(1), (h)(4)(iii)(B)(3).

21. The agency regulation provides:

(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must 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 are [*sic*] 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)(1)-(4).

FACTUAL ALLEGATIONS

Plaintiff PS Lifestyle

22. Plaintiff PS Lifestyle employs approximately 1,300 workers in the United States and earned a gross annual income of \$18 million in fiscal year 2016. Established in 2008 as an Ohio limited liability company, PS Lifestyle’s core values and mission are “To Inspire and Elevate Individual Experiences.”

23. PS Lifestyle serves its triumvirate of customers—seniors, their families, and the senior communities in which they live—through several initiatives. Its PS Salon and Spa is a leading salon and spa operator within senior communities in the United States, with more than 650 locations across 35 states. Its PS Shop is the industry’s only online site through which families and friends can purchase salon and spa services, “pro-aging” products, and personalized

gift certificates. PS Shop provides a convenient way for families and friends to connect with seniors in these communities, while complementing the marketing and communications efforts of the senior communities that partner with it. PS Lifestyle publishes *American Senior Magazine*, to educate and empower seniors 65 and older, their families, friends and caregivers. Its PS Salon Design and Procurement division provides services related to establishing and equipping salons and spas in senior communities.

Varghese's Employment with PS Lifestyle

24. Ms. Varghese is a highly-educated Indian citizen, who earned her advanced degree in the United States. She received a Bachelor of Engineering degree in Electronics Engineering in 2011, from the Madhav Institute of Technology & Science in Gwalior, India. She received her Master of Business Administration (MBA) in May 2017 from Case Western Reserve University in Cleveland, Ohio, concentrating her course work on Finance.

25. Ms. Varghese presently holds F-1 student immigration status. As a practicum through her current degree program enrollment, she continues to work at PS Lifestyle in the same job as in the past. Throughout all periods of her employment with PS Lifestyle, she has complied with her F-1 status. Should USCIS approve PS Lifestyle's H-1B petition, she will resume her work full-time as Director of Business Development as an H-1B nonimmigrant.

PS Lifestyle's H-1B Petition

26. In April 2018, PS Lifestyle properly submitted its H-1B petition for consideration as a "master's exemption" petition. Included with this petition was a request to change Ms. Varghese's status from F-1 student to H-1B and to extend her stay in the United States. PS Lifestyle filed the H-1B petition because it had made an investment in Ms. Varghese and wanted to continue benefiting from her contributions to PS Lifestyle's operations. Pursuant to its lottery,

USCIS randomly selected PS Lifestyle's petition and, on or about April 12, 2018, accepted PS Lifestyle's H-1B petition for filing.

27. In support of its H-1B petition, PS Lifestyle included, among other evidence, a March 31, 2018 letter that described PS Lifestyle, the Director of Business Development job duties, including percentages of time spent performing each of these duties, and Ms. Varghese's qualifications. This evidence specified that the minimum education required for the Director of Business Development job was a master's degree in Business Administration, Finance, or a similar field. PS Lifestyle also required related professional experience.

28. In its letter, PS Lifestyle described the Director of Business Development's primary responsibilities as:

Produc[e] financial and market intelligence by querying data repositories and generating periodic reports; devise models and methods for identifying data patterns and trends in available information sources; develop business intelligence solutions independently through knowledge of business needs, appropriate data repositories, relational databases, spreadsheets, BI [business intelligence] best practices and project management techniques.

29. PS Lifestyle also provided a detailed description of the six sets of duties required to perform the responsibilities of the Director of Business Development, with percentages for each, totaling 100 percent. These were as follows:

Maintain and update the entire data repository, query and manipulate data using SQL [Structured Query Language, for communicating with relational database management systems] and VBA [Visual Basic for Applications, a computer language] to fully support the company's ongoing performance reporting needs and metrics design and facilitate easy search capabilities. Perform data cleaning and data analysis on historical data to find trends in business and financial data to determine the next course of action for business. (25 percent)

Conduct statistical analysis using SPSS, R and Tableau [types of data analytics tools] to generate financial or quantitative models to estimate revenues for potential customers and in turn help partner with the best communities to increase revenues. This includes collecting business requirements, gathering financial data, testing the

models by applying various methods such as multiple regression, logistic regression and decision trees, implementing them and documenting solutions. (25 percent).

