Degree Equivalence (Cont'd)

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty.

If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. The petitioner cannot use a combination of education, training and/or work experience to demonstrate eligibility in this situation.

Degree Equivalence (Cont'd)

It must be clearly demonstrated that:

- the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation;
- the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and
- the alien has recognition of expertise in the specialty.

Degree Equivalence (Cont'd)

Recognition of expertise in the specialty should be evidenced by at least one type of documentation such as:

1. Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

2. Membership in a recognized foreign or United States association or society in the specialty occupation;

Degree Equivalence (Cont'd)

3. Published material by or about the alien in professional publications, trade journals, books, or major newspapers;

4. Licensure or registration to practice the specialty occupation in a foreign country; or

5. Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Degree Equivalence (Cont'd)

Recognized authority

A recognized authority is a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested.

Degree Equivalence (Cont'd)

Ultimately, the adjudicating officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Licensing Requirements

If the occupation (not the duties) requires a state or local license the alien must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for a permanent license, except for administrative reasons, e.g. need Social Security # or DHS permission to be employed to receive licensure.
  - If all other requirements are met, allow for 1 year to obtain the permanent license.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the beneficiary is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.

- If otherwise approvable, the petition may be granted for **one year** or for the period that the temporary license is valid, whichever is longer.

Permanent Licenses

- A petition can be approved up to three years for beneficiaries who have permanent licenses

- Permanent licenses will still have an expiration date and may have renewal requirements listed.

  - Expiration dates on permanent licenses have no bearing on validity dates given. If otherwise eligible, the petition may be granted for up to three years.

Occupations that Typically Need a License

- Public school teachers require teaching credentials, certificates, or licensure
  - Should have license/certification in the area of intended employment
  - Some require special certification. Example: special education teachers
- Some charter school and/or private school teachers depending on the State or charter agreement
- Most healthcare occupations
- Engineers offering services to the public
- Architects
- Lawyers

Uncertified Health Care Workers

On or after July 26, 2004, if an alien seeks admission to the U.S., a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the U.S. is employment in the affected health care occupations.

- Certification should not be confused with licensure.

Uncertified Health Care Workers

Unless they have been certified, aliens in the following seven (7) fields are inadmissible to the United States under section 212(a)(5)(C) of the Act as uncertified health care workers:

1. Nurses
2. Physical Therapists
3. Occupational Therapists
4. Speech Language Pathologists & Audiologists
5. Medical Technologists
6. Medical Technicians
7. Physician's Assistants

Uncertified Health Care Workers

- In this category, nurses include:
  - Licensed practical nurses
  - Licensed vocational nurses
  - Registered nurses
- Medical technologist are also called Clinical Laboratory Scientists
- Medical technicians are also called Clinical Laboratory Technicians

Health Care Worker Certifications

At this time, only three entities are approved by USCIS to certify health care workers:

- Commission on Graduates of Foreign Nursing Schools (CGFNS) – issue certificates for all health care workers
- Foreign Credentialing Commission on Physical Therapy (FCCPT) – issues certifications for physical therapists
- National Board for Certification in Occupational Therapy (NBCOT) – issues certifications for occupational therapists

Health Care Degree Requirements

- Generally, Nurses, Medical Technologists and Medical Technicians require less than a baccalaureate degree for minimum entry into the field.

- Physical Therapists, Occupational Therapists and Physician's Assistants require a baccalaureate degree.

- Speech Language Pathologists & Audiologists may require a Masters degree.

Nurses

- Most nursing positions do not require a person with a four-year degree in the specialty occupation.
- To qualify for H-1B classification, the institution and/or the duties of the position must be specialized.
- Foreign Degrees entitled "Bachelor of Nursing Degree" may not be equivalent to a 4-year U.S. degree
- If approving an H-1B Nurse, (or any position requiring a nursing degree) you must have SISO sign-off.

Nurses (Cont'd)

In contrast to general RN positions, certain specialized nursing occupations may require a 4 year bachelor's or higher degree in a specific specialty:

- Clinical Nurse Specialists (CNS)
- Certified Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Nurse-Midwife (CNM)

Nurses (Cont'd)

- Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree.

- Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration.

Physicians

All H-1B petitions filed for a physician must include evidence that the beneficiary:

- Has a full and unrestricted license to practice medicine in a foreign state;

OR

- has graduated from a medical school in the United States or in a foreign state.

Physicians (Cont'd)

Petitions for physicians performing direct patient care must include:

- Evidence that the beneficiary has the license or authorization required by the state of intended employment to practice medicine

OR

- Evidence that the beneficiary is exempt from law from the licensing requirement

Physicians (Cont'd)

Unless the beneficiary is of national or international renown in the field of medicine, the petitioner must establish that the beneficiary:

Will be employed primarily to teach and/or conduct research for a public or nonprofit private educational or research institution or agency and no patient care will be performed, except that which is incidental to the physician's teaching or research

OR...

Physicians (Cont'd)

The beneficiary has:

- passed the Federation Licensing Examination (or equivalent examination as determined by the Secretary of Health and Human Services) **or**
- is a graduate of a United States medical school;

AND

- has competency in oral and written English (demonstrated through passage of a proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG)); **or**
- is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Physicians – Medical Residents

- Recent medical graduates who are completing their internship are referred to as Medical Residents.

- Medical Residents may have temporary licenses.

  - Exceptions: New York does not issue temporary licenses to their Medical Residents. They can be approved for up to three years.

  - Evidence of no licensing requirement is needed for hospitals in other states.

H-1B Petitioner Requirements

United States Employer

8 C.F.R. § 214.2(h)(4)(ii) defines this as:

A person, firm, corporation, contractor or other association or organization in the U.S. which:

1. Engages a person to work within the U.S.
2. Has an employer-employee relationship with respect to employees under this part; and
3. Has an IRS tax identification number

United States Employer (Cont'd)

The 8 CFR 214.2(h)(4)(ii) definition of "U.S. Employer" also states that an employer – employee relationship is indicated by the fact that the petitioner may:

- hire,
- pay,
- fire,
- supervise, or
- otherwise control the work of the beneficiary.

Employer-Employee Relationship

- In addition to the other requirements for an H-1B visa, a petitioner must satisfy the requirement that it is a U.S. employer or an agent.

- The petitioner must establish that a valid employer–employee relationship exists (or will exist) between itself and the beneficiary, *and* that the relationship will continue to exist throughout the requested H-1B validity period.

Agents

- Under 8 CFR 214.2(h)(2)(i)(F) it is possible for an "agent" to file an H-1B petition.
- The beneficiary must be one who is *traditionally self-employed* or who uses agents to arrange short term employment on his/her behalf with numerous employers or in cases where a foreign employer authorizes the agent to act on its behalf.
- An agent may be:
  - The actual employer (performing the function of an employer);
  - a representative of both the employer(s) and the beneficiary; or
  - A person or entity authorized by the employer to act for (or in place of) the employer.

Agents (Cont'd)

- An agent functioning as an employer must:
  - Guarantee wages and other terms and conditions of employment by contractual agreement with the beneficiary
  - Provide an itinerary of definite employment and information on other planned services.
- An agent in business as an agent must:
  - Provide a complete itinerary of services or engagements (including dates, names and addresses of actual employers, and names and addresses of venues).
  - Contracts between the employers and the beneficiary may be required in questionable cases.
- However, the fact that a petition is filed by an agent who is not the actual employer does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

Purpose of January 8, 2010 Memorandum

"Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" Donald Neufeld Memo

- This memorandum is intended to be a forward-looking document and is not intended to be used by adjudicators to re-adjudicate previously approved petitions.

- The memorandum and AFM update were issued to provide clear guidance in the context of H-1B petitions on the requirement that the petitioner establish that an employer – employee relationship exists, and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

January 8, 2010 Memorandum

- USCIS interprets the employer–employee relationship to be the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

- This common law test requires that all characteristics of the relationship be assessed and weighed with no one factor being decisive.

Third Party Placement

- Third party placement is the placement of a beneficiary at a work site that is not operated by the petitioner. This is a common practice in some industries.

- Third party placement may make it more difficult to assess whether the requisite employer–employee relationship exists and will continue to exist.

- Third party placement arrangements can meet the employer–employee relationship requirement, but sometimes they do not.

The Right to Control

- USCIS must look at many factors to determine whether the petitioner has the right to control the beneficiary such that a valid employer–employee relationship exists.
- The petitioner must establish that it has the right to control when, where, and how the beneficiary performs the job.

Right to Control vs. Actual Control

- The right to control the beneficiary is different from actual control.
- An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary.
- The employee–employer relationship hinges on the *right* to control the beneficiary.

Factors to Consider

1. Does the petitioner supervise the beneficiary and is such supervision on or off-site?

2. If the supervision is off-site, how does the petitioner maintain such supervision, *e.g.*, weekly calls, reporting back to the main office routinely, or site visits by the petitioner?

3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?

Factors to Consider

5. Does the petitioner hire, pay, and have the ability to fire the beneficiary?

6. Does the petitioner evaluate the work-product of the beneficiary, *e.g.* progress/performance reviews?

7. Does the petitioner claim the beneficiary for tax purposes?

8. Does the petitioner provide the beneficiary any type of employee benefits?

9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

Factors to Consider

10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

Remember: No single factor is dispositive.

Self Employed Beneficiary – Sole Stockholder

- USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. *See Matter of Aphrodite*, 17 I&N Dec. 530 (BIA 1980).

- If a petitioner is able to show, through evidence (e.g., documentation that there is an independent Board of Directors) that in fact the corporation has the independent right to control the employment of the owner/majority shareholder, then the petitioner may be able to establish a valid employer-employee relationship.

Self Employed Beneficiary – Stockholder

- In determining whether a valid employer-employee relationship exists between a stockholder petitioner (the corporation) and the beneficiary, the adjudicator must determine whether it is the corporation that has the independent right to control the work of the employee.

- However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may have difficulty establishing that a valid employment relationship exists in that the beneficiary, who is also the owner, may not be able to establish the requisite "control." See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

Additional Factors for Majority Shareholders and Sole Owners

- Whether the petitioner can hire or fire the beneficiary or set rules or regulations on the beneficiary's work;
- Whether the petitioner supervises the beneficiary's work and, if so, to what extent;
- Whether the beneficiary reports to someone higher in the petitioner's organization;
- Whether the beneficiary is able to influence the petitioner and, if so, to what extent; and/or
- Whether the parties intended the beneficiary to be an employee, as expressed in written agreements or contracts.

Please note: These petitions are adjudicated by the EIR team.

Meeting the Test

- The petitioner meets the relationship test if in the totality of the circumstances it presents evidence to establish by a preponderance of the evidence its right to control the beneficiary's employment throughout the duration of the term of employment.

- Officers should be mindful of the nature of petitioner's business and the type of work done by the beneficiary.

- Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case.

Documentation of the Employer–Employee Relationship

- The evidence should provide sufficient detail that the employer and the beneficiary are (or will be) engaged in a valid employer-employee relationship.

- If the employer will not have the right to control the employee as required, the petition may be denied for failure of the petitioner to satisfy the requirements of being a U.S. employer under 8 CFR § 214.2(h)(4)(ii).

Evidence of the Relationship in Initial H-1B Petitions

The petitioner can demonstrate an employer – employee relationship by providing a combination of the following or similar types of evidence:

1. A complete itinerary of services or engagements;
2. Copy of signed Employment Agreement between the petitioner and the beneficiary detailing the terms and conditions of employment;
3. Copy of an employment offer letter that clearly describes the nature of the employer – employee relationship and the services to be performed by the beneficiary;
4. A description of the performance review process;
5. Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

6. Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized)
   - that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

7. Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as:
   - a detailed description of the duties the beneficiary will perform,
   - the qualifications that are required to perform the job duties,
   - salary or wages paid, hours worked, benefits,
   - a brief description of who will supervise the beneficiary and their duties, and
   - any other related evidence; and/or

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

8. Copy of position description or any other documentation that describes:

   - the skills required to perform the job offered,
   - the source of the instrumentalities and tools needed to perform the job,
   - the product to be developed or the service to be provided,
   - the location where the beneficiary will perform the duties,
   - the duration of the relationship between the petitioner and beneficiary,
   - whether the petitioner has the right to assign additional duties,

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

- the extent of petitioner's discretion over when and how long the beneficiary will work,
- the method of payment,
- the petitioner's role in paying and hiring assistants to be utilized by the beneficiary,
- whether the work to be performed is part of the regular business of the petitioner,
- the provision of employee benefits, and
- the tax treatment of the beneficiary in relation to the petitioner.

