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H-1B ENTRY LEVEL WAGE BLUES

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Those who filed under the FY 2018 H-1B visa lottery and were selected must have been pleased. As premium processing was eliminated, the approvals have just started coming in this summer. Cases that are not readily approved receive Requests for Evidence (RFE). Many of the RFEs object to the H-1B worker being paid an entry level wage.

The RFE attempts to trap the employer. It challenges whether the Labor Condition Application, if it indicates a Level 1 wage, appropriately supports the H-1B petition. According to the DOL's prevailing wage policy guidance, a Level 1 (entry) wage is assigned to positions that require a basic understanding of the occupation, and such an employee performs routine tasks that require limited, if any, exercise of judgment. Such an employee also works under close supervision and receive specific instructions on required tasks and results expected.

The RFE - which meticulously parrots the Level 1 duties from the DOL's wage guidance - then asserts that the position described in the H-1B petition appears to be more complex than a position that is assigned a Level 1 wage. Therefore, the RFE asserts that the employer has not sufficiently established that the H-1B is supported by a certified LCA that corresponds to the petition.

Employers who receive such an RFE should not panic. Just because the position is assigned an entry level wage does not necessarily mean that the position cannot qualify as an H-1B specialty occupation. Moreover, even an occupation assigned with an entry level wage can be complex and thus require a bachelor's degree in a specialized field. The DOL's worksheet within its wage guidance indicates that if the occupation requires a bachelor's degree and up to two years of experience, it will be assigned a Level 1 wage to a corresponding Job Zone 4 occupation. In the event that the job requires skills, would that bump up

the wage to Level 2? Unless the job requires skills that are not encompassed in the O*NET tasks, work activities, knowledge, and Job Zone examples for the selected occupation, the position can still remain in Level 1, according to the DOL's wage guidance.

Hence, the corresponding tasks of an occupation requiring a bachelor's degree and up to two years of experience can still be complex, even if the wage remains at Level 1 and the position requires supervision. For example, it would be difficult for the USCIS to argue that an entry level doctor, lawyer or architect cannot qualify for H-1B visa classification. These occupations need underlying degrees in the specialty as a minimum for entry into the profession. Even if the lawyer is closely supervised, he or she still needs to perform complex tasks relating to the underlying Juris Doctor degree. The same logic ought to apply to other occupations that are readily classifiable under the H-1B visa such as engineers or computer systems analysts. The job duties at any wage level correspond to the knowledge that is acquired through a specialized degree such as a degree in engineering or computer science.

Indeed, the wage level assigned to the occupation ought not determine whether it is eligible for H-1B visa classification or not. If the position does not require a minimum of a bachelor's degree for entry into the occupation, such as a plumber or welder, then even a Level 4 wage assignment would not be able to salvage this occupation for purposes of H-1B classification.

In March 31, 2017, on the eve of the FY 2018 H-1B Cap filing season, the USCIS issued a policy memorandum stating that computer programmer positions are not always "specialty occupations" that would render the occupation eligible under the H-1B visa. This memo rescinded an earlier memo of the Nebraska Service Center from 2000, which acknowledged that computer programming occupations were specialty occupations for H-1B purposes. The new guidance references computer programmers in the DOL's Occupational Outlook Handbook that states, "Most computer programmers have a bachelor's degree; however, some employers hire workers who have an associate's degree." The guidance also questioned whether a computer programmer position that is offered an entry-level wage could qualify for an H-1B specialty occupation because, as the OOH suggests, an associate's degree is sufficient to enter into the field. While this policy memorandum only applied to entry level computer programmers, practitioners are now seeing that any occupation that is assigned a Level 1 wage, even if it is not related to computer programmer, gets

an RFE. It may be worth noting that even an entry level computer occupation should be eligible for H-1B classification if it can be demonstrated that the skills necessary to perform the duties require the minimum of a bachelor's degree.