Analyze macroeconomic and geographic trends to draw key insights that drive corporate strategy and business development. Use continuous improvement techniques to measure profitability using key performance indicators. (10 percent)

Facilitate in setting up a CRM [Customer Relationship Management] system to manage business relationships, customer and financial data. (10 percent)

Manage timely flow of business intelligence information to business development and marketing team to help them focus and market to the right customers. Generate custom reports summarizing business, financial or economic data for use by executives and managers. (20 percent)

Communicate with customers, partners and professional organizations to stay abreast of industry or business trends. (10 percent).

30. On October 15, 2018, Defendant USCIS issued a request for evidence (“RFE”).

USCIS claimed that PS Lifestyle had not met any of the regulatory criteria to qualify for a specialty occupation. The RFE included suggestions as to the type of evidence that PS Lifestyle could include to establish each of the regulatory criteria.

31. PS Lifestyle’s timely RFE response demonstrated that the Director of Business Development position fell within a specialty occupation. Relevant here, PS Lifestyle demonstrated that the position is so complex that it can be performed only by an individual with a master’s degree in Business Administration, Finance or a similar field, thus satisfying 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (the second prong). Additionally, PS Lifestyle demonstrated that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s or higher degree, thus satisfying 8 C.F.R. § 214.(h)(4)(iii)(A)(4). Either of these, standing alone, demonstrated that the position was a specialty occupation.

32. In its RFE response, PS Lifestyle submitted a scholarly article from the January 2015 Information Systems Education Journal (ISEDJ), authored by three professors of Information Management, that set out intersecting competencies required to perform business analytics, including expertise in the business domain, technical data management proficiency and applied statistics. The authors confirm that jobs in business analytics require the theoretical and practical application of a specialized body of knowledge. As one example, it identifies applied statistical skills as encompassing both a theoretical understanding of statistical methods, as well as practical knowledge of software packages commonly used for statistical analysis.

33. Additionally, this article explained the rapid growth in business analytics as a profession, the reasons for this growth, and the efforts of academia to keep pace—with more than 130 new programs focused on business analytics being launched between 2007 and 2012. The article further documented that, despite the many new academic programs, a model curriculum for programs in business analytics did not exist at either the undergraduate or graduate level.

34. As further proof that the position is so complex and specialized that it can only be performed by a person with the educational background required by the employer, PS Lifestyle submitted the entry for Business Intelligence Analysts found in the O*Net OnLine database. (O*Net stands for “Occupational Information Network.”) Developed and maintained by a state agency under a DOL grant, the O*Net database is based on the SOCs and “contain[s] hundreds of standardized and occupation-specific descriptors on almost 1,000 occupations covering the entire U.S. economy.”¹ The O*Net education entry for a Business Intelligence Analyst states: “Most of these occupations require a four-year bachelor’s degree, but some do not.”

¹ *About O*Net*, <https://www.onetcenter.org/overview.html> (last accessed April 4, 2019).

35. When, as here for Business Intelligence Analysts, the O*Net’s education entry provides that most of the occupations require a four-year bachelor’s degree, the O*Net is probative evidence supporting an employer’s position that its job duties are so complex and specialized that they can only be performed by an individual with the education the employer requires. The employer may demonstrate, separate and apart from the O*Net, that its degree requirement is in the “specific specialty (or its equivalent).”

USCIS’ Denial of the 2018 H-1B Petition

36. On November 27, 2018, Defendant USCIS denied PS Lifestyle’s H-1B petition. *See* Exh. A. The decision makes fundamental factual errors by ignoring ample record evidence and is based upon clear errors of law.

37. USCIS misstates the law in concluding that, while a showing that at least one of the requirements in 8 C.F.R. § 214.2(h)(4)(iii)(A) is necessary to establish that the job falls within a specialty occupation, such a showing is not sufficient to satisfy the statutory definition. This interpretation contravenes the plain language of the regulation. Additionally, in stating that the regulatory criteria are “supplemental” to the statutory definition, the decision impermissibly imposes evidentiary requirements beyond those required by Congress. By satisfying two of the regulatory criteria, PS Lifestyle demonstrated that its job is in a specialty occupation.