Itinerary Requirement

If the petition requires the beneficiary to perform services at more than one work location, 8 CFR 214.2(h)(2)(i)(B) requires the petitioner to submit a complete itinerary of services or engagements detailing:

- The dates of each service or engagement;
- And the names and addresses of the establishment, venues or locations where the services will be performed.

Other Requirements: Export Control

- Petitioners are required to answer Part 6 "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States" of Form I-129.
- If a petitioner did not answer this question, the adjudicator must issue a RFE.
- The RFE for Export Control is located in O:Common.

Debarment

- In accordance with 20 CFR 655.855, DOL notifies USCIS about organizations that have engaged in certain actions that render them subject to mandatory debarment (212(n)(2)(C)(i) and (iii).

- During a period of debarment, USCIS is prohibited from approving any petitions filed by the petitioner (including pending petitions filed prior to the period of debarment).

- The ban does not generally affect previously approved petitions.

Labor Condition Application (LCA)

Labor Condition Application (LCA)- General Requirements

- DOL Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA.*
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.
- The LCA **does not** constitute a determination that the occupation is a specialty occupation.

*(Except H-1B2 petitions for DOD research project workers)

Labor Condition Application (LCA)- General Requirements (Cont'd)

- Validity dates - employment may only be authorized for these dates. The approval dates on the petition cannot be outside the range of the LCA start and end dates.
- LCAs for multiple beneficiaries - In some cases DOL may issue an LCA that is valid for more than one beneficiary.
  - Because only one alien can be on an H-1B petition, the same LCA can be used for multiple petitions if it is designated so on the LCA.
  - Petitioner must submit a list of all the prior petitions filed using this LCA each time a new petition is submitted.

Labor Condition Application (LCA)- SMSA

An LCA is required for each Standard Metropolitan Statistical Area (SMSA) where the beneficiary will be working:

- This is an area designated by DOL
- Usually an SMSA follows county lines, but not always
- We do make some exceptions to crossing SMSA lines in large metropolitan areas like LA/Orange/Riverside/San Diego Counties
- More than one work location may be listed on an LCA

Labor Condition Application (LCA)- Review

- Check validity dates of the LCA
- The LCA must reflect the specialty occupation that the beneficiary will be employed in
- The LCA must reflect the location where beneficiary will be working
- If the beneficiary is to work at multiple sites in more than one SMSAs, all SMSAs must be listed on the LCA. Multiple work locations may be included on the same or separate LCAs.

Labor Condition Application (LCA)-Review (Cont'd)

- In the event that the duties of the proffered position do not correspond with the occupational specialty certified on the LCA, you may issue a request for evidence for:
  - an LCA, certified prior to the date of the filing of the present petition, for the occupation that corresponds to the proffered duties.
  - further clarification of the proffered position that confirms the occupation on the LCA is correct for the position.
- Note: SISO concurrence is required for issuance of this RFE.

Labor Condition Application (LCA)- Review (Cont'd)

- The petitioner must obtain the LCA before filing the H-1B petition.
- Therefore, the LCA must have a certified date that is on or before the receipt date of the I-129 H-1B petition.
- If the LCA is obtained after the filing of the I-129 H-1B petition (or not obtained at all), the petition shall be denied.

Limitations on Stay

Initial Period of Stay

- For specialty occupations, the validity period may be for up to three years
  - may not exceed the validity period of the corresponding LCA
  - may be limited by other factors (e.g., temporary licensure, contracts, etc.)

Limitations on Stay

8 C.F.R. 214.2(h)(13)(iii)(A)

- An H-1B alien in a specialty occupation... who has spent six years in the United States under section 101(a)(15)(H) and/or (L) of the Act may not seek extension, change status, or be readmitted to the United States under section 101(a)(15)(H) or (L) of the Act unless the alien has resided and been physically present outside the United States, except for brief trips for business or pleasure, for the immediate prior year.
  - If a petitioner is seeking to start a new 6-year period for a beneficiary who has already spent time in H or L status, make sure that they have been outside of the U.S. for at least one year. Brief trips to the U.S. are not interruptive of the 1-year period but do not count toward the 1-year period.

Adjudication of the Petition

Consulate Notification

- If the beneficiary is not in the U.S. they are not eligible for a change of status or an extension of stay.

- If we approve the H-1B petition we will send a duplicate copy of the approved petition (if one has been provided) to the consulate (through KCC) in the beneficiary's foreign country.

Requirements for Change of Status (COS)

- Beneficiary must be physically in the U.S. at the time of filing
- Passport must be valid at the time of filing
- Departure is treated as abandonment until petition is approved
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused under extraordinary circumstances

Change of Status (COS)-Prohibitions

There are some nonimmigrant classifications that do not permit a change to H-1B status. These classifications include, but are not limited to:

- J-1 exchange visitor, who is subject to the 2-year foreign residence requirement of section 212(e)
  - There are special waiver requirements for J-1 foreign medical graduates.
- A J-2 dependent of a J-1 Conrad doctor cannot COS to any other nonimmigrant classifications except H-4 until the principal fulfills the three-year commitment as he/she is subject to the same conditions of the waiver as the principal J-1. (Approval of J-2 COS to H-1B requires SISO and ACD concurrence.)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- M-1 student - 8 CFR 248.1(d)
  - If the education or training which the student received while an M-1 student enables the student to meet the qualifications for temporary worker classification the COS will be denied. (SEVIS I-20 forms).
  - Must be maintaining status (I-94, 797, etc.)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-2B – An H-2B who has spent 3 years in the U.S. under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they are outside of the US for the immediately preceding 3 months.

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-3 – An H-3 trainee who has spent 24 months in the US under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they have resided outside of the US for the immediate prior 6 months.

F-1 COS to H-1B-"Cap Gap"

Under the interim rule, the status and any employment authorization under 8 CFR 274a.12(c)(3)(i)(B) and (C) for an F-1 student who is the beneficiary of a COS petition will be automatically extended until October 1 of the FY in which the H-1B visa is being requested where the H-1B COS petition is timely filed requesting an October 1 employment start date.

The automatic extension is terminated if the H-1B petition is rejected, denied or revoked.

Requests for Evidence (RFE)

- USCIS may issue an RFE and/or Notice of Intent to Deny (NOID) when the petitioner has failed to establish eligibility for the benefit being sought.

- The RFE should specifically state what is at issue and be tailored to request specific types of evidence from the petitioner that directly relate to the deficiency USCIS has identified.

- The RFE should not require a specific type of evidence unless provided for by the regulations (*e.g.* an itinerary of service dates and locations), nor request information that has already been provided.

- Officers should state what element the petitioner has failed to establish and provide examples of documents that could be provided to cure the deficiency.

Split Decisions

- Remember if a nonimmigrant in the U.S. wants to change nonimmigrant status or extend nonimmigrant status, they must be currently in nonimmigrant status at the time of filing

- The adjudication of the H-1B petition of an alien currently in the U.S. has two distinct parts. Adjudication of the H-1B petition and the adjudication of the COS or EOS request.

- If they are not in or maintaining status when filing an EOS or COS and we approve the H1B petition, we may deny the EOS or COS. This is called a split decision.

Questions?

Div 1 Roundtable Summary - 11/10/2010

Agenda Items

1. Discuss 'Rules/Standards of Evidence' – "preponderance standard" (either with or without PP)

2. Discuss EER, Bobbie Johnsons email regarding validity dates and not giving special treatment to companies (i.e. Cognizant)

3. Discuss 'Assertions vs. Documentation" and place it into context with type of entity, totality of evidence and the "preponderance" standard.

4. Time permitting – open it up to the floor for general questions.

Attendance – Div 1 (ISOs, SISOs, ACD), EB Seniors, Other divisions' ISOs assisting with H-1B adjudication, CFDO, Counsel, QA

1. Discussed "Rules/Standards of Evidence: There are three Standards:

- Preponderance (51%)
- Clear and Convincing
- Beyond Reasonable Doubt

The standard of proof applied in most administrative immigration proceedings is the "**preponderance of the evidence**" standard.

* Refer to Aytes Memo (01/11/06) that discussed Burden of Proof and Standard of Proof for guidance.

2. Discuss the submitted contracts/MSAs vs. the requested employment date.

* Refer to Bobbie Johnsons email sent July 28, 2010 and previous roundtable note dated 10-21-10 for guidance.

Answer to questions on how to grant the validity date:

Officers should look at the totality of the circumstances and other factors such as: reputable companies vs. 10/25/10 companies; history of filings; FID's records...etc. If the petitioner is a reputable company who has had a good filing history, never benched its employees, then the validity date may be determined based on general terms and conditions listed in the submitted MSAs. Officers do not need to send out an RFE asking for a particular document to justify the requested employment date. On the other hands, if officers do not know anything about the petitioner who just happens to be in the 10/25/10 category, or do have reasons to believe that the petitioner may have been an H1B violator (i. e. FID), then they should scrutinize the petition, RFE, limit the requested employment date and possibly deny the case if the petitioner do not establish the validity of the requested employment date.

3. Discuss "Assertion vs. Documentation"

Assertion is the petitioner's statement in the petition. Documentation is evidence that verifies the assertion. Officers do not need to request documentation for every assertion. Again, officers should look at the totality of the evidence and apply the "preponderance" standard. Depend on the petitioner and its nature of business, duties asserted by the petitioner may be acceptable. Again, treat each case based on its own merits.

4. General Questions

Q. Can we request an objective documentary evidence, such as DE6s, payroll records etc., to determine the eligibility because the submitted document is considered "self-serving"?

A. Officers should not mandate a particular document from the petitioner; nor should officers disregard the submitted evidence because it is deemed "self-serving". We may face legal issues if we request a specific type of evidence that is not required by regulations. However, if there are discrepancies found in the record, then officers may be able to request collaborating documents to resolve the discrepancies. In this case, officer should articulate the reasons for requesting a particular document, provided that it is material to the issue identified in the RFE/ITD. In the situation when the availability of "specialty works" is of concern, officers may provide a list of suggested documents in the RFE. In either case, if the petitioner fails to comply and petition is eventually denied, the issues addressed should be related to specialty occupation and/or discrepancies found in the record. Do not deny the petition solely because the petition fails to provide a particular document requested in the RFE.

Q. Restriction on RFE/Denial an "EOS with the same petitioner" petition based on Yates memo's guidance

A. According to Yates memo," a prior determination by an adjudicator that the alien is eligible for the particular nonimmigrant classification sought should be given deference". However, upon the request for extension with the same petitioner, if it has been found that (1) there was a material error with regard to the previous petition approval; (2) a substantial change in circumstances has taken place; or (3) there is new material information that adversely impacts the petitioner's or beneficiary's eligibility, then prior approval of the petition need not be given deference. Officers do have authority to RFE/deny, in the exercise of his or her discretion, the extension request by the same petitioner in the same classification.

In this case, officers should apply the guidance memo wisely. When reviewing the documents submitted with EOS filings, do not second guessing and do not RFE for additional evidence just because the submitted evidence in the record is deemed insufficient according to officers' standard. A material error, a substantial change in circumstances, or new material information must be clearly articulated in a request for evidence or decision denying the benefit.

It is noted that change in work locations and/or end clients is considered "Change in the previously approved employment". This can be treated as same as new employment/change employer filings. Yates memo's guidance does not apply to this type of cases.

Q. Why do we still RFE some big IT consulting companies such as Tata, Infosys, Wipro...etc when they've already had long history of credible filings?

A. While it is true that we do not need to scrutinize petitions filed by certain organizations based on their history of filings. However, depend on the evidence provided in the record, RFE is necessary in some cases. All petitions should be equally treated regardless of the size of the company.

Concern on the out- of- date info on FID record - Joe will bring up this concern on the meeting with the CFDO next week and will request the FID record to be updated.

10/21/2010 - Div 1 Roundtable Summary

Attendance - Div 1 (ISOs, SISOs, ACD), EB Seniors, Div 2 and Div 12 ISOs assisting with H-1B adjudication, CFDO, Counsel, QA

* Discussed I-129 H-1B CAP Exemption
  - CAP exempt - (1) Nonprofit research org or governmental research org
    (2) Institutions of higher education or related or affiliated nonprofit entity
    - EB Seniors readdressed definition of related or affiliated
    - Introduced new "**Affiliation chart**" drafted by Counsel
      - Discussed 3 prongs used to establish affiliation
        - Shared ownership or control by the same board or federation,
        - Operated by an institution of higher education, or
        - Attached to an institution of higher education as a member, branch, cooperative, or subsidiary

    (3) Third Party Petitioners employed "AT":
    - Institutions of higher education or a related or affiliated non-profit entity,
    - A nonprofit research organization, or
    - A governmental research organization

* Follow Aytes Memo (06/06/06) regarding affiliation except example from the memo that states that a beneficiary must be working at least 51% of the time at the qualifying institution. The bene does NOT need to spend the majority of their time at the qualifying institution. (Anticipation of a new memo to address this is forthcoming from HQ).