President Trump's Executive Order on Buy American Hire American may also be responsible for this trend, which provides in relevant part:

> In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries

Even if the administration has not been able to promulgate new regulations to achieve its stated goals under the executive order, these RFEs are indirectly implementing President Trump's "Buy American Hire American" policy by thwarting H-1B petitions filed for entry level positions. While H-1B petitions with Level 1 wages have run into trouble prior to the Trump administration, RFEs are now being issued more frequently whenever a Level 1 wage has been noticed. Immigration attorneys must fight back on behalf of their clients. Otherwise, the government could potentially exclude entry-level professionals from using the H-1B visa, some of whom have recently graduated from US universities. These entry-level professionals, while full of skill and talent, are not typically afforded higher wages at the beginning of their careers. If the H-1B program were to look unfavorably upon wage-earners commanding Level 1 wages in the DOL wage classification system, then we would be systematically excluding highly skilled, young workers that have the potential to positively impact the US economy and various professional sectors. Paying such an entry wage is not *per se* unlawful if the individual is being hired for a position with less than 2 years of experience and which requires supervision. Another argument that can be made is that if an employer is forced to pay a legitimate entry level worker on an H-1B visa at a wage level higher than the entry level wage, we may end up in a situation where a foreign national is making more than his or her American counterpart. Under the H-1B law, the employer must pay the higher of the prevailing or the actual wage. *See* INA 212(n)(1)(A)(i). If an employer is forced to pay a higher wage to an H-1B worker at the entry level, then the employer may have to adjust the wage for all similarly situated workers. This may not necessarily be a bad thing if all wages rise, but if the rise in wages is as a result of reading out H-1B visas from the INA for entry level

workers in acknowledged professions, it could also have the effect of artificially distorting wages that could ultimately hurt competitiveness. If the wage paid is well above the minimum wage in Level 1, but slightly under Level 2, and at times there is at least a $20,000 or $30,000 difference between Level 1 and Level 2, then that too can be used to argue that the higher wage being paid is commensurate to the more complex duties in the H-1B petition, despite the RFE asserting that the duties are basic, even if this higher wage is still within Level 1.

There is nothing in the INA or in the implementing regulations that suggest that a position that commands an entry level wage is ineligible for H-1B visa classification. All that is required is for 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." 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).

All of the criteria in 8 CFR §214.2(h)(4)(iii)(A) suggest that the bachelor's degree is the minimum requirement for entry into the occupation or for purposes of performing the duties of the position. However, if one is relying on prong 4 to establish H-1B eligibility because it is unusually complex or specialized, the AAO

in an unpublished decision has noted that this would create an issue of credibility if the LCA only identifies a Level 1 wage. Therefore, practitioners should be prepared to either assert that the duties can be specialized and complex even if a Level 1 wage is being paid, or alternatively, argue under prongs 1, the first part of prong 2 or prong 3. In a different decision, the AAO recognized that a Level 1 wage in certain occupations, such as doctors or lawyers, would not preclude a finding that they qualified as specialty occupations. Of course, if the position required more than 2 years of experience, then it will be harder for the employer to argue, if not impossible, that an entry level wage was justified. On the other hand, if the beneficiary was demonstrating possession of a degree through work experience, it should be carefully explained that this experience is not part of the job requirement, but is being used by the beneficiary to obtain the equivalent of a specialized degree through training or work experience.

Lawyers must use every argument in their legal arsenal to overcome RFEs intending to deny H-1B petitions that contain a Level 1 wage, and if there is a denial, to seek either administrative or judicial review. The law did not intend to impose a Catch-22 on employers who legitimately hire H-1B workers for entry level positions. If the employer argues that the duties are routine and comport to the Level 1 wage definition then the USCIS will play "gotcha" by asserting that the occupation does not qualify for H-1B classification. If, on the other hand, the employer argues that the duties are complex and specialized, then the USCIS will likely continue to delight in playing "gotcha" by asserting that the LCA does not correspond to the H-1B petition. There is a way to avoid this trap. An employer can demonstrate that routine entry level duties that still need to rely on skills acquired from a specialized bachelor's degree program would qualify the occupation for H-1B classification. Alternatively, an employer may also be able to demonstrate that certain duties can be complex and specialized in occupations even at an entry level. The employer must choose the best argument based on the specific occupation being challenged and facts of the case.

There was a time when obtaining an H-1B visa was considered routine and easy. Not so any longer.