38. In finding that PS Lifestyle did not satisfy the second regulatory criterion, second prong (8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), USCIS misrepresented PS Lifestyle’s job description as “generic in nature and provid[ing] no further detail as to the unique or complex nature of the proffered position.” Exh. A at 5. Additionally, USCIS ignored the detailed supporting evidence documenting the complex nature of the job—the ISDEJ article and the O*Net entry—when it stated that PS Lifestyle failed to provide any further evidence of the nature of the job.

39. USCIS also erroneously imposes a nonexistent requirement, i.e., that PS Lifestyle demonstrate that its job is more complex or unique than similar positions in the same industry. Exh. A at 5. All that the second prong of the second criterion requires, however, is a showing that the “particular position is so complex or unique that it can be performed only by a person with a degree.” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The record evidence, ignored by USCIS, demonstrates this.

40. As to the fourth regulatory criterion, USCIS errs as a matter of law by imposing a requirement not found in the regulation, namely, that PS Lifestyle was required to prove “that the proffered position is [] more specialized or complex than any other Director of Business Development job.” Exh. A at 6. The regulation requires only that PS Lifestyle establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attaining a bachelor’s or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Additionally, USCIS erred in stating that there was insufficient evidence of the complex and specialized nature of the position, ignoring both PS Lifestyle’s specific job description detailing this and its supporting evidence including the ISDEJ article and the O*Net entry.

41. Under 5 U.S.C. §§ 702 and 704, Plaintiff PS Lifestyle has suffered a “legal wrong” and has been “adversely affected or aggrieved” by agency action for which there is no adequate remedy of law.

42. Plaintiff PS Lifestyle has been deprived of Ms. Varghese’s practical application of the theoretical knowledge she acquired in her course of study culminating in her MBA degree with a concentration in Finance coursework and her relevant work experience.

COUNT ONE

**Violation of the Administrative Procedure Act, 5 U.S.C. § 701, et seq.,
the Immigration and Nationality Act and its Implementing Regulations**

43. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein, the allegations in paragraphs 1-42 above.

44. Plaintiff is entitled to review by this Court pursuant to 5 U.S.C. §§ 701-706.

45. A reviewing court shall “hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

5 U.S.C. § 706(2)(A).

46. Defendants denied PS Lifestyle’s H-1B petition solely on the ground that the evidence in the record was insufficient to establish that Plaintiff PS Lifestyle’s Director of Business Development position is a specialty occupation.

47. Plaintiff PS Lifestyle submitted evidence demonstrating that the position satisfied the statutory definition of a specialty occupation, 8 U.S.C. § 1184(i)(1)(A)-(B).

48. Plaintiff PS Lifestyle’s evidence demonstrated that the position satisfied at least two of the regulatory criteria for demonstrating a specialty occupation where the plain language of the regulation requires only one to be met. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (second prong); (A)(4).

49. Defendants failed to properly consider all record evidence; reached factual conclusions as to these two regulatory criteria unsupported by any evidence in the record; misconstrued the applicable regulations; impermissibly imposed evidentiary requirements beyond those required by Congress; and erroneously concluded that Plaintiff PS Lifestyle had not demonstrated that the Director of Business Development position fell within a specialty occupation.

50. Defendants' errors, singly and in combination, were arbitrary, capricious and in violation of the law. Consequently, Defendants acted arbitrarily, capriciously, and contrary to the law in violation of the APA, the INA, and the immigration regulations by denying Plaintiff PS Lifestyle's H-1B petition.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendants' determination that evidence submitted by Plaintiff PS Lifestyle was insufficient to establish that the Director of Business Development position is in a specialty occupation was arbitrary and capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), the INA and the regulations;
2. Vacate the denial of PS Lifestyle's H-1B petition and remand this matter to Defendants with instructions that, within ten days of the date of the Court's Order, it: approve the Form I-129, Petition for Nonimmigrant Worker filed by Plaintiff PS Lifestyle; change the beneficiary's immigration status from that of a student in the F-1 classification to the H-1B classification; and extend the beneficiary's stay in H-1B status until and including July 25, 2021;
3. Award Plaintiff its costs in this action; and
4. Grant such other relief as the Court deems just, equitable and proper.

Dated: April 4, 2019

Respectfully submitted,

s/ Leslie K. Dellon
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