* Cognizant Talking Points:

As a reminder, anything that applies to Cognizant will also apply with other filings. Generally, we should be following the e-mail that was sent in July 2010 regarding "EE-Relationship and Validity Period" which applies not only to Cognizant but to all H1B petitions.

NO RFE

- If the file already contains initial evidence of EE relationship but it does not cover the full validity period requested on the petition. We would limit the validity to the time that can be established. If the evidence is for less than a year. **We will give them one year.**

- Depending on the totality of filing, we can give them the full validity if the contract/end client letter indicates that there is an **automatic renewal clause. An RFE may be issued if the contract/end-client letter is outdated.**

RFE

- Contract/End client letter is outdated.
- End-termination date was clearly **redacted** from the contract/end-client letter
- **No End/termination date** in the contract or end-client letter. Again, case to case basis if we can articulate a reason to believe that the beneficiary will be benched.

A "Cognizant" specific RFE is in O:common. This template addresses both EE and availability of specialty occupation. Use it "when appropriate" since there are filings that will NOT require an RFE.

In addition, you can use the RFE for other petitioners, if appropriate. We've used it for WIPRO, Infosys. The RFE still follows the OCC approved RFE. It does not mandate specific evidence to be submitted. Petitioners are provided with options.

* CFDO - Fraud Referral Process has changed. More information available in the Div 11 O:common folder

- Virtual offices - CFDO created a VO list to assist ISOs with adjudication.

This list is used to identify possible VOs and should not be used as the sole basis for denying a case. The entire totality of the evidence should be used when making a final adjudicative decision.

Follow Up - Next roundtable will be the first week of November. The topics will include EE relationship, specialty occupation work availability, and standard of proof (preponderance of the evidence).

COMPLEXITY AND UNIQUENESS OF THE PROFFERED POSITION

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. -

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, with the United States Citizenship and Immigration Services ("USCIS") to classify the alien beneficiary as a specialty occupation worker under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The overarching issue to be discussed in this proceeding is whether the position offered to the beneficiary requires a baccalaureate degree or higher in a specialty occupation.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

INA 214(i)(1) defines the term "specialty occupation" as an occupation that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) 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)(2) outlines the fundamental requirements of a specialty occupation:

> (A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,
>
> (B) completion of the degree described in paragraph (1)(B) for the occupation,

or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The term "specialty occupation" is further defined at 8 C.F.R. §214.2(h)(4)(ii) as:

> . . . 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.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet 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.

USCIS will attempt to determine whether the petitioner has established that its particular position is so complex or unique that it can be performed only by an individual with a degree pursuant to the latter portion 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

See individual "Word" documents in this folder for examples of ANALYSES: Block, Copy, Paste, and Edit appropriate text here.

CONCLUSION 1: Use when only evidence provided was for whether degree normally required

The petitioner also failed to establish any of the remaining three criteria: that a degree requirement is common to the industry in parallel positions among similar organizations, or alternatively that the proffered position is so complex or unique that it can be performed only by an individual with a degree; that the petitioner normally requires a degree or its equivalent for the position; or that the nature of the specific duties is so specialized and complex that knowledge required to perform the duties s usually associated with the attainment of a baccalaureate or higher degree.

CONCLUSION 2: General Blanket Denial Statement.

The petitioner has failed to establish that any of the four factors enumerated in 8 C.F.R. 214.2(h)(4)(iii)(A) are present in this proceeding. The petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary. The petitioner also has not show that it has, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty for the offered position. Nor did the petitioner present documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions amount organizations similar to the petitioner. It is also noted that the record does not include evidence from professional associations regarding an industry standard, or documentation to support the complexity or uniqueness of the proffered position. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

It is, therefore, concluded that the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.

FINAL CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

CSC Discusses Specialty Occupations

Cite as "*Posted on* AILA InfoNet at Doc. No. 00050901 (May 9, 2000) ."

CSC Discussion Group Summary

The AILA representatives were:

Cynthia Lange
Kathrin Mautino
Angelo Paparelli
Nancy-Jo Merritt
Jeff Appleman [Jeff participated in the planning for the meeting, but was unable to attend]
Crystal Williams [AILA National Office]

Dona Coultice, Director of the CSC, led the INS group. The other CSC representatives were:

Howard Dison
Nancy Albe
Ernie _____
Joe Holiday
Sheila Fisher
Blake Odo
Rachel Wilcox
Mary Agnelly

Also present was Pandora Wong, from DOL, Region IX

On March 9, 2000, a group from AILA sat down with a group from the CSC to discuss the definition and treatment of "specialty occupations." The discussion's focus was on trying to clarify the INS thinking that underlies the recent rash of H-1B denials. AILA pointed out the legislative history of the 1990 Act with respect to Congress' intent to expand the interpretation of eligibility for the H-1B category. INS, on the other hand, seems to take a receding view of eligibility. The following observations were made by the INS participants:

Jobs in flux. The CSC takes the view that the nature of many occupations has changed in recent years, such that a number of jobs that once required a degree no longer require one. One INS participant noted that her son, who is only graduating from high school, is being courted by tech companies for computer industry jobs. Some jobs in these categories (such as website designer, computer graphic designer, programmer, etc.) are seen as being performed sometimes by high school or 2-year graduates, and sometimes by professionals with degrees. The point is to convince the CSC that a given job falls on the side of the continuum that requires the degree.

Avoid minimalist/DOT job descriptions. INS participants seem to regard the provision of short and general job descriptions, or of descriptions lifted directly from the DOT, as practically

an invitation to deny. Adjudicators indicated a willingness to "stretch" to approve when they know about the company (Intel and Microsoft were specifically mentioned), but are unlikely to do so for a company they don't know. Also, there is a constant evolution and changeover of adjudicators, meaning that each new adjudicator is not necessarily informed by past knowledge obtained at the CSC.

Identify which criteria under 214.2(h)(4)(iii)(A) you are relying on. You must demonstrate that one of the four alternative criteria for proving the position is in a specialty occupation is met. Spell out which categories you are trying to prove, and provide evidence to back up the assertion. If the adjudicator thinks you've proven the case in any one category, the petition will be approved. If the adjudicator thinks you are "getting there" with respect to at least one category, an RFE would be issued. If the adjudicator doesn't know which category you're trying to prove, the case will be denied (or a "kitchen sink" RFE will be issued). "The four areas are optional; we only need one, and if we can't tell which one you are relying on, we may choose one that doesn't meet the requirements." The example given was "web page designer." "Our children design web pages. What is it about your requested web page designer's duties that places that job in one of the four categories?" Graphic designers were mentioned again in this context, as requiring only a two-year degree. If you have a petition for a graphic designer, you need to point to which of the four categories supports the specific job in the petition. [During this part of the discussion, the supervisors were nodding affirmatively, clearly in strong agreement. The job title alone is not sufficient.]

If using "the employer normally requires a degree" criterion, take extra care. The adjudicator has to be convinced that the degree is more that an employer preference. (Example given: Everyone that the employer hires as a taco vendor has a degree. That doesn't mean that the job truly requires a degree.) INS doesn't like to adjudicate based on the job definition, but instead looks to what is so specialized about the job. INS will look elsewhere to see if a job is really a specialty occupation, such as the employer's internet web site regarding what jobs are open and what is advertised on the web as requirements (therefore, if you are presenting requirements different from what's on the employer's website, you need to explain the differences). Adjudicators also feel that there are people working in the Service Center who "are very knowledgeable" about certain occupations, so the adjudicators may check with them.

How to prove that the employer normally requires a degree. The CSC strongly prefers that the employer prove the educational background of those in the job now, rather than in the past. If there are not others in the job now, the background of the last incumbent is helpful (if the last incumbent failed in the job because he didn't have a degree, this can be helpful to the case). If you don't affirmatively address the background of the last person in the job, an RFE may ask you to address it.

Where jobs that appear to be alike have different levels of difficulty. It was acknowledged that some apparently similar jobs within an employer's business can have different levels of sophistication, and thus different levels of requirements. It can help to point this out and expand on it. For example, if an employer has a grouping of junior level jobs that perform some of the less complex duties associated with a particular occupation, indication of this can help to prove that there are other jobs that concentrate on the more complex duties: in other words, simpler

duties are left to the positions that don't require a degree, while the more senior people in the same apparent occupation would need a degree because they are not involved in those simpler duties.

Proving that the degree requirement is common to the industry. To show that the companies you are using for comparison are in the same industry, present evidence of how you are defining the industry. Unlike the DOL prevailing wage context, it is fair here to look at such factors as company size and geographic location—"companies of similar size and scope" is an acceptable standard to INS.

All occupations are on the table. There is no occupation that one can assume will be considered a specialty occupation just because it always has been. "Predictability creates an issue," according to the Service Center Director. Industries are changing rapidly, and she wants adjudicators to perform real analysis of job duties, rather than just looking at job titles. For example, a job may be called Engineer, but if too many duties are really those of a technician, the job is not a specialty occupation.

Role of precedent decisions and adverse information. Adjudicators noted their belief that there will be times that a precedent decision will be deemed outdated and thus not followed. AILA pointed out that precedent decisions are binding unless INS announces that it will contest the precedent. AILA also reminded the INS of its obligation to provide evidence of adverse information leading to a denial.

The DOT's SVP is not a factor. Pandora Wong discussed how the SESAs use the DOT and OOH primarily to compare wage information. She said that the DOL does not question the SVP level once the SESA has determined a wage level. There had been some concern by practitioners that the CSC was relying heavily on the OOH. The CSC staff was derisive of the use of DOT job descriptions, and also of the use of the SVP. Mary Agnelly said that INS had been advised that the SVP "does not serve our purposes." The AILA group pressed the SVP as a useful guide to educational level, as having been prepared by a sister agency after extensive research and surveys. The CSC staff did not seem receptive.

Smaller companies are questioned more. If a company has only a handful of employees, it is more likely that the CSC will have questions (particularly if the job duties are straight from the DOT). You should give evidence that the company really needs someone in this position, such as showing volume of transactions. A case in which a company had four H-1B petitions showing salaries that together exceeded the company's gross income was given as an example of a questionable situation. Situations such as upcoming IPOs, private financing, and positioning for selling the company were pointed out as possible, and increasingly frequent, scenarios explaining such phenomena. INS suggested that the documentation include such information to overcome these potential problems. In response to sensitivities about confidentiality in such circumstances, INS suggested the petitioner either take its chances or wait until after the situation can be made public to petition for the person. AILA noted that there is an Executive Order regarding minimization of disclosure that provides guidance in this regard.

The relationship between the company's business needs and the position is crucial. A small company with five or six employees requesting a full-time accountant should be prepared to demonstrate the need for the accountant, such as showing a high volume of transactions. Differentiate the company's need from what an outsider might expect is needed. The example given by the CSC was a successful H for a gardener/anthropologist at Williamsburg.

INS feels scrutinized on these issues. The Service Center Director indicated that she feels under considerable pressure from Congress and the press with respect to letting "fraud" go undetected. At the same time, she is starting to feel pressure from the other side (noting in particular the Lofgren hearing) about unwarranted denials and delays.

Problems in sorting out fraud. Adjudicators noted that a lot of the "kitchen sink" RFEs are attempts to sort out potential fraud at the adjudications level so that it does not have to send the case to Investigations. It was acknowledged that these generalized laundry lists are symptoms of the adjudicators being reluctant to say what is really bothering them about the case for fear that they will give away what cues them to look deeper. AILA members suggested that the RFEs be more directed, perhaps asking for evidence of the company's bona fides and suggesting some documentation that could satisfy the INS' suspicions, rather than sending long lists that don't state the problem but seem to require every piece of documentation listed, down to the fire escape plan. INS noted that background material on the company filed up front can help, particularly for those companies that are not household names.

Proving equivalency. The CSC is more apt to recognize experience as equivalent to a degree if there is some education to back it up. If there is only a bare 12 years of experience, it is particularly important to show that the experience was progressive and to show such evidence as the qualifications (i.e., degree) of the person's supervisors in those jobs. Letters from the prior employers can be particularly helpful.

Proving the degree requirement is specialized. INS reminded that the job doesn't just have to require a degree—it must require a degree in a specialized field. One question that is often asked by INS is whether the degree can be obtained in the U.S. INS pointed to fields (such as textiles) where U.S. programs are usually only 2-year. The battle will be more uphill to show these are specialty occupations. College catalogues from U.S. schools showing the existence of the 4-year course of study can be helpful, particularly for fields that are rare in the U.S. For more common fields in which the programs tend more to be 2-year, multiple college catalogues would be needed to be persuasive.

