



## ANALYZING THE DEFINITION OF A SPECIALTY OCCUPATION UNDER INA 214(I) TO CHALLENGE H-1B VISA DENIALS

*Posted on April 10, 2018 by Cyrus Mehta*

In recent denials of H-1B petitions, the USCIS has been taking the position that the occupation for which H-1B classification is sought must require a degree in the specific field. This position runs contrary to the definition of a specialty occupation. An occupation that may require a degree in diverse fields may also qualify. Denials resulting in the wholesale reading out of qualifying occupations will likely continue when H-1B cases selected under the FY 2019 cap are adjudicated. A careful analysis of the statutory definition of specialty occupation provides a good starting point to challenge such denials.

Under INA § 214(i)(1) a “specialty occupation” is defined as an occupation that requires

-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

The regulation at 8 CFR § 214.2(h)(4)(ii) parrots INA § 214(i)(1) by defining “specialty occupation” as follows, except that the regulation requires a bachelor’s degree in “a” specific specialty while the statute requires a bachelor’s degree in “the” specific specialty, which may be a distinction without a meaningful difference:

*Specialty occupation means an occupation 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.*

At issue is whether the occupation, in order to qualify for an H-1B visa, must require a bachelor's degree in the specific specialty. A lawyer would qualify as a specialty occupation as only a degree in law would allow entry into the occupation. But INA § 214(i)(1) reads more broadly. It also ought to encompass a marketing analyst, even though this occupation may require a bachelor's degree in diverse fields such as marketing, business or psychology. Unfortunately, the USCIS does not always agree. Is the USCIS correctly interpreting INA §214(i)(1).

The answer lies with how the phrase in the parenthetical "or its equivalent" is interpreted in INA § 214(i)(1). In *Tapis International v INS*, 94 F. Supp. 2d 172, the court held that a "position may qualify as a specialty occupation if the employer requires a bachelor's degree *or its equivalent*. For the "equivalent" language to have any reasonable meaning, it must encompass .....various combinations of academic and experience based training. It defies logic to read the bachelor's requirement of "specialty occupation" to include only those positions where a specific bachelor's degree is offered." The phrase "or its equivalent" in INA 214(i)(1) is distinct from what the H-1B beneficiary is required to possess to qualify for specialty occupation. INA 214(i)(2) sets forth separate requirements, such as completion of a bachelor's degree or experience in the specialty through progressively responsible positions relating to the specialty. Therefore, the phrase "or its equivalent" actually broadens the requirement for a bachelor's degree is a specific specialty to encompass "not only skill, knowledge, work experience, or training ..... but also various combinations of academic and experience based training." *See Tapis, supra*. Thus, if an occupation requires a generalized degree, but specialized experience or training, it should still qualify as a specialty occupation. The AAO often cites *Royal Siam Corp v. Chertoff*, 484 F.3d 139 (First Cir. 2007) for the proposition that a general purpose degree is not sufficient to meet the definition of a specialty occupation. In *Royal Siam Corp*, the First Circuit stated that a degree requirement in a specific specialty-one that relates directly to the duties and responsibilities of a particular

position-is given more weight by the agency than a requirement for a generic degree. Thus, if the position carefully outlines the specialized degrees or experience that are essential to perform the duties of the position duties, it should be distinguished from the holding in *Royal Siam Corp.*

If USCIS does not consider this interpretation of “or equivalent”, it would be impossible to classify most occupations for H-1B classification. Under *Residential Finance Corp. v. USCIS*, 839 F. Supp.2d. 985(S.D. Ohio 2012), the court found that “the knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has obtained the credentialing indicating possession of that knowledge.” The AAO has accepted this finding and has added that when there are disparate fields listed as minimums into the field, the petitioner must establish “how each field is directly related to the duties and responsibilities of the particular position such that the required body of highly specialized knowledge is essentially an amalgamation of these different specialties.” *Matter of N-L-, Inc.* AAO August 3, 2016.

