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STUDYING FOR THE H-1B: USCIS QUESTIONS THE BUSINESS ADMINISTRATION DEGREE

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Since writing last year on the challenges facing employers who wish to hire H-1B workers for uncommon specialty occupations, we have seen the U.S. Citizenship and Immigration Services (USCIS) present a novel way to push back on H-1B filings: by challenging whether the beneficiary's degree is in a field related to the specialty occupation. This has especially been rampant in cases where the minimum requirement is a business administration degree.

To recap, the onus is on the petitioning employer to demonstrate that the proffered position requires the "theoretical and practical application of a body of highly specialized knowledge" ***and***"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." Immigration and Nationality Act (INA) §214(i)(l). The regulations further define "specialty occupation" as one that "requires the attainment of a bachelor's degree or higher in a specific specialty." 8 CFR § 214.2(h)(4)(ii). The regulations then provide four regulatory criteria, and the petitioner must satisfy at least one, that would qualify the position 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 are so specialized and complex that

> knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. *See* 8 CFR §214.2(h)(4)(iii)(A).

Two recent cases provide insight into how the USCIS is interpreting the above statute and regulations. The first was a non-precedent decision from the USCIS Administrative Appeals Office (AAO) dated April 7, 2014 upholding the denial of the H-1B petition of an IT solutions company for a "Project Compliance Analyst." The petitioner filed its Labor Condition Application (LCA) for the occupational category "Management Analysts" (OES/SOC Code 13-1111.00), with a Level I prevailing wage rate. The position's minimum qualifications called for a bachelor's degree in business administration or a related field and two years of project management or management consulting experience. The AAO did not find that the position is a specialty occupation, and also noted that even if it had ruled differently, there was insufficient evidence to demonstrate that the beneficiary met the minimum requirements of the proffered position.

The primary issue in the case was whether the petitioner's requirement of a bachelor's degree in business administration or a related field met the requirements of a specialty occupation. The petitioner had argued, using an AILA memorandum dated April 4, 2012 and addressed to the USCIS director, that a bachelor's degree in a *specific specialty* is not required if the petitioner satisfies one of the four prongs of 8 CFR §214.2(h)(4)(iii)(A). The AAO rejected AILA and the petitioner's interpretation and reiterated that USCIS has always interpreted the regulations in harmony with the statute, meaning that the four prongs provide supplemental criteria "that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation."

The first step in the AAO's analysis is determining if the degree is in a specific specialty that is directly related to the proffered position. Specialties that are closely related meet the "degree in the specific specialty (or its equivalent)" requirement of INA § 214(i)(l)(B) easily. The AAO's example of closely related specialties is chemistry and biochemistry where the body of highly specialized knowledge would be essentially the same. On the other hand, **when the minimum requirements are in two disparate fields, such as philosophy and engineering, then the petitioner must demonstrate how each field is "directly related to the duties and responsibilities of the position such**

that the 'body of highly specialized knowledge' is an amalgamation of the different specialties." The AAO also said it would find a specialty occupation in a case where the job duties and requirements are a combination of a general bachelor's degree and experience such that both INA §214(i)(l)(A) and (B) are satisfied.

But the statute and regulations allow for the minimum requirements to be a bachelor's degree in a specific specialty ***or its equivalent***. When relying on a degree that is not a single specific specialty, the employer will have to demonstrate that the position is a specialty occupation by meeting one of the four prongs of 8 CFR §214.2(h)(4)(iii)(A). And what this case teaches us is that the USCIS no longer views the business administration degree, without more, as being a degree in a specific specialty.
The petitioner here found itself having to prove that it meets at least one of the criteria listed in 8 CFR §214.2(h)(4)(iii)(A). To meet the first prong (a bachelor's degree or higher in a specific specialty or its equivalent is normally the minimum requirement for entry into the position), the petitioner cited the U.S. Department of Labor's Occupational Outlook Handbook ("OOH") entry for Management Analysts, specifically the minimum requirements for the field:

> *A bachelor's degree is the typical entry-level requirement for management analysts. However, some employers prefer to hire candidates who have a master's degree in business administration (MBA)... any fields of study provide a suitable education because of the range of areas that management analysts address. Common fields of study include business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English.*

The AAO was not convinced by this argument. In an ungenerous reading of the OOH's entry for the position, the AAO said that because the OOH stated that bachelor's degrees are *typical* did not insinuate that they are always required for the position. Moreover, the AAO found that because the OOH lists many disparate fields that Management Analysts practice in (business, management, economics, political science and government, accounting, finance, marketing, psychology, computer and information science, and English), it could not conclude that this occupational category is one that requires the theoretical

and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in a *specific* specialty as required by INA § 214(i)(l) and 8 CFR § 214.2(h). **The takeaway lesson here is to be careful when relying on the OOH when there is no specific specialty entry field for the occupation because the AAO will interpret the degree requirement as too general and not specific enough for a specialty occupation.**