Adjudicators' pet peeves. When the adjudicators were asked what really drives them crazy, some answers were: when the job title doesn't reflect the duties described; when the support letter just says "please refer to the OOH"; when the Form 1020 is completed but the answers only say "see enclosed"; on EOS's, the major field of study, highest degree completed and salary are not stated; on the supplement when the prior periods of stay question is not completed.

Special Assessment

(U//FOUO) Criminal Exploitation of H1B Specialty Occupation Visas

23 October 2006

Homeland Security

Office of Intelligence and Analysis
Homeland Security

Special Assessment

(U//FOUO) Criminal Exploitation of H1B Specialty Occupation Visas

23 October 2006

(U) Attention: Federal Departments and Agencies, State Homeland Security Advisors, and State and Local Law Enforcement.

(U) Distribution Notice: Requests for further dissemination must be approved by the DHS/Office of Intelligence and Analysis (I&A) Directorate—Production Management at IA.PM@hq.dhs.gov.

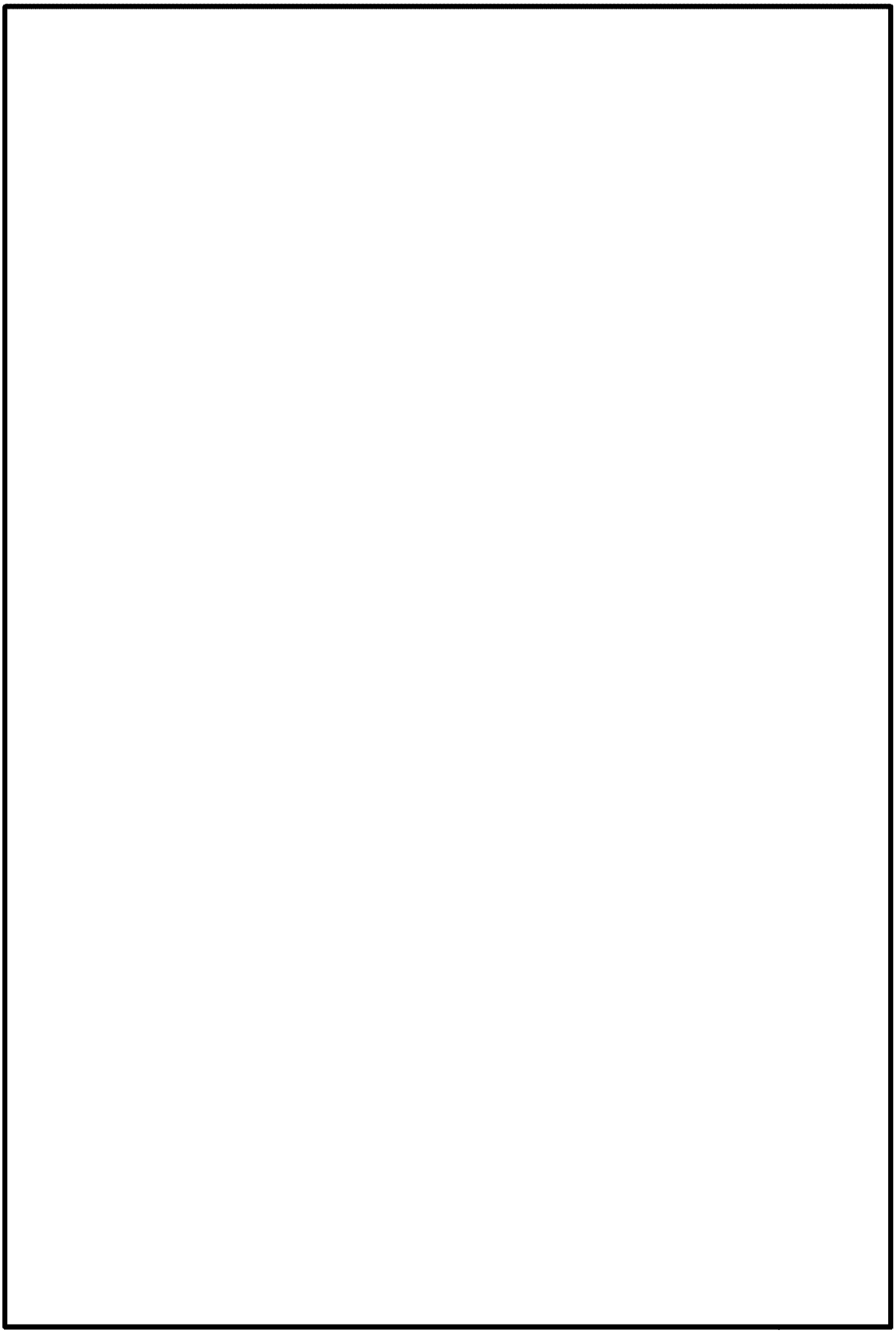
(U) Scope

(U//FOUO) The purpose of this Special Assessment is to provide information on the potential for exploitation of the H1B Specialty Occupation visa to fraudulently gain entry into the United States.

(U) Key Findings

(b)(7)(e)

(b)(7)(e)



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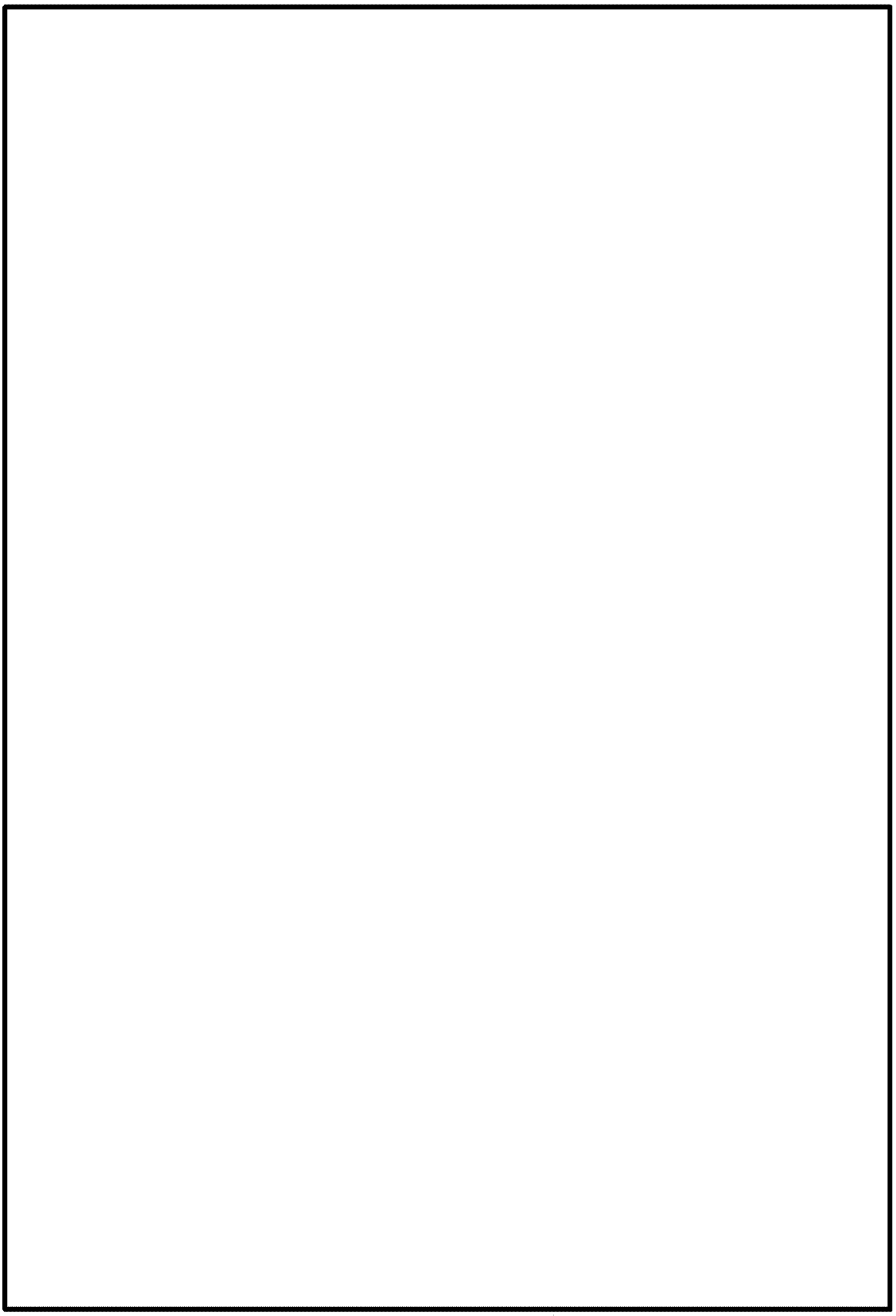

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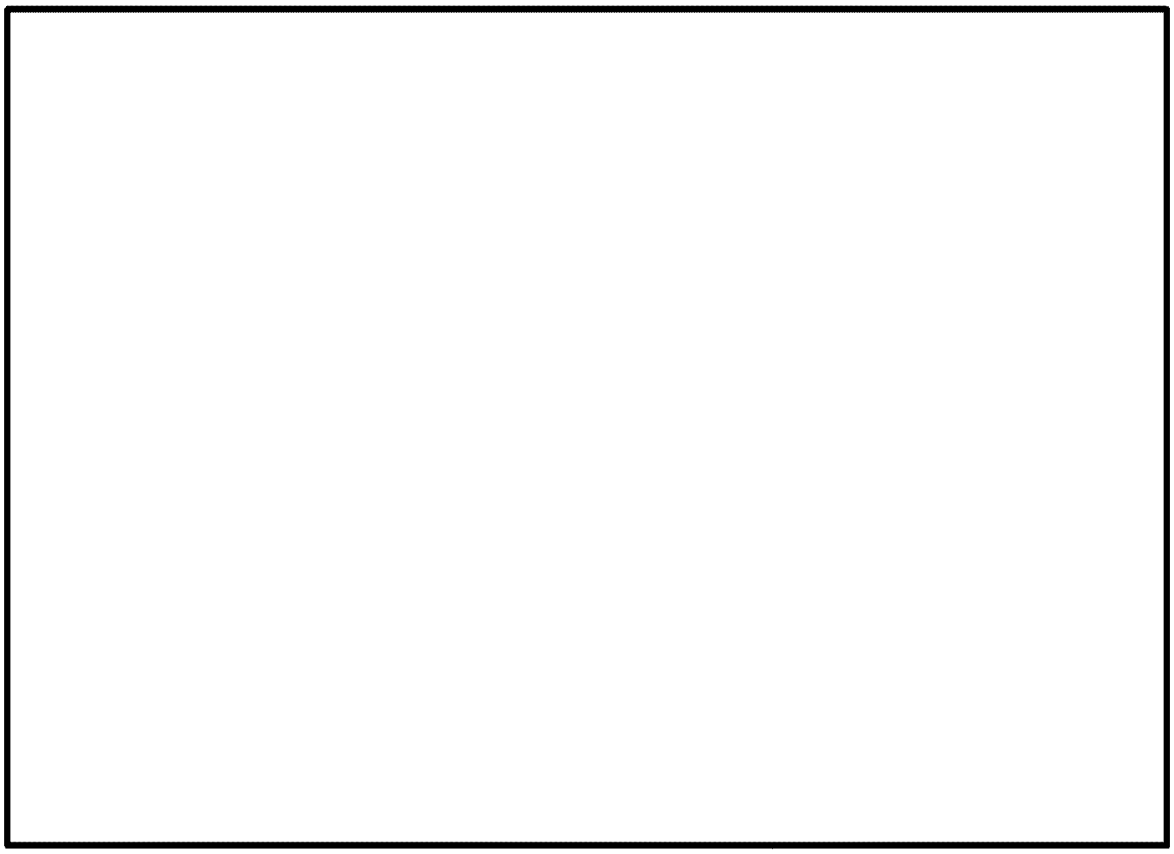

(b)(7)(e)

SAMPLE ANALYSIS:

- Actual job duties determine specialty occupation.

The petitioner's creation of a position with a perfunctory bachelor's degree requirement will not mask the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. The critical element is whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000).

To interpret the regulations any other way would lead to absurd results. If USCIS were limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id at 388. *See also* Matter of Michael Hertz Associates 19 I. & N. Dec. 558 (Comm'r 1988) (The mere requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility).

ALIEN'S DEGREE MUST RELATE TO THE POSITION OFFERED.

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. -

You filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The [first, second, third, next, only] issue to be discussed is whether you have established that the beneficiary is qualified in a specialty occupation by virtue of possessing a baccalaureate degree or equivalent in a specific field of study which is directly related to the position being offered.

