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CHALLENGES IN FILING H-1B VISA PETITIONS FOR UNCOMMON SPECIALTY OCCUPATIONS

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The U.S. Department of Labor (DOL) regularly releases statistics on the H1B – the top occupations and the top employers that file Labor Condition Applications (LCA) for these nonimmigrant worker petitions. As of the Fourth Quarter of FY 2014, six of the top ten certified positions were computer-related occupations. The rest of the positions in the top ten are Accountants/Auditors, Management Analysts, Financial Analysts, and Electronics Engineers who do not work on computers. Altogether they make up about 77% of all LCAs submitted to the DOL for certification.

The USCIS last released an H-1B report in July 2013 for FY 2012. USCIS reported that approximately 59.5% of approved H-1B petitions were for computer-related occupations, and the rest of the top five were occupations in architecture, engineering, and surveying; administrative specializations; education; and medicine and health.

But, what of the other H-1B occupations? Such uncommon H-1B occupations may include food service managers and music managers, among others. These nontraditional H-1B "specialty occupations" are less often processed by USCIS and often pose a greater challenge for attorneys and their clients because they do not fit neatly with other "specialty occupations" that USCIS officers commonly see. This is also part of a growing trend where the USCIS is viewing such occupations more skeptically, even if the record contains evidence favoring an approval. It is helpful here to first define this doozy of a term.

8 CFR 214.2(h)(4) defines "specialty occupation" as one in which:

> *...requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not*

> *limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.*

To hire a foreign worker under the H-1B category, the employer must show in its petition that the proffered position meets at least 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 so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 CFR 214.2(h)(4)(iii)(A)

Practitioners may find that despite efforts to indicate to the USCIS that the complexity and specialized nature of the proffered position meets the definition of an H-1B specialty occupation, the USCIS will nonetheless issue Requests for Evidence (RFEs) or denials. This is because the USCIS is unwilling to issue H-1B approvals for positions that do not are dissimilar to common H-1B occupations, such as computer programmers or analysts, and are unwilling to consider evidence of the complexity of occupations as evidence. RFEs often request information such as:

- Documentation describing the business, such as business plans, reports, presentations, promotional materials, newspaper articles, website printouts, etc.
- Detailed description of the proffered position, including approximate percentages of time for each duty that the beneficiary performs

- Copies of contracts or work orders from every company that will utilize the beneficiary's services to show the beneficiary will be performing duties of a specialty occupation
- Documentation of how many other individuals in the employer's organization are currently or were employed in the same position, along with evidence such as employees' degrees and evidence of employment in the form of paystubs or tax forms

Yet, despite providing such evidence, the employer may nevertheless, receive a denial of the petition even after carefully responding to an RFE. Attorneys are left scratching their heads at some of the frustrating reasoning posited by USCIS that often ignores regulation and precedent.

One problematic course that USCIS continues to take is overly relying on the DOL's Occupational Outlook Handbook (OOH) when determining whether a bachelor's degree is a normal requirement for an occupation. The OOH may guide the USCIS, but it does not in and of itself define what is a specialty occupation – only the regulations can do this. Moreover, the OOH should not be the only source USCIS should use when determining whether a bachelor's degree is a normal requirement for a proffered position. The USCIS should not ignore the employer's statements and evidence of its normal practice of requiring a bachelor's degree for a proffered position. USCIS should analyze the proffered position based on the definition provided in 8 CFR 214.2(h)4)(iii)(A) instead of relying heavily on the OOH. See Fred 26 Importers, Inc. v. DHS, 445 F. Supp.2d 1174, 1180-81 (C.D. Cal. 2006)(court reversed AAO where it failed to address expert and other evidence and simply asserted that a small company did not require specialized and complex duties); The Button Depot, Inc. v. DHS, 386 F Supp.2d 1140, 1148 (C.D. Cal. 2005)(court reversed AAO decision and found AAO had abused discretion when it applied unrelated regulatory provisions and failed to provide a basis for its conclusion that "it does not agreed with the opinion evidence submitted by the petitioner); Matter of – (AAO unpublished decision, Aug. 15, 2006, WAC 0417253199)(AAO reversed, finding that although OOH does not state a baccalaureate level education is the normal minimum requirement, the duties of the position are so specialized and complex that knowledge required to perform them is usually associated with the attainment of a bachelor's degree or higher).

Second, the USCIS ignores expert opinions that determine the proffered

position is a specialty occupation by virtue of its complex and unique nature. In Matter of Chawathe, 25 I&N Dec. 369, 376 (AAO 2010) the AAO directs the USCIS to examine each piece of evidence for relevance, probative value, and credibility, individually and in the context of the entire record according to the "preponderance of the evidence" standard. The USCIS may reject an expert opinion letter or give it less weight if it is not in accordance with other information in the record or if it is questionable. See Matter of Caron Int'l, Inc., 19 I&N Dec. 791, 795 (Comm'r 1988). However, if "the expert testimony reliable, relevant, and probative as to the specific facts in issue" then the USCIS must not ignore it. See Matter of Skirball Cultural Center, 25 I&N Dec. 799, 805-806 (AAO 2012). In Matter of Skirball, the AAO reversed the USCIS's denial of a P visa petition for a musical group, finding that the USCIS erroneously rejected expert opinion even though it did not question the credentials of the experts who provided opinions, take issue with the experts' knowledge of the group's musical skills, or find any reason to doubt the truthfulness of the testimony. The reasoning in Matter of Skirball must be applied to the adjudication of H-1B nontraditional specialty occupations where often the employer must rely on expert opinion and atypical evidence to support their assertion that the duties of the position are so complex and unique that a bachelor's degree is required to execute those duties. Thus the USCIS should not ignore or reject expert opinions especially if they are submitted in conjunction with other supporting evidence when the USCIS has no reason to doubt the veracity of the testimony.

Although it may be daunting to file H-1B petitions for nontraditional or uncommon specialty occupations, attorneys can overcome or avoid the USCIS's sometimes inconsistent and wrong application of the standards in place in 8 CFR 214.2(h)(4)(iii)(A). When preparing the H-1B petition, attorneys should research the occupation thoroughly and have a full understanding of the job duties, the nature of the organization, and the position's standing within the company. The explanation of the duties should be detailed and, if possible, include the approximate percentage of time spent on each. Evidence to support the petition should include information about the company, the nature of the industry, the complexity of the position, and proof that the beneficiary has obtained the education and/or experience level required for the position. There may be times when the proffered position may fall within a category of occupation that the OOH has determined does not normally require a bachelor's degree to perform. If this is the case, the employer should ensure

that the appropriate occupation is used for the LCA and the employer should also consider submitting an expert opinion evaluating both the job duties of the proffered position and the education and experience of the beneficiary. Lastly, the employer may explain how its proffered position is analogous to similar jobs that either the OOH or case law has found to be specialty occupations. If one uses job postings by other employers requiring the same bachelor's degree, USCIS can discount such evidence if the employers who posted such notices were not similar in size as the H-1B petitioning employer.

Until USCIS properly applies the standards for H-1B specialty occupations determined by the regulations and case law, employers of uncommon or nontraditional H-1B occupations must remain vigilant in their petition filings. They must keep in mind that when faced with a nontraditional H-1B occupation, the USCIS may look only to the OOH for guidance. Lastly, attorneys should provide adequate advice and warning regarding the filing of H-1B petitions for such nontraditional occupations and to prepare employers for fickle and nonsensical RFEs. Finally, attorneys must advise their clients that they must be prepared to seek administrative and even judicial review of erroneous denials.