Unfortunately for the petitioner in this case, the AAO was not swayed by evidence that the position met the other three prongs (sample ads submitted were not in parallel positions among similar organizations (strike for prong two), petitioner could not argue that it normally requires a degree for the position since it was a newly created one (strike for prong three), and the job duties were too general for the AAO to surmise that the position is so specialized and complex that knowledge required to perform the duties is usually associated with getting a bachelor's or higher degree (strike for prong four)). The petitioner's arguments about the complexity of the position was also hurt by the fact that its Level 1 wage rate on the LCA – a wage rate associated with entry level positions. If an employer wishes to make the argument that the position is a specialty occupation because it is complex and unique, it cannot then only pay entry level wages. Thus, in this case where a business administration degree was the minimum requirement, the case was denied because the USCIS is not convinced a business administration degree was in a specific enough specialty and the petitioner could not demonstrate how the position met one of the prongs of 8 CFR §214.2(h)(4)(iii)(A).

In a second recent case, the USCIS again questioned whether the minimum requirement was in a specialty related to the occupation. The H-1B petition was filed by a home health care provider for a Deputy Controller, with a finance degree as the minimum requirement. *Irish Help at Home LLC v. Melville*, Case3:13-cv-00943-MEJ (N.D. Ca. Feb. 24, 2015). As in the case discussed above, the OOH profile for the relevant occupational category, Financial Managers (SOC/OES Code 11-3031.00), listed "a bachelor's degree in finance, accounting, economics, or business administration" as the degrees often required for financial managers, but that "many employers now seek candidates with a master's degree, preferably in business administration, finance, or economics." Despite requiring a bachelor's degree in finance or a related field (which the beneficiary readily met with her Finance degree), the Court upheld the denial, not convinced that the proffered position is a specialty occupation because

even a general purpose degree like a bachelor's in business administration would have adequately prepared a candidate for the position, thus undermining the petitioner's assertion that the position required a degree in a specific specialty. So it would seem again that the business administration degree, without more, is too general to be sufficient as the minimum requirement for an H-1B specialty occupation. It would behoove the petitioner to provide even more evidence that the position is a specialty occupation by arguing how it meets at least one of the other prongs in 8 CFR §214.2(h)(4)(iii)(A). And it is worth noting that in this case also, the petitioner argued that the position was complex and unique but this was undermined by its classification of the position at the Level 1 wage rate in the LCA.

Elsewhere, anecdotal evidence has confirmed that the USCIS continues to use Requests for Evidence (RFEs) to question whether business administration degrees are directly related to the proffered position. As an example, an IT services and software solution company filed a petition for a systems analyst classified in the Computer Systems Analyst occupational category (SOC/OES code 15-1121.00). The USCIS issued an RFE questioning how a bachelor's degree in business administration is related to the field. The RFE cited case law, specifically *Matter of Ling*, 13 I&N Dec. 35 (Comm. 1968), to point out that "business administration" is a general term for professional and non-professional activities, a business administration degree would be insufficient to qualify the degree holder as a member of the professions, "unless the academic courses pursued and knowledge gained is a realistic prerequisite to a particular occupation in the field of business administration in which he is engaged or plans to be engaged." This should give pause to petitioners and attorneys alike. Whereas before petitioners may have obtained approvals for holders of business administration degrees in the IT sector, now their minimum requirements will be questioned, and they will have to show (1) how business administration is a degree related to the IT position, and (2) how the beneficiary's business administration degree courses earned him or her knowledge that was a realistic prerequisite to the specific occupation. The USCIS has even questioned in a different case how a business administration degree is related to the position offered: CEO of a small company.

Through these recent cases and RFEs, USCIS has again found a way to strike back against H-1B employers, this time by focusing on beneficiaries with business administration degrees. While degrees in business administration,

especially at the masters level, are considered specialized in their own right like law or medicine, and are routinely sought by employers, the USCIS's attitude is not in keeping with the real world. USCIS is no longer accepting at face value that a business administration degree would prepare an individual to perform the duties of positions in fields such as business management, systems analysis, financial management, and management analysis. This would also adversely impact entrepreneurs who are petitioned through their own startups, even though an MBA program equips one with the specialized knowledge and skills to be an entrepreneur. USCIS's skeptical attitude toward the business degree also runs counter to its Entrepreneur in Residence policy, which is has actively promoted in recent years.

When the candidate holds a business administration degree, employers and attorneys should consider whether to provide detailed job duties to demonstrate the complexity of the position, explain how the degree is **directly related** to the position, and perhaps obtain an evaluation of the position and degree requirements from a professor or official with authority to grant college-level credit for training/experience in the specialty at an accredited college or university. And when the minimum requirements are in disparate fields, the employer should strive to explain clearly how each field is related to the position. And, further, if the argument is made that the position is complex and unique, employers should offer an appropriately mid- to high-level wage. Overall it appears USCIS has unfortunately placed a target on the business administration degree and employers should beware of nasty RFEs and even denials.