RULE:

INA 101(a)(15)(H)(i)(b) provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)....

INA 214(i)(1) defines the term "specialty occupation" as one that requires, among other elements: "(B) 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." (Emphasis added).

The term "specialty occupation" is further defined at 8 C.F.R. 214.2(h)(4)(ii) as:

> An occupation which requires theoretical and practical application of a body of highly specialized knowledge in a field of human endeavor...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. (Emphasis added).

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet 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 C.F.R. 214.2(h)(4) (iii)(C) further lists four criteria, one of which must be met, for a beneficiary to qualify to perform services in a specialty occupation. Essentially, the beneficiary must:

(1) Hold a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(2) Hold a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

(3) Hold an unrestricted State license, registration or certificate which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; or

(4) Have education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

According to the statute and regulations the H-1B classification is not established merely by the beneficiary's possession of a baccalaureate degree (or equivalent). It must also be demonstrated that there exists a nexus between the nature of the beneficiary's degree (or equivalent) and the position duties proposed by the petitioner. The required degree must

be in a specific specialty, that is, in a discipline that contains a body of highly specialized knowledge that is necessary for performance of the position. In this context, USCIS interprets "degree" in all of the four criteria of 8 C.F.R. 214.2(h)(4)(iii)(A) as one in a specific specialty. Therefore, unless it is in a specific specialty, a degree or degree-equivalent requirement will not qualify a position as an H-1B specialty occupation.

USCIS' precedent decisions have confirmed that a generalized degree, such as that in business administration, absent specialized experience, is insufficient to qualify an alien beneficiary in a specialty occupation: Matter of Ling, 13 I. & N. Dec. 35, 37 (a petitioner with a business administration degree must establish a particular area and occupation in the field of business administration in which he is engaged or plans to be engaged and must also establish that he meets the special academic and experience requirements of that designated activity, as a prerequisite to a determination as to professional status."); Matter of Shin, 11 I. & N. Dec. at 688 ("The mere acquisition of a degree or equivalent experience does not, of itself, qualify a person as a member of a 'profession.' The knowledge acquired must also be of nature that is a realistic prerequisite to entry into the particular field of endeavor."); Matter of Asuncion, 11 I. & N. Dec. 660 (Reg. Comm. 1966) (Traits common to a "professional" include recognition as a member of these professions normally requires the successful completion of a specified course of education on the college or university level, culminating in the attainment of a specific type of degree or diploma); Matter of Michael Hertz Associates, 19 I. & N. Dec. 558 (Comm'r 1988) (Since there must be a close corollary between the required specialized studies and the position, the requirement of a degree of generalized title, such as business administration or liberal arts, without further specification, does not establish eligibility).

Furthermore, USCIS' interpretation has been upheld in numerous federal court decisions as a reasonable interpretation that is consistent with section 214(i)(1) of the Act. See Tapis International v. INS, 94 F.Supp. 2d 172, 175 (D.Mass. 2000) ("INS was not unreasonable in interpreting the guidelines to demand that an employer require a degree in a specific field. Otherwise a position would qualify if any bachelor's degree were required"); Hird/Blaker Corporation v. Slattery, 764 F.Supp. 872, 875 ("First, the degree must involve a 'precise and specific course of study which relates directly and closely to the position in question.' An occupation that requires a general degree such as business administration or liberal arts, therefore, is not a 'profession.'"); Shanti, Inc. v. Reno, 36 F.Supp.2d 1151 (D.Minn. 1999) (An alien who possessed a degree in business administration but had no previous experience in field of restaurant management was not qualified to perform services in a specialty occupation, and that the position of restaurant manager was not a "specialty occupation"); All Aboard Worldwide Couriers, Inc. v. Attorney General, 8 F.Supp.2d 379 (S.D.N.Y. 1998) (No abuse of discretion where petitioner unable to establish that its competitor organizations require job candidates to have a B.A. in a specific, *specialized* area).

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

Your organization is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

SAMPLE ANALYSIS 1of 4:

- Degree unrelated to the position offered.

See shell in the "Equivalency" folder: "Forgn Ed Eval, Unrelated Field." This should be coupled with an analysis of whether the beneficiary possesses the equivalent of a degree in the appropriate field based upon work experience.

SAMPLE ANALYSIS 2 of 4:

- Position is an amalgam position with no specific specialty;
- none of the duties appear to be in a specialty occupation.

Upon review of the record, the proffered position appears to be that of events planner, with major responsibilities in contract negotiation and monitoring. As such it is an amalgam position containing elements of a short-term contract specialist, a hotel or travel manager, and an events planner. The Handbook does not contain a classification that is analogous to the proffered position.

In addition, none of the elements of the proffered position appear to require a minimum of a baccalaureate degree in a specific specialty for entry into the position. For example, if the Handbook's lodging manager classification is viewed as related to the proffered position, this classification does not require a baccalaureate degree in a specific specialty: "Hotels increasingly emphasize specialized training. Postsecondary training in hotel or restaurant management is proffered for most hotel management positions, although a college liberal arts degree may be sufficient when coupled with related hotel experience." Without more persuasive testimony, you have not established the first criterion of 8 C.F.R. 214.2(h)(4)(iii)(A)

SAMPLE ANALYSIS 3 of 4:

- Position is a combination of jobs with no specific specialty;
- none of the duties appear to be in a specialty occupation.

You are an Arizona corporation that operates special sports and leisure industry events on behalf of a variety of clients. You have three employees and a gross annual income of $1,400,000. You seek to employ the beneficiary as a Director of Operations for a period of three years.

In correspondence supporting the initial petition, you stated that the proffered position would be responsible for the development, application and management of all software and computer systems required by the employer for all company produced events. The director of operations would be required to interface and coordinate all corporate efforts with individual client's management and professional staff in areas of marketing, advertising, event management, scoring and software coordination. You indicated that, in order to perform the duties of the position, an individual would need a bachelor's degree in marketing, leisure management, computer science/marketing, or its equivalent. You stated that these responsibilities required a person who had completed college level English and Communication course work. Completion of college level public relations and marketing courses was also a necessity to help the director of operations address various audiences in an appropriate manner.

The proffered position requires a wide range of skills necessary for the planning and completion of events involving potentially thousands of participants. The skills required, however, appear to be general managerial skills that can be obtained through education or past work experience. There is no requirement that the education conform to a specific specialty. Indeed, it appears that any number of educational pursuits, and/or work experiences would suffice, provided that supporting course work include various courses specific to the proffered position. You have, therefore, not met the first criterion listed above.

SAMPLE ANALYSIS 4 of 4:

- Alien possesses a degree but not in a field indicated by the OOH.

Your organization is an environmental engineering business. You seek to employ the beneficiary as a water quality controller.

Upon review of the record, you have not established that the beneficiary is qualified to perform an occupation that requires a baccalaureate degree in a specific specialty. The proffered position is similar to that of an environmental scientist. The Department of Labor's Occupational Outlook Handbook (Handbook), 2012 - 2013 edition, finds that environmental scientists require at least a bachelor's degree in hydrogeology; environmental, civil, or geological engineering; or geochemistry or geology. The beneficiary holds a baccalaureate degree in "Natural Resources Engineering (Fisheries)" and a master's degree in "Fishery Management" from Iranian institutions. An evaluator from the

Academic Credentials Evaluation Institute, Inc. found the beneficiary's education equivalent to a Bachelor of Science in Fisheries degree and a Master of Science in Fisheries degree as awarded by regionally accredited U.S. institutions of higher education. The record, however, contains no evidence that the beneficiary's degrees in a fisher-related field qualify him as an environmental scientist, a position that requires at least a bachelor's degree in hydrogeology; environmental, civil, or geological engineering; or geochemistry or geology. For this reason, the petition may not be approved.

As such, the beneficiary is not qualified for classification as a specialty occupation worker.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

CERTIFIED LCA DOES NOT EQUAL SPECIALTY OCCUPATION

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

· To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. ·

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, to classify the alien beneficiary as a specialty occupation worker with the United States Citizenship and Immigration Services ("USCIS") under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE:

The [first, second, third, next, only] issue to be addressed is whether the mere issuance of a certified labor condition application qualifies the proffered position as a specialty occupation.

RULE:

101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien . . who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1) . . . with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1) . . .

INA 214(c)(1) states, in part:

> The question of importing any alien as a nonimmigrant under section 101(a)(15)(H), (L), (O), or (P)(i) in any specific case or specific cases shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer. Such petition shall be made and approved before the visa is granted. The petition shall be in such form and contain such information as the Attorney General shall prescribe. The approval of such a petition shall not, of itself, be construed as establishing that the alien is a nonimmigrant . . .

INA 212(n)(1) states in part:

> No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:
>
> (D) The application shall contain a specification of the number of workers sought, the occupational classification in which the workers will be employed, and wage rate and conditions under which they will be employed.

Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(4)(i)(B)(2) states:

> Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom the H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in 214(i)(2) of the Act.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

The petitioner is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

The petitioner contends that the proffered position is a specialty occupation by virtue of having obtained a certified labor condition application from the United States Department of Labor ("USDOL").

However, as provided in 8 C.F.R. 214.2(h)(4)(i)(B)(2) above, certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. Instead, it states that the director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. In the present case, the evidence is insufficient to establish that the position involves a specialty occupation.

CONCLUSION:

Consequently, the petitioner's contention that the issuance of a certified labor condition

from the USDOL, without more, satisfies the petitioner's burden of proof in establishing that the proffered position constitutes a specialty occupation is without merit.

The burden of proof to establish eligibility for a desired preference rests with the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

SAMPLE ANALYSIS 4:

- Contract between petitioner and client sufficiently detailed, but proposed job duties are not in a specialty occupation using 4-prong analysis.

The petitioner is a staffing solutions, business systems development, and marketing business with 10 employees and a gross annual income of $500,000. It seeks to employ the beneficiary as a test engineer for a period of three years.

The record contains a summary of the terms of employment indicating that the petitioner has hired the beneficiary and will pay the beneficiary's salary. Even though the documentation may demonstrate that the petitioner and beneficiary share an employer-employee relationship, as with employment agencies as petitioners, USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation. The critical element is not whether the petitioner is an employer or an agent, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000). To interpret the regulations any other way would lead to absurd results. If USCIS was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. Id at 388. *See also* Matter of Smith, 12 I. & N. Dec. 772 (D.D. 1967), it was concluded that a firm which pays the beneficiary directly and guarantees full-time employment is the actual employer. *See also* Matter of Ord, 18 I. & N. Dec. 285 (Comm'r 1982); Matter of Artee Corporation, 18 I. & N. Dec. 366 (Comm'r 1982); Matter of Walsh and Pollard, 20 I. & N. Dec. 60 (BIA 1988), citing Sussex Eng'g, Ltd. v. Montgomery, 825 F.2d 1084 (6th Cir. 1987).

Counsel submits a contract that the beneficiary would be rendering test engineering work at Compunet Systems Solutions, a business that has a contract and work order request form with the petitioner. In this contract, dated January 2, 2001, between the petitioner and Compunet, Compunet is described, in part, as follows:

> Compunet is a provider of systems, networking, software, and hardware installations and development and employs a staff of network engineer, systems analysts, test engineers, electrical engineers and other technical staff on a per project need.

This contract includes a "Job Order Request Form" with the following job description for a test engineer:

> Perform a variety of engineering work in electronics gadgets and components; inspect, test, repair, maintain and service telecommunications; develop operational, maintenance and testing procedures for electronic products, components, equipment and systems; perform general monitoring and troubleshooting in production lines; provide support to field technicians, cable

locations, direct and coordinate activities concerned with manufacture, construction, installation, maintenance, operation, and modification of electronic equipment; test system operations using testing equipment and diagnose malfunctions; perform other functions related to engineering work using engineering education background engineering work using engineering education background and skills and may assist in inspecting electronic equipment, instruments, product and systems to ensure conformance to specifications.

The proffered position appears to be primarily that of a technical support specialist. In its Occupational Handbook, 2002 - 2003 edition, the Department of Labor describes the position of a technical support specialist, in part, as follows:

[OOH DUTIES]

Thus, while there is no universally accepted way to prepare for a job as a computer support specialist, many employers prefer to hire persons with some formal college education. A bachelor's degree in computer science or information systems is a prerequisite for some jobs, while other jobs may require only a computer-related associate degree. Thus, the petitioner has not shown that a bachelor's degree or its equivalent is required for the position being offered to the beneficiary.

Second, the petitioner has not demonstrated that is client has, in the past, required the services of individuals with baccalaureate or higher degrees in engineering, for the offered position. Third, the petitioner did not present any documentary evidence that a baccalaureate degree in a specific specialty or its equivalent is common to the industry in parallel positions among organizations similar to its client. Finally, the petitioner did not demonstrate that the nature of the beneficiary's proposed duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

SAMPLE ANALYSIS 2

Events Planner

- Detail-oriented position does not equal more specialized or complex.

