



## STOPPING H-1B CARNAGE

*Posted on October 23, 2017 by Cyrus Mehta*

In his inaugural address, President Trump pledged to end what he referred to as "American carnage," depicting the United States bleakly—as a "land of abandoned factories, economic angst, rising crime"—while pledging "a new era in American politics."

To reverse what Trump sees as American carnage, his administration has unleashed carnage on the H-1B visa program. The H-1B visa has become the visible symbol of an immigration program that is thought to no longer protect American jobs and favors the foreign worker. Whether this is factually true is beside the point – it is good for optics and in furtherance of Trump's campaign slogan of America First. It does not matter that H-1B visas help American firms remain globally competitive, or that foreign workers complement the US workforce rather than replace them, resulting in greater overall efficiency, productivity and jobs. The H-1B visa is the low hanging fruit that the administration uses for target practice by shooting out a Request for Evidence (RFE), which is often a prelude to the denial.

Consistent with his view of American First, on April 18, 2017, President Trump signed the "[Buy American and Hire American](#)" Executive Order No. 13788. The EO aims to create higher wages and employment rates for U.S. workers, and directs the Secretaries of State, Labor, and Homeland Security, as well as the Attorney General, to issue new rules and guidance to protect the interests of U.S. workers in the administration of the immigration system. The EO highlights the H-1B visa program and directs the agencies to ensure that H-1B visas are awarded to the most skilled and highest-paid beneficiaries.

Although the administration has yet to influence any legislation in Congress or change rules, the impact of the EO has hit the H-1B visa program the hardest. It has been seen in the [increased number of Requests for Evidence \(RFEs\)](#)

[challenging the paying of Level 1 wages](#), even though employers have legitimately offered positions to entry-level workers under the H-1B visa program. Despite the wage challenges, a well-crafted response can overcome the suspicion that an entry-level 1 wage cannot be sustained under the H-1B visa. Anecdotal evidence suggests that the USCIS is approving cases after a level 1 wage challenge, although at the same time the USCIS challenges whether the occupation qualifies for H-1B classification. Therefore, winning the level 1 wage challenge may be a pyrrhic victory if the USCIS reads out the occupation from the H-1B law. It is necessary to not just overcome the level 1 wage challenge, but also the challenge as to whether the occupation in question qualifies for H-1B visa classification.

At first, the Trump administration focused its attack on programmers. On 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 the relevant part on computer programmers in the [DOL’s Occupational Outlook Handbook](#) (OOH) that states, “Most computer programmers have a bachelor’s degree; however, some employers hire workers who have an associate’s degree.” The guidance also questions 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.

It has now become evident that USCIS is not just challenging programmers, but relying on the OOH to attack other computer occupations, especially at the California Service Center. It does not matter whether the employer is paying a level 1 wage or higher. For example, when challenging a Computer Systems Analyst, the USCIS uses the OOH as a basis to issue the RFE and then the denial. USCIS recognizes, in many unpublished AAO decisions, “OOH as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.” When justifying its challenge to an occupation, the USCIS cites the section in the OOH relating to education and training. For example, with respect to [Computer Systems Analysts](#), it reproduces the following extract from the OOH (often underlining the parts

USCIS thinks are relevant to support the decision):

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who know how to write computer programs.

### **Education**

Most computer systems analysts have a bachelor's degree in a computer-related field. Because computer systems analysts are also heavily involved in the business side of a company, it may be helpful to take business courses or major in management information systems (MIS).

Some employers prefer applicants who have a Master of Business Administration (MBA) with a concentration in information systems. For more technically complex jobs, a master's degree in computer science may be more appropriate.

Although many analysts have technical degrees, such a degree is not always a requirement. Many systems analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Some analysts have an associate's degree and experience in a related occupation.

Many systems analysts continue to take classes throughout their careers so that they can learn about new and innovative technologies and keep their skills competitive. Technological advances come so rapidly in the computer field that continual study is necessary to remain competitive.

Systems analysts must also understand the business field they are working in. For example, a hospital may want an analyst with a background or coursework in health management. An analyst working for a bank may need to understand finance.