Accordingly, there is a clear basis to challenge a USCIS denial on grounds that the occupation does not always require a degree in the specific specialty or that the degree may be too generalized, especially where an employer has taken pains to connect the specialized duties with the degree requirement. Indeed, 8 C.F.R. § 214.2(h)(4)(iii)(A) is further consistent with INA § 214(i) as it provides several ways in which a petitioner can establish that the position can qualify as a specialty occupation. Those criteria are:

- (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). The petitioner is required only to show that the position meets one of the four criteria. *Defensor v. Meissner*, 201 F.3d 384 (5<sup>th</sup> Cir. 2000), which the USCIS also relies on when denying H-1B petitions, held that the four criteria in 8 CFR § 214.2(h)(4)(iii)(A) were only necessary conditions, but not necessary and sufficient conditions to establish that the occupation is a specialty occupation. In other words, an employer may under prong 3 require a bachelor's degree for an occupation that ordinarily never requires a degree, but that may still not meet the statutory definition of a specialty occupation under INA § 214(i)(1). On the other hand, if the employer provides probative evidence of its need for a bachelor's degree, and that its past hiring practices were also consistent with that need, as well as consistent with industry standards, the USCIS ought to accept the employer's justification for a bachelor's degree in a specialized field under the preponderance of evidence standard.

For a petition that has a proffered position of computer systems analyst, for example, USCIS has been selective in its reading of the Occupational Outlook Handbook in order to justify a denial on the ground that a bachelor's degree in a computer science is not always a requirement. A denial often focuses on the following language in the OOH:

*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 have skills in information technology or computer programming.*

(...)

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

*Petitioners and their attorneys should closely review the OOH themselves rather than rely on the few sections USCIS provides in its denial. If attorneys do this, they will realize that USCIS chooses to leave out an important section of the educational requirements that "**ost** computer systems analysts have a bachelor's degree in a computer-related field." USCIS ignores this language in order to support its faulty determination*

*that a bachelor's degree in a specific specialty, or its equivalent, is not normally the minimum requirement for the position and that the degree requirement is not common to the industry under the first and second criteria of 8 CFR §214.2(h)(4)(iii)(A). However, where the regulation uses the words "normally" and "common" it would be erroneous to determine that a proffered position is not a specialty occupation merely because not **all** employers require a bachelor's degree. If most employers require a bachelor's degree, this should be sufficient to meet the statutory definition of a specialty occupation.*

*Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531, at \*30-31 (S.D.N.Y. Sep. 29, 2017) emphasized that if "most" computer systems analysts have a bachelor's degree in the appropriate field, as is provided in the OOH, then it follows that the degree is "normally" required for the position, and thus, the position qualifies as a specialty occupation." In (Redacted Decision) 2012 WL 4713226 (AAO February 08, 2012), and consistent with the *Next Generation Tech* reasoning, the AAO has explained in at least 2,415 unpublished decisions that "USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations." For computer scientists, for example, the OOH provides that "ost computer and information research scientists need a master's degree in computer science or a related subject, such as computer engineering." This illustrates that, provided the specialties are closely related, a minimum of a bachelor's degree or higher in more than one specialty satisfies the "degree in the specific specialty" requirement of INA § 214(i)(1)(8). In reversing the CSC's denial of a petition, *Residential Finance* said that the "premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors."

It is clear that both USCIS and the courts have repeatedly held that where most employers in an occupation require a bachelor's degree in a narrow range of majors, or a related major, or its equivalent, it is a specialty occupation. In situations where the OOH is unhelpful, such as with respect to a Food Service Manager, where the OOH makes clear that a bachelor's degree is not always required to enter the field, the employer must take pains to even further

describe the specialized and complex duties of the position within the context of the employer, and potentially rely on the fourth prong of 8 CFR § 214.2(h)(4)(iii) for establishing the specialty occupation. The fourth prong provides that “the nature of 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)(4); *Fred 26 Importers, Inc. v. DHS*, 445 F. Supp.2d 1174 (C.D. Cal. 2006)(although agreeing that the degree must directly relate to the position where an HR manager did not have a degree in HR management, reversed AAO for ignoring evidence, including expert opinion, that the duties were specialized and complex). Indeed, 8 CFR §214.2(h)(4)(iii)(A)(4), arguably like in *Tapis*, recognizes that INA 214(i)(1) requires that the specialty occupation encompasses a bachelor’s degree in the specific specialty “or its equivalent”.

INA §214(i)(1) clearly provides for a broader interpretation of a specialty occupation. The USCIS is erroneously interpreting this provision when denying H-1B cases. The denials have become more rampant under President Trump’s Buy American Hire American Executive order, and we have blogged extensively on this unfortunate trend, [here](#), [here](#) and [here](#). There is a good basis to challenge these H-1B denials based on the statutory provision itself.