In response to USCIS' Request for Evidence, Counsel clarified the original duties of the proffered position. While this clarification of duties does indicate that the proffered position is detail-oriented, they do not necessarily establish that the proffered position is any more specialized or complex than any other events planning job. Without more persuasive evidence as to the specialized nature of the offered job, the petitioner has not met the fourth criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

SAMPLE ANALYSIS 5:

- Duties described are common to other similar positions

To the extent that they are depicted in the record, the duties do not appear so specialized and complex as to require the highly specialized knowledge associated with a baccalaureate or higher degree, or its equivalent, in a specific specialty. The duties detailed by the petitioner include: research and review of medical literature to be summarized for the dentist; and supervision of patient billing and insurance filings; are not so unique or complex as to require a baccalaureate level of education to perform them. They are routinely performed by individuals not holding bachelor's degrees in any specific specialty. The duties may be performed with the attainment of knowledge provided in various educational programs, or through training and/or job related experience.

SAMPLE ANALYSIS 3:

- Job duties indicate entry-level position

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, the petitioner may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

The position description states that the beneficiary would perform "only delegated, selected or routine task[s] . . . under close supervision." This indicates that the position is not particularly complex or unique and the petitioner submitted no evidence to the contrary.

GENERAL MARKETPLACE CONSIDERATIONS NOT RELEVANT TO A DETERMINATION OF SPECIALTY OCCUPATION

INTRODUCTION: COUNSEL ASSERTS THAT MARKETPLACE REQUIRES MANAGERS TO HAVE A DEGREE

Counsel makes an "observation" to the effect that, with regard to the H-1B specialty occupation status of management positions, USCIS policy and adjudications are inconsistent with marketplace reality:

> It is the observation of this Attorney of Record that (1) the positions taken by the USCIS are inconsistent with reality and current conditions in the U.S. business market place concerning the area of "degree holding and non-degree persons holding management positions" and (2) Immigration and Naturalization (INS) employees acting in the name of the Director of the Service Center in following guidelines, directives, Operations Instructions, Headquarters' memos concerning "complex and specialized occupations."
>
> But what is the real question to be reviewed? Most people finishing high school go on to seeking higher education. Thirty/forty years ago the median standard of education was a high school diploma. Today, in most non-government jobs, the basic entry requirement is either an associate or bachelor's degree. In the world marketplace the U.S. is a white collar job market. You just don't find much on the job training any more. A great majority of our country's low end jobs have gone abroad. Organizations like **Panda Express** fast food establishments set nationwide standards by requiring their managers to have at least a bachelor's degree. The standard set by the USCIS in the area of management jobs needs to be reviewed even before it looks to the area of specialized and complex duties. It is just not in tune with the marketplace. Today, a manager of human resources must deal with state and federal tax, health, environmental and safety problems. He/she also has to deal with on the job personality social and financial problems, and numerous other areas that schooling has exposed them to. Most non-schooled persons would not be hired by industry to management jobs because of the liability and litigation issues alone. Revisit the marketplace and you will rarely find a non-government establishment hiring a non-degreed person to a management position.

RULE:

USCIS focuses only on the evidence of record, and the evidence of record does not substantiate this observation of counsel. Mere assertions of counsel without documentary support do not constitute evidence. Matter of Obaigbena, 19 I. & N. Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503, 506 (BIA 1980); Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983). USCIS must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. Matter of Izumii, 22 I. & N. Dec. 169 (Assoc. Comm'r, Examinations 1998). Accordingly, counsel's "observations" here and elsewhere in the record have no evidentiary value, although they

may serve to focus the USCIS' review on specific issues of concern to counsel. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act.

You (the petitioner) filed a Form I-129, Petition for a Nonimmigrant Worker, with U.S. Citizenship and Immigration Services ("USCIS") to classify the beneficiary as a specialty occupation worker under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA").

According to Form I-129, your organization is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $[amount]. You seek to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

For the reasons set forth below, your petition for H-1B classification is denied.

ISSUE

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

Section 101(a)(15)(H)(i)(b) of the INA defines an H-1B nonimmigrant as an alien who is coming temporarily to the United States to perform services in a specialty occupation.

Section 214(i)(1) of the INA defines the term "specialty occupation" as an occupation that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) 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.

Section 214(i)(2) of the INA states that an alien applying for classification as an H-1B nonimmigrant worker must possess:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C) (i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The regulations at Title 8, Code of Federal Regulations ("8 C.F.R.") § 214.2(h)(4)(ii) state, in pertinent part:

> *Specialty occupation* means an occupation which [(1)] 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 [(2)] 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.

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet 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 [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

You must meet all of the applicable statutory and regulatory provisions to establish eligibility for the benefit sought.

The title of the offered position does not determine whether a particular position qualifies as a specialty occupation. USCIS also considers the duties of the offered position and nature of the petitioner's business operations. Each position is evaluated based upon the nature and complexity of the duties to be performed for the specific employer. For a position to qualify as a specialty occupation, the duties of the position must primarily involve specialty occupation work.

The beneficiary's credentials are relevant only when the offered position is found to qualify as a specialty occupation. The fact that a beneficiary holds a bachelor's or higher degree in a field of study related to the offered position is not relevant when determining if the evidence establishes that the offered position qualifies as a specialty occupation.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

OPTIONAL - RFE - Read closely and add or delete info if necessary: During the adjudication of this petition, USCIS sent you a request for evidence (RFE) notifying you that additional information/evidence was required. In the RFE, USCIS provided you with a non-exhaustive list of documentation to submit in support of your assertion that the position qualifies as a specialty occupation.

OPTIONAL - Position Description:

You describe the duties of the offered position as follows:

> If the adjudicator feels it is essential to the analysis, the duties or a summary of the duties may be described here. But, it is not absolutely necessary.
>
> If you quote the petitioner's description of duties, indent 0.5" from Left & Right margins.

END OPTIONS

Begin discussion of the four criteria

When attempting to establish whether the position qualifies as a specialty occupation, you must show that the position satisfies the applicable statutory and regulatory provisions, including one of four criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A). The four criteria are:

(1) **A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position**

On the Form I-129, you indicated that you seek the beneficiary's services as a [Insert Nursing Type Position]. However, in reviewing whether the offered position qualifies as a specialty occupation, the duties to be performed are determinative rather than the job title. In this case, the duties of the offered position are consistent with those of a Registered Nurse (RN).

According to the U.S. Department of Labor's *Occupational Outlook Handbook*[1] ("OOH") and the State Board of Nursing (Board), most Registered Nurse positions in [Name of State] do not normally require a U.S. bachelor's or higher degree in nursing, or its equivalent, as the minimum for entry into these particular positions.

The OOH describes the training and other qualifications required for a [Registered Nurse], in part, as follows:

[Cite the training and other qualifications as provided in the OOH.]

The OOH and the Board recognize that there are three general paths for becoming a registered nurse, i.e., a Bachelor's of Science degree in Nursing (BSN), an Associate's degree in Nursing (ADN), or a diploma from an approved nursing program. Further, licensed graduates of any of the three types of educational programs (BSN, ADN, or diploma) qualify for entry-level positions. The OOH and the Board do not support the assertion that at least a bachelor's degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into these particular positions.[2]

You have not established that a bachelor's or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position. Thus, you have not satisfied the criterion at 8 C.F.R. § 214.2(h)(4)(iii)(A)(*1*).

> **(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;**

USCIS will discuss this criterion in two parts as follows:

> **2a. Degree Requirement is Common to the Industry in Parallel Positions among Similar Organizations**

To satisfy this prong, you must establish that a requirement of at least a bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions

---

[1] USCIS recognizes the OOH as an authoritative source on the duties and educational requirements of the occupations that it addresses. For more information on registered nurses, see the online version of the OOH at http://www.bls.gov/ooh/healthcare/registered-nurses.htm.

[2] Further, you have not provided probative evidence from another objective, authoritative source that satisfies this criterion of the regulations.

that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner.

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the OOH or the Board reports that the industry requires a bachelor's or higher degree in a specific specialty, or its equivalent; whether the industry's professional association has made a degree a minimum entry requirement; and whether letters or affidavits from firms or individuals in the industry attest that such firms "routinely employ and recruit only degreed individuals." *See Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) (quoting *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989)).

The conclusions about a degree requirement for a [Registered Nurse] as shown in the OOH and the State Board of Nursing were discussed in the previous section.

2a. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

You have submitted no evidence to demonstrate that at least a bachelor's degree in a specific specialty, or its equivalent, is common to the nursing field in parallel positions among similar organizations. Accordingly, you have not established that the offered position satisfies this criterion of the regulations.

2a. SAMPLE ANALYSIS 2 OF 4 - Job listings submitted but insufficient:

Although you submitted [...one...two...twelve...thirty...etc....] job listings, the listings you provided are insufficient to establish that a bachelor's or higher degree in a specific specialty, or its equivalent, is common to the industry in parallel positions among similar organizations.

Option 1 of 4 - Employers not recognized: Further, it is difficult to ascertain whether the employers who published these announcements are similar to your organization.

Option 2 of 4 – Employers recognized but unlike the petitioner: Also, the job listings are from employers dissimilar to your organization.

Option 3 of 4 - Job Announcements DO NOT specify a required educational background:

More importantly, while they all require a bachelor's degree, the majority of the announcements do not specify how the claimed requirement of a degree is directly related to the duties and job responsibilities of a particular position.

Option 4 of 4 - Job Announcements DO specify an educational background but do not limit the field of study:

Although some of the announcements do specify an educational background, they do not limit the field of study to particular fields that are directly related to the offered position, such as [Choose Or Add: nursing], but instead allow for a wide variety of fields of study including [Choose Or Add:...liberal arts, ...sociology,...psychology, ...literature, ...journalism, ...philosophy ....advertising ...public affairs ...public speaking ...English ...political science ...and ...creative and technical writing... and so on]

2a. SAMPLE ANALYSIS 3 OF 4 - No documentation submitted from industry-related professional associations, firms, or individuals:

In addition, you submitted no documentation demonstrating that an industry-related professional association requires a bachelor's degree or higher in a specific specialty, or its equivalent, for entry into the field. Further, you did not submit letters or affidavits from firms or individuals in the [nursing] industry attesting that such businesses routinely employ and recruit only degreed individuals. Also, no other evidence was submitted that is sufficient to establish that the degree requirement is common to the industry in parallel positions among similar organizations. Accordingly, you have not met this criterion of the regulations.

2a. SAMPLE ANALYSIS 4 OF 4 - Documentation was submitted from industry-related professional associations, firms, or individuals but does not specify that a baccalaureate degree in a specific specialty, or its equivalent, is required:

Although the record contains letters from [...one...two...five...etc.] [Choose Or Add: representatives of businesses and/or professors ...etc.] who state that a bachelor's degree is required for [Insert Job Title] positions, none of these individuals specify that a bachelor's or higher degree in a specific specialty, or its equivalent, is required to perform the duties of the position.

[Optional:] Further, the record does not include sufficient evidence to substantiate that the business representative(s) and/or professor(s) are associated with your industry.

The record does not establish the individuals' qualifications or their experience giving such opinions. Further, the individuals do not provide probative evidence establishing any particular research materials used in order to support the conclusions regarding the academic requirements for the position (e.g., statistical surveys, authoritative industry publications, or professional studies).

[Final Conclusion for all Sample Analysis in Criterion 2a:]

As such, you have not submitted sufficient documentation to show that the degree requirement is common to the industry in parallel positions among similar organizations.

ATTACHMENT TO I-292

2b. Complexity or Uniqueness of the Offered Position.

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, you may show that the offered position is so complex or unique that it can be performed only by an individual with a degree. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(*2*).

2b. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

You have not submitted any documentation to establish that this position involves duties that are so unique or complex that only an individual with at least a bachelor's degree in a specific specialty, or its equivalent, could perform them.

2b. SAMPLE ANALYSIS 2 OF 4 - Described duties are generic in nature:

You submitted a breakdown of the job duties for the offered position along with the percentage of time that the beneficiary will spend on the various duties. However, the submitted list of duties is generic in nature and provides no further detail as to the unique or complex nature of the offered position. You have not sufficiently demonstrated complexity or uniqueness as an aspect of the offered position. Further, the evidence is not sufficient to establish that the offered position is more unique or complex than other similar positions within the same industry that can be performed by individuals who do not possess a bachelor's or higher degree in a specific specialty, or its equivalent.

Without additional evidence showing the unique or complex nature of the position, or how this position differs from other similar positions within the same industry, you have not established that the offered position satisfies this criterion of the regulations.