After citing the OOH section, the USCIS typically asserts that although a bachelor's degree is often sufficient for computer systems analyst position, the OOH does not specify a specific educational background required for this occupation. USCIS then goes on to conclude that as the requirements appear to vary by employer as to what course of study might be appropriate or preferred, a Computer Systems Analyst cannot qualify for the H-1B visa.

A decision based on the OOH ought to be challenged. It is not appropriate to

treat the OOH as the gospel truth, without regard to the evidence that was submitted by the petitioning employer, and to twist the meaning of the words in order to justify a denial.

The regulations 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 go on to provide four regulatory criteria, and the petitioner must satisfy at least one, that would qualify the position as a specialty occupation (and if the USCIS can underline what it believes is relevant, so will this author!):

- A baccalaureate or higher degree or its equivalent is **normally** the minimum requirement for entry into the particular position;
- 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;
- The employer **normally** requires a degree or its equivalent for the position; or
- 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).

It is clear from the plain meaning of these regulations that there is no requirement that a bachelor’s degree is always a requirement. Nowhere in the regulation does it require that a bachelor’s degree must “always” be a minimum requirement. In fact, if the OOH uses terms such as “most” or “typically” or “common”, that should meet the requirement of the regulations.

USCIS also selectively cites portions from the OOH, and conveniently neglects to cite this concluding important paragraph in the education and training part of Computer Systems Analysts:

Systems analysts must understand the business field they are working in. For example, a hospital may want an analyst with a thorough understanding of health plans and programs such as Medicare and Medicaid, and an analyst working for a bank may need to understand finance. Having knowledge of their industry helps systems analysts

communicate with managers to determine the role of the information technology (IT) systems in an organization.

The employer may rely on this section in the OOH to demonstrate that the computer professional is working in the niche business field, which could be health care or computer security. Therefore, the systems analyst would also need to have a thorough understanding of the business field, such as finance, besides being able to perform the generic duties of a systems analyst. By emphasizing the need for the computer systems analyst to be performing in a niche business area, the employer may have more of a legal justification for requiring a specialized degree in the field. When relying on prong 4 under 8 CFR §214.2(h)(4)(iii)(A), it is important to justify that complex duties may be performed even with the Level 1 wage. In other words, the job duties of the challenged occupation remain complex in the O\*Net, regardless of the H-1B worker performing at an entry level and being closely supervised. The reason why a Level 1 wage was assigned is because the prospective worker met the entry level wage under the DOL's [prevailing wage guidance](#) based on less than two years of experience required for the job and not possessing unusual skills – not because the duties were any less complex. It may also be imperative to obtain an expert opinion from a professor in the same field to justify the essentiality of a bachelor's degree, even at the entry level. The USCIS may disregard the expert opinion, but it may only reject such an opinion if it is not in accord with other information in the record or is otherwise questionable. In [Matter of Skirball Cultural Center](#), the AAO held that uncontroverted testimony of an expert is reliable, relevant, and probative as to the specific facts in issue.

The AAO in an [unpublished decision](#) in 2006 reversed a denial of an H-1B petition that was filed by an action film entertainment company on behalf of a foreign national who would be employed as a Film and Video Director. Although this is not a precedential decision, it can be used as a template to respond to a challenge when the USCIS relies on the OOH to deny that a specialty occupation is classifiable under the H-1B visa. In reversing the denial of the H-1B petition by the California Service Center, the AAO listed in great detail the foreign national's proposed duties as Film and Video Director. The duties included interpreting the screenplay, communicating with actors and camera personnel, development of script with the producer, selecting locations, work out all camera angles, directing the actors and directing performance of all on-camera talent, to name a few.

The AAO concluded that despite the fact that the USCIS made reference to the OOH not mentioning that a baccalaureate education in a specific specialty is normally the minimum for entry into such positions, this position was sufficiently complex to require a bachelor's degree. The AAO, therefore, relied on the 4th prong of the regulation, 8 C.F.R. § 214.2(h)(4)(iii)(A)(4), analyzing that the position was so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree. The relevant extract from the AAO's decision is worth noting:

Much of the work performed by the petitioner involves the transformation of live-action (photographed "reality") into special effect animated digital media. That process utilizes "motion-capture," a process involving computerized capturing and digitizing of live-action for the purpose of integrating this information into video game development and Internet applications. Motion-capture is an area of expertise that requires the use of specialized equipment and personnel. Further, the beneficiary is involved in virtually all areas of project production and development, including the editing of the final project. Under these circumstances, the petitioner has established the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(4)

The AAO's rejection of the official job description in the OOH is salutary, and petitioners should continue to convince the USCIS, and the AAO if there an appeal, that completely relying on the OOH is inappropriate, and it is also necessary to consider the complexity of the duties described by the petitioner in the H-1B petition. The AAO decision is striking because the OOH entry for the occupation of film and video director was more equivocal than computer systems analyst with respect to employers requiring a bachelor's degree in the occupation. Petitioning employers should take great pains in fleshing out the duties of the position when filing an H-1B petition in showing that they are different from the standardized duties in the OOH. In the event that the OOH does not state that the occupation in question always requires a bachelor's degree, it is imperative that the employer be able to justify that the position is complex and specialized to require a bachelor's degree. It would also be helpful for the employer to show that it has hired others in the past with the same degree requirements, provide industry articles and other information about the minimum entry requirements into these occupations as well as descriptions of US college programs leading to degrees in the specialty occupation.

If an industry or occupation does not always require a bachelor's degree, as

confirmed in the OOH, and the employer is unable to establish that the position is more specialized and complex than the industry standard, the H-1B petition may fail. For instance, an H-1B petition filed on behalf of a violinist by a symphony orchestra did not succeed as the employer was unable to establish that the position always, rather than usually, required a bachelor's degree. See [Louisiana Philharmonic Orchestra v. INS](#), 44 F.Supp, 2d 800 (E.D. Lou. 1999); *denial upheld after remand* 2000 U.S. Dist. LEXIS 3331 (Mar. 18, 2000). Therefore, it is important to demonstrate that the duties are more specialized and complex than the norm, while keeping in mind that the argument should also be consistent with the fact that an entry-level wage, if that is the case, can also justify such duties. Also, a "specific specialty" does not mean a degree in only one field. A specialty occupation may justify several common or related degree fields. If the OOH adds a few degree fields to a description, that does not mean that the position no longer qualifies for H-1B classification. Even when the minimum requirements are in two disparate fields, such as philosophy and engineering, then, as stated in an [unpublished AAO decision](#), the petitioner must demonstrate how each field is "directly related to the duties and responsibilities of the particular position such that the 'body of highly specialized knowledge' is essentially an amalgamation of these different specialties."

In the event that the H-1B is denied, it is not the end of the road. The denial can be appealed to the Administrative Appeals Office (AAO). Once the appeal is filed, the USCIS Service Center which denied the petition has 45 days within which to conduct an initial field review and decide whether to treat the appeal as a motion to reopen and/or reconsider and approve the petition; or forward the appeal and the related record of proceedings to the AAO. If the AAO denies, the denial can also be challenged in federal court. If USCIS seeks to reinterpret H-1B provisions in light of the Buy American Hire American EO resulting in denials, those decisions ought to be challenged as they are contrary to the plain meaning of the statute as well as Congressional intent. There is nothing in the law or the regulations that clearly indicate that the government can wholesale deny H-1B classification for an occupation just because the OOH indicates that most employers, rather than all employers, require a bachelor's degree. Similarly, there is nothing in the INA that suggests that an H-1B visa petition cannot be approved solely because the prospective H-1B worker will be paid an entry level wage. Indeed, it is also permissible under *Darby v. Cisneros* to bypass

the AAO and challenge the denial directly in federal court. The Trump administration cannot read out entire occupations from the H-1B law based on slavish reliance of the OOH. If the AAO does not relent, then perhaps a federal court will be able to stop the H-1B carnage.