



## NEW MUTANT H-1B GENE - UNDIFFERENTIATED ENGINEERING DEGREES

*Posted on November 19, 2018 by Cyrus Mehta*

It has become harder to obtain an approval of an H-1B visa petition under the Trump administration. The USCIS insists that an occupation must require a degree in a specific specialty. It constantly moves the goalposts to deny H-1B petitions, even if the occupation was previously readily approvable. A position that requires an engineering degree may now not be so readily approvable for H-1B classification.

Take for example the position of Operations Research Analyst. The [Occupational Outlook Handbook](#), which the USCIS slavishly relies upon, describes the training and educational requirements for an Operations Research Analyst as follows:

“Many entry-level positions are available for those with a bachelor’s degree. However, some employers may prefer to hire applicants with a master’s degree.

Because operations research is based on quantitative analysis, students need extensive coursework in mathematics. Courses include statistics, calculus, and linear algebra. Coursework in computer science is important because analysts rely on advanced statistical and database software to analyze and model data. Courses in other areas, such as engineering, economics, and political science, are useful because operations research is a multidisciplinary field with a wide variety of applications. ”

Winning an H-1B for an Operations Research Analyst should be a no brainer. It is clear that a specialized degree is required to enter the field. As the operations research is based on quantitative analysis, an engineering degree can provide the knowledge base for a qualified candidate to enter the field. The USCIS then

plays “gotcha” when an operations research position requires an engineering degree or because of the reference to an engineering degree in the OOH. This is the verbiage that the USCIS includes in its decisions to deny an occupation that may require an engineering degree:

“According to publicly available Internet resources, there are approximately forty (40) different types of engineering degrees ranging in specialties to include but not limited to Mechanical, Ceramics, Civil, Electrical, Environmental, Agricultural, Marine, to Electronics Engineering. As such, it can be determined that the OOH does not indicate that a baccalaureate degree in a specific field of study is the minimum educational requirement for Operations Research Analysts as needed in order to qualify the proffered position as a specialty occupation.”

Till now, it was presumed that an occupation that requires an engineering degree should qualify for H-1B classification. Although there are many types of engineering disciplines, the basic quantitative skills gained in an engineering degree program should equip the worker to perform the technical duties of a specialty occupation whether it is for the position of Operations Research Analyst, Software Developer or Computer Systems Analyst.

Even if the OOH does not refer to an engineering degree, the USCIS tends to object if the employer requires an engineering degree to qualify for the position. Thus, the OOH, with respect to [Software Developers](#), states that “software developers usually have a bachelor’s degree in computer science and strong computer programming skills.” But if the prospective H-1B beneficiary qualifies with an engineering degree rather than a degree in computer science, the USCIS will use that to either issue a request for evidence or deny the petition.

It seems that the engineering degree is suffering the same fate as the business degree. Requiring a general purpose business degree without more has never fared too well. The H-1B petition filed by an upscale Thai restaurant that required its manager to have a general purpose business degree was shot down. See e.g. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139 (1<sup>st</sup> Cir 2007). Still, the Appeals Administrative Office in a recent non-precedential decision, *Matter of C-B-S- Inc.*, ID# 1308199 (AAO Sept. 6, 2018), has stated that “a bachelor’s or higher degree in business administration combined with relevant education, training, and/or experience may, in certain instances, qualify the proffered

position as a specialty occupation.” The same logic should apply more so for an engineering degree. In fact, it can more be easily shown that the technical knowledge gained from an engineering degree, whether it is electrical or mechanical, ought to qualify the H-1B worker to be a software developer or an operations research analyst.

Both petitioners and beneficiaries should not take these denials lying down. As explained in a [prior blog](#), such denials are in contravention to how a specialty occupation is defined under the INA. 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

It is not so obvious from a reading of INA 214(i)(1) that only occupations such as law or medicine would qualify for an H-1B visa on the assumption that only degrees in law or medicine would allow entry into the occupation. Even in law, a law degree may not always be required. One can qualify to take the bar exam in [some states through an apprenticeship in a law office](#). A physician may also qualify through either a Doctor of Medicine (MD) degree or through a Doctor of Osteopathic Medicine (DO). If the USCIS reads INA 214(i)(1) as applying to an occupation that requires a degree in one single specialty, as it is tending to with engineering degrees, then no occupation will qualify for the H-1B visa. This is clearly not what Congress intended. INA § 214(i)(1) ought to be read more broadly.

The USCIS should revert to a more commonsensical reading of the H-1B visa provision. 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 USCIS should be forced to adhere to holding in *Tapis International*.

Even if an employer requires a degree in engineering, in conjunction with a degree in computer science, it is atrocious for the USCIS to deny the H-1B petition because the engineering degree cannot qualify the worker for H-1B classification. The USCIS cannot categorically deny H-1B petitions because there exist 40 disciplines within engineering without considering the employer's justification for such disciplines and how the prospective H-1B worker qualifies for the position. The USCIS must review this requirement in the context of the employer's business. If a small mom and pop general retail store requires an engineering degree, the USCIS would be justified in looking at such an H-1B petition with skepticism. On the other hand, a company that requires an analyst to design and develop a sophisticated artificial intelligence marketing tool should be able to justify degrees in computer science, engineering, math, business analysis or marketing. Each of these fields, and the specific coursework that was taken, would potentially equip an H-1B beneficiary to perform different aspects of the duties of the position. An employer should also not be expected to specify the engineering field or limit the degree requirement to one specialty. The employer can have a general engineering degree requirement, and then assert in each petition, why the H-1B worker through the knowledge gained in his or her engineering degree program, whether it is electronics, civil or ceramic, equips the worker to perform the duties of the specialty occupation.

If the mutant H-1B gene afflicting engineering degrees is not excised, what is there to stop the USCIS from asserting the same logic to degrees in law or medicine? Could the USCIS assert that a JD degree or equivalent foreign law degree requirement is so general purpose that the employer must demonstrate the specialization within the law degree that would equip the H-1B worker to perform the duties of the position of a corporate attorney? Of course, that would make no sense. The knowledge developed from a law degree allows the prospective attorney to perform his or her duties in any legal specialization, be it corporate, tax or immigration law. This should be the case even if the attorney never took a course in corporate or immigration law in law school. The same logic should apply to the knowledge developed in an engineering degree that would equip the H-1B worker to perform the specialized duties of a software developer position or an operations research position. If both positions rely on quantitative skills, those skills could be gained through an engineering degree program whether it was in civil or aeronautical

engineering. If the USCIS wholesale turns down H-1B petitions for positions that require an engineering degree, an employer should [seek to challenge the denials in federal court](#), which like aggressive chemo therapy could potentially place the cancer in remission.