2b. SAMPLE ANALYSIS 3 OF 4 - Offered position not as complex as listings:

You have not demonstrated that the job duties of the offered position are as complex as those listed in the advertised positions. For example, the duties of the job listings include [List THOSE Duties from the job listings that are more complex than the duties of the offered position: e.g...."budgeting, training, supervising staff, monitoring and managing a national, regional, or local programs, etc.,...."]. These duties are more complex and/or unique than those of the offered position.

2b. SAMPLE ANALYSIS 4 OF 4 - Assertions of counsel do not constitute evidence:

You assert that the position is complex and unique. However, you have not submitted documentary evidence to support this statement. Mere assertions of counsel do not constitute evidence. *Matter of Ramirez-Sanchez*, 17 I& N Dec. 503, 506 (BIA 1980). USCIS

must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. *Matter of Izummi,* 22 I& N Dec. 169, 185 (Assoc. Comm'r 1998). Without additional evidence, you have not established this criterion.

[Final Conclusion for all Sample Analysis in Criterion 2b:]

You have not established that the offered position involves duties that are either so complex or unique that only an individual with a degree in a specific specialty could perform them.

(3) The employer normally requires a degree or its equivalent for the position;

(3) SAMPLE ANALYSIS 1 OF 3 - New Position - No evidence provided:

[Choose One: You have not hired anyone previously for the offered position/You had no evidence to present on this issue, as this is the first person you intend to employ in the offered position.] As such, you have not established this criterion.

(3) SAMPLE ANALYSIS 2 OF 3 - Long-standing Position – No evidence submitted to show it normally requires a degree:

Although your organization has been established since [Year], you have not demonstrated that you have, in the past, required the services of individuals with bachelor's degree or higher in a specific specialty, or its equivalent, for the offered position. You assert that your job announcements specified a minimum of a bachelor's degree in the field(s) of [nursing.].

However, the record contains no corroborating documentation, such as copies of your job announcements, a list of the names of your past [Registered Nurses], proof of their employment, or evidence of their educational backgrounds.

You have the burden of proof to establish eligibility for the requested immigration benefit. Making assertions without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Treasure Craft of California,* 14 I& N Dec. 190, 194 (Reg. Comm'r 1972).

(3) SAMPLE ANALYSIS 3 OF 3 - Position does not meet the statutory definition of specialty occupation:

You claim to have hired only individuals with a bachelor's degree or higher in [nursing] for the offered position. However, the evidence has not established that the 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).

Therefore, even though you claim that you normally require a bachelor's degree for this position, the position still does not require a bachelor's or higher degree in a specific specialty, or its equivalent, and therefore it does not qualify as a specialty occupation. *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (stating that an employer may not use token bachelor's degree requirements to mask the fact that a position in general is not a specialty occupation). *See* 214(i)(1) of the INA and 8 C.F.R. § 214.2(h)(4)(ii).

[Final Conclusion for all Sample Analysis in Criterion (3):]

As such, you have not submitted sufficient documentation to demonstrate that you normally require at least a bachelor's degree in a specific specialty, or its equivalent, for the position.

(4) The nature of the specific duties [is] so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

(4) SAMPLE ANALYSIS 1 OF 2 - No evidence submitted – Petitioner's unsubstantiated assertions are insufficient to establish specialized & complex duties:

The record contains insufficient information to establish the specialized and complex nature of the offered position.

To satisfy this criterion, you must demonstrate that the nature of the specific duties is so specialized and complex that the knowledge required to perform them is usually associated with the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent. However, relative specialization and complexity have not been sufficiently developed as an aspect of the offered position (through the job duties, the evidence regarding your business operations or by any other means) to distinguish it from other, similar [registered nurse positions] for which a bachelor's or higher degree in a specific specialty, or its equivalent, is not required.

There is insufficient documentation in the record to satisfy this criterion of the regulations.

(4) SAMPLE ANALYSIS 2 OF 2 - No evidence submitted – Counsel's clarification is insufficient to establish specialized & complex duties:

In response to our RFE, you clarified the duties of the offered position. While this clarification of duties does demonstrate that the offered position requires a certain amount of skill, training, and/or attention to detail, it does not establish that the offered position is any more specialized or complex than any other [registered nurse] position that can be performed by an individual who does not possess a bachelor's or higher degree in a specific specialty, or its equivalent.

Without additional evidence as to the specialized and complex nature of the offered job, you have not met the fourth criterion of 8 C.F.R. § 214.2(h)(4)(iii)(A).

[End Sample Analysis for Criteria (4)]

CONCLUSION:

You have not established that the offered position meets any of the four criteria of a specialty occupation enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A). Therefore, your petition for H-B classification is denied.

In visa petition proceedings, the burden is on the petitioner to establish eligibility for the benefit sought. *See Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

NOTICE OF INTENT TO REVOKE

This notice is in reference to the Form I-129, Petition for Nonimmigrant Worker, which was filed by the petitioner pursuant to section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act. The petition was filed at the California Service Center for [Insert Beneficiary Name], and approved by the United States Citizenship and Immigration Services ("USCIS") on [Insert Date].

USCIS has received information regarding the beneficiary's qualification for the classification sought. In accordance with Title 8, Code of Federal Regulations ("8 C.F.R.") 214.2(h)(11)(iii) it is the intent of USCIS to revoke the petition.

When attempting to establish whether the position is a specialty occupation, the petitioner must show that the position meets one of four criteria. 8 C.F.R. 214.2(h)(4)(iii)(A) lists the four criteria as: (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.

[Enter the information received regarding the qualification of the position].

Therefore, this position does not meet any of the preceding criteria for classification as a specialty occupation.

The petitioner is afforded thirty (30) days from the date of this notice to submit additional evidence or arguments for consideration in these proceedings. Additionally, when USCIS serves a notice by mail, three (3) days are added to the prescribed period in which to respond. 8 C.F.R. 103.8(b). Any evidence or arguments will be reviewed before to a final determination in this matter. Failure to respond will result in the adjudication of the petition based on the current record, including the preceding information.

Kathy A. Baran
Director

Attachment to ITR Coversheet

cc: Attorney Name, Esq.

Attachment to ITR Coversheet

SAMPLE ANALYSIS 4:

Use of inter-net job postings to show degree in specialty field normally required:

- Internal job posting contradicts H-1B petition.
- One ad persuasive, but four ads unpersuasive.
- Some ads do not require a degree in a specific specialty.
- Other ads have a degree requirement, but no specialty.

The petitioner is a human resources management company that seeks to employ the beneficiary as a business development analyst.

According to the evidence submitted, the beneficiary would perform duties that entail, in part: conferring with management regarding expansion goals; developing strategic business plans and policies to enter new markets and introduce innovative packages and services; preparing a market study of employers in the area and other communities and analyzing the data; identifying needs of the target clients; and recommending and implementing customer-driven activities to raise the level of customer retention and loyalty.

USCIS does not use a title, by itself, when determining whether a particular job qualifies as a specialty occupation. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that USCIS considers. Each position must be evaluated based upon the nature and complexity of the actual job duties. In addition, the beneficiary's merely obtaining a degree in a related area does not guarantee the position is a specialty occupation. Performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

USCIS often looks to the United States Department of Labor's ("USDOL") Occupational Outlook Handbook ("OOH" or "Handbook") when determining whether a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into a particular position. The proffered position appears to be closest in nature to a Marketing Manager, and that the Handbook reports that employers in general do not require a bachelor's degree in a specific specialty as the minimum entry into a marketing manager position.

With respect to the Internet postings, the duties of Manpower Professional's posting are similar to those of the proffered position and is, therefore, persuasive in establishing this criterion. Nevertheless, the four other postings: HR Anew, Jefferson Wells International, Spherion, and Catalina Marketing Corporation do not require a bachelor's degree in a specific specialty. HR Anew accepts a bachelor's degree in economics, finance, marketing, or business administration. Jefferson Wells International accepts a bachelor's degree in finance, accounting, business, business administration, or management. Spherion accepts a bachelor's degree in the vaguely termed discipline of "business or a related field." Equally important, the duties of the Spherion posting are very dissimilar from those of the proffered

position. Finally, Catalina Marketing Corporation requires a bachelor's degree; however, a specific specialty is not indicated. Consequently, the four posting outweigh the probative value of the Manpower posting. Thus, the internet postings are insufficient to establish the first criterion.

Notably, USCIS finds that the petitioner's document entitled "Job Opening", which the president of the petitioning entity signed, specifically states that the minimum qualifications for the proffered position are:

> Education and Training: Bachelor of Science degree in Business Administration, Management, Marketing, or other related courses required. In the absence of a bachelor's degree in business, at least 10 years work experience as sales and marketing professional with emphasis on strategic planning, product development and servicing of accounts.

Thus, the petitioner's job announcement plainly evinces that a bachelor's degree in a specific specialty is not required to enter into the proffered position: a variety of bachelor's degrees are accepted and work experience, which does not equate to a bachelor's degree, is a substitute for a bachelor's degree.

SAMPLE ANALYSIS 2:

- Company president used to perform duties and has MBA degree; however
- Job posting shows degree requirement, but no specific field of study.

With regard to this third criterion, namely, that the employer normally requires a baccalaureate degree or its equivalent for the proffered position, the petitioner stated that the president of the company had previously performed the purchasing job responsibilities, and he had both a bachelor's degree and a master's degree in business. Nevertheless, the petitioner, in its job posting submitted in response to USCIS' request for further evidence, clearly established that it only requires a baccalaureate degree, not a baccalaureate degree in a specific specialty, for the proffered position. Without more persuasive evidence, the petitioner has not established the third criterion of 8 C.F.R. 214.2(h)(4)(iii)(A).

DEGREE AVAILABILITY DOES NOT EQUAL SPECIALTY OCCUPATION

ISSUE:

The issue to be determined here is whether mere availability of a degree for a specific field of study suggests that such a degree is normally required and, therefore, a specialty occupation.

SAMPLE ANALYSIS 1: CHIEF AUDIO ENGINEER

Counsel declares that, because there are specialized college programs that focus on the knowledge and skills required for the chief audio engineer position, this clearly indicates that it is customary for employers to require a bachelor's degree. U.S. Citizenship and Immigration Services (USCIS) disagrees with this assertion. Employers do not decide what the qualifications are for a position based on whether a specialized program is offered by a college: employers determine the qualifications for a position based on the necessary level of knowledge and skill required to perform the duties of the position.

SAMPLE ANALYSIS 2: INDUSTRIAL ENGINEERING ASSISTANT

The petitioner is seeking the beneficiary's services as an industrial engineering assistant. The beneficiary would perform duties that entail: monitoring purchase orders; maintaining cost controls; planning the use of facilities; and analyzing statements, organizational charts, and workers' job duties. The petitioner indicated that a qualified candidate for the job would possess a bachelor's degree in industrial engineering.

USCIS concludes that the offered position is not a specialty occupation because the job is not an industrial engineering position; it is an engineering technician position.

Although counsel observes that more than 1,000 U.S. colleges or universities offer degrees in industrial engineer, such an observation is no relevance to these proceedings. USCIS did not state that the job of industrial engineer is not a specialty occupation. USCIS concluded correctly that the proffered position is not one of an industrial engineer and therefore, it does not require a baccalaureate degree or its equivalent, in a specific specialty.

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DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. -

You filed Form I-129, Petition for a Nonimmigrant Worker, on [Insert Date Filed], to classify the beneficiary as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

Your organization, [Insert Name of Petitioner], is a [City, State], [for-profit OR non-profit] enterprise engaged in [nature of petitioner's business...software development and consulting services...etc....] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years.

Position is not a Specialty Occupation

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

When a petition is filed for classification as an H1B worker, you must show that the beneficiary will perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) 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.

8 C.F.R. 214.2(h)(4)(ii) defines a specialty occupation to mean:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such 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.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet 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.

When determining whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not use a title, by itself. The specific duties of the proffered position, combined with the nature of your business operations are factors that USCIS considers. USCIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the

attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's mere obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

Although you are requesting to classify the beneficiary as an alien employed in a specialty occupation, you are not the entity that will be providing such duties to the beneficiary.

You are in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. You negotiate contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. You then pay the worker, in this case the alien, directly from an account under your own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

ANALYSIS:

Subsequent to the filing of the petition, USCIS requested that you provide additional evidence that included a list of suggested evidence to establish the actual duties to be performed by the beneficiary and that the position meets the standards to qualify as a specialty occupation.

In general, you were requested to provide contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring computer related services of the beneficiary and any other evidence you deemed would establish sufficient specialty occupation work.

OPTION #1 – Petitioner claims beneficiary will work "in-house" on a project(s):

On [Insert date petitioner responded], you responded by stating that the beneficiary will be working in-house on a project for [you OR name of the end-client]. You submitted [Describe the documents submitted: e.g., a cover letter, itinerary, proposal; contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] to establish that the beneficiary would work on a project during his tenure with your organization.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

While the beneficiary may in fact be tasked to work on a project according to the provided evidence, the very nature of your consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #2 – Petitioner claims beneficiary will work "in-house" on proprietary or pre-packaged software:

On [Insert date petitioner responded], you responded by stating that the beneficiary will be working in-house on your proprietary or pre-packaged software. You submitted [Describe the documents submitted: e.g., a cover letter, itinerary, contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] claiming that the beneficiary would work on the proprietary or pre-packaged software during his tenure with you.

While you claim to have your own proprietary or pre-packaged software product, the record is insufficient to support this claim. For instance, you did not submit evidence of: [Choose or add:]

- critical reviews of your software in trade journals that describes the purpose of the software, its cost, its ranking among similarly produced software manufacturers;
- your software inventory;
- sufficient warehouse space to store your software inventory;
- the marketing analysis for your final software product;

- a cost and pricing analysis for your software product;
- sufficient work space and equipment to support the production of your software; and/or
- software training materials.

Additionally, the very nature of your consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement specific projects and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the claimed in-house work, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #3 – Petitioner provided contracts, work orders, etc., but not with "end-client:"

On [Insert date petitioner responded], you responded by submitting a copy of [Choose: a proposal; contract; consulting services agreement; statements of work, work orders, letters, "other"] between you and another software consulting firm, [Insert name of the second software consulting company], that will further contract the beneficiary's services with other firms needing computer related positions to complete their projects to show that you have work for the beneficiary.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

Furthermore, absent evidence such as valid contracts, statements of work, work orders, service agreements, letters between [Insert name of the second software consulting company] and the actual end-client firm ultimately involved with the beneficiary's computer related duties, or any other evidence you believe would support your claim of a specialty occupation, the evidence does not establish the work to be completed; that the duties to be performed are those of a computer [CHOOSE: programmer...analyst, etc.] position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary through the duration of the requested H-1B validity period. Inasmuch as you are not a firm needing computer related positions to complete your projects, the record does not show any specific work to be done.

END OPTIONS

The present record does not demonstrate the specific duties the beneficiary would perform under contract for your clients. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir.

2000) held that for purposes of determining whether a proffered position is a specialty occupation, a petitioner acting in a similar manner as your organization is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work to be performed is for an entity other than your organization. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

The record, as presently constituted, is insufficient to establish that the position offered to the beneficiary qualifies as a specialty occupation and that you have sufficient work for the requested period of intended employment.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

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The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

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On [Insert date petitioner responded], you responded by submitting a copy of [Choose: a proposal; contract; consulting services agreement; statements of work, work orders, letters, "other"] between you and another software consulting firm, [Insert name of the second software consulting company], that will further contract the beneficiary's services with other firms needing computer related positions to complete their projects to show that you have work for the beneficiary.

OPTIONAL: Read Carefully: However, none of the documents submitted describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

Furthermore, absent evidence such as valid contracts, statements of work, work orders, service agreements, letters between [Insert name of the second software consulting company] and the actual end-client firm ultimately involved with the beneficiary's computer related duties, or any other evidence you believe would support your claim of a specialty occupation, the evidence does not establish the work to be completed; that the duties to be performed are those of a computer [CHOOSE: programmer...analyst, etc.] position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary through the duration of the requested H-1B validity period. Inasmuch as you are not a firm needing computer related positions to complete your projects, the record does not show any specific work to be done.

END OPTIONS

The present record does not demonstrate the specific duties the beneficiary would perform under contract for your clients.

Therefore, you have not established that the position offered to the beneficiary qualifies as a specialty occupation and that you have sufficient work for the requested period of intended employment.

CONCLUSION:

The burden of proof to establish eligibility for a desired preference rests with you, the petitioner. Matter of Brantigan, 11 I. & N. Dec. 493. Here, that burden has not been met.

One Issue Denial

Consequently, the petition is hereby denied for the above stated reason.

Multiple Issue Denial

Consequently, the petition is hereby denied for the above stated reasons, with each considered as an independent and alternative basis for denial.

Computer Consultants & Staffing Agencies
Third Party Placement/"Job-Shop"
On- OR Off-site Employment

- NOT A SPECIALTY OCCUPATION -
(Rev. 01-29-2009)

Generally, this format is used for "10-25-10" computer consulting firms or staffing agencies that have aberrant filing practices, (e.g., 10 employees with hundreds of petitions filed in a short period of time).

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

- To delete dialogue boxes, right click on the little box that appears in the upper left corner and cut. -

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on [Insert Date Filed], to classify the beneficiary as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

The petitioner, [Insert Name of Petitioner], is a [City, State], [for-profit OR non-profit] enterprise engaged in [nature of petitioner's business...software development and consulting services...etc....] with [number] employees and a gross annual income of $ [amount]. It seeks to temporarily employ the beneficiary, [Insert Name of Beneficiary], as a [position...computer programmer or analyst...etc....] for a period of [number] years.

Position is not a Specialty Occupation

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

When a petition is filed for classification as an H1B worker, the petitioner must show that the beneficiary will perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an

application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) 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.

8 C.F.R. 214.2(h)(4)(ii) defines a specialty occupation to mean:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such 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.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet 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.

When determining whether a particular job qualifies as a specialty occupation, U.S. Citizenship and Immigration Services (USCIS) does not use a title, by itself. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations are factors that USCIS considers. USCIS must examine the ultimate

employment of the alien and determine whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's mere obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

Although the petitioner is requesting to classify the beneficiary as an alien employed in a specialty occupation, the petitioner is not the entity that will be providing such duties to the beneficiary.

The petitioner is in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. The petitioner negotiates contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. The petitioner then pays the worker, in this case the alien, directly from an account under its own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

ANALYSIS:

Subsequent to the filing of the petition, USCIS requested that the petitioner provide additional evidence that included a list of suggested evidence to establish the actual duties to be performed by the beneficiary and that the position meets the standards to qualify as a specialty occupation.

In general, the petitioner was requested to provide contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring computer related services of the beneficiary and any other evidence the petitioner deemed would establish sufficient specialty occupation work.

OPTION #1 – Petitioner claims beneficiary will work "in-house" on a project(s):

On [Insert date petitioner responded], the petitioner responded by stating that the beneficiary will be working in-house on a project for the petitioner. The petitioner submitted [Describe the documents submitted: e.g., a cover letter, itinerary, proposal; contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] to establish that the beneficiary would work on a project during his tenure with the petitioner.

OPTIONAL: Read Carefully: However, none of the documents submitted specifically request the services of the beneficiary; list the beneficiary's itinerary; describe in detail the work to be performed by the beneficiary; or list the qualifications that are required to perform the job duties.

While the beneficiary may in fact be tasked to work on a project according to the evidence provided by the petitioner, the very nature of the petitioner's consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the in-house work claimed by the petitioner, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #2 – Petitioner claims beneficiary will work "in-house" on proprietary or pre-packaged software:

On [Insert date petitioner responded], the petitioner responded by stating that the beneficiary will be working in-house on its proprietary or pre-packaged software. The petitioner submitted [Describe the documents submitted: e.g., a cover letter, itinerary, contracts, statements of work, work orders, service agreements, or letters from end-client firms, etc. ...] claiming that the beneficiary would work on the proprietary or pre-packaged software during his tenure with the petitioner.

While the petitioner claims to have its own proprietary or pre-packaged software product, the record is insufficient to support its claim. For instance, the petitioner did not submit evidence of: [Choose or add:]

- critical reviews of the petitioner's software in trade journals that describes the purpose of the software, its cost, it's ranking among similarly produced software manufacturers;
- the petitioner's software inventory;
- sufficient warehouse space to store the petitioner's software inventory;
- the marketing analysis for the petitioner's final software product;
- a cost and pricing analysis for the petitioner's software product; and/or
- sufficient work space and equipment to support the production of the petitioner's software.
- software training materials.

Additionally, the very nature of the petitioner's consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement specific projects and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the in-house work claimed by the petitioner, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

OPTION #3 – Petitioner provided contracts, work orders, etc., but not with "end-client"

On [Insert date petitioner responded], the petitioner responded by submitting a copy of [Choose: a proposal; contract; consulting services agreement; statements of work, work orders, letters, "other"] between the petitioner and another software consulting firm, [Insert name of the second software consulting company], that will further contract the beneficiary's services with other firms needing computer related positions to complete their projects to show that the petitioner has work for the beneficiary.

OPTIONAL: Read Carefully: However, none of the documents submitted specifically request the services of the beneficiary; list the beneficiary's itinerary; or describe in detail the work to be performed by the beneficiary.

Furthermore, absent evidence such as valid contracts, statements of work, work orders, service agreements, letters between [Insert name of the second software consulting company] and the actual end-client firm ultimately involved with the beneficiary's computer related duties, or any other evidence the petitioner believes would support its

claim of a specialty occupation, the evidence does not establish the work to be completed; that the duties to be performed are those of a computer [CHOOSE: programmer...analyst, etc.] position, and, thus, a specialty occupation position; and that the work will be available for the beneficiary when he enters the United States through the duration of the requested H-1B validity period . Inasmuch as the petitioner is not a firm needing computer related positions to complete their projects, the record does not show any specific work to be done.

END OPTIONS

The present record fails to demonstrate the specific duties the beneficiary would perform under contract for the petitioner's clients. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for purposes of determining whether a proffered position is a specialty occupation, a petitioner acting in a similar manner as the present petitioner is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work to be performed is for an entity other than the petitioner. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As such, the petitioner has not established that the duties of the proffered position for the beneficiary require a specialty occupation and that it has sufficient work for the requested period of intended employment. Therefore, the beneficiary is ineligible for classification as a specialty occupation worker.

As such, the petitioner has not established that the beneficiary is eligible for classification as an alien employed in a specialty occupation.

CONCLUSION:

Pursuant to INA 291, the burden of proof in these proceedings rests solely with the petitioner. Here that burden has not been met.

Consequently, the petition is hereby denied for the [Choose: two, three, four, etc....] above stated reasons, with each considered as an independent and alternative basis for denial.

POSITION NOT A SPECIALTY OCCUPATION

DIRECT QUOTES/CITES – FORMATING: When citing anything, (e.g., statute, regulation, policy, or the record) for use anywhere in the decision it must be indented 0.5" from both the left and right margins.

To indent, place the cursor on the line, paragraph, or blocked text that you wish to indent. Then click on "Format" at the top left side of this screen. Next, click on "Paragraph." Click on the tab, "Indents and Spacing." Under "Indentation" click on the up arrow until you get the number 0.5" in both the "Left" and "Right" indentation fields.

DELETE ALL HIGHLIGHTED DIRECTIVES AND DIALOGUE BOXES BEFORE PRINTING

To delete boxes, right click on the little box that appears in the upper left corner and cut. –

You filed Form I-129, Petition for a Nonimmigrant Worker, with the United States Citizenship and Immigration Services ("USCIS") to classify the alien beneficiary as a specialty occupation worker under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("INA" or "Act").

ISSUE

The [first, second, third, next, only] issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

RULE

Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized

knowledge, and

(B) 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.

Section 214(i)(2) of the Act outlines the fundamental requirements of a specialty occupation:

(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

(B) completion of the degree described in paragraph (1)(B) for the occupation, or

(C)(i) experience in the specialty equivalent to the completion of such degree, and

(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The term "specialty occupation" is defined at 8 C.F.R. 214.2(h)(4)(ii) as:

...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.

Pursuant to 8 C.F.R. 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet 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.

When determining whether a particular job qualifies as a specialty occupation, USCIS does not use a title, by itself. The specific duties of the offered position combined with the nature of the petitioning entity's business operations are factors that USCIS considers. Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

ANALYSIS: (NOTE: The petitioner information paragraph is required only once in multiple issue denials.)

Your organization is a [City, State] [non-profit OR for-profit] enterprise engaged in [nature of petitioner's business] with [number] employees and a gross annual income of $ [amount]. You seek to temporarily employ the beneficiary as [a, an] [position] for a period of [number] years.

OPTIONAL - RFE - Read closely and add or delete info if necessary: Subsequent to the filing of the petition, you were requested to provide additional evidence to include a detailed description of the actual duties to be performed by the beneficiary on a day-to-day basis, and evidence to establish that the position meets the standards to qualify as a specialty occupation. Additionally, you were requested to submit more information about the products and services provided by the company; and lists and/or organizational charts showing employees and the positions they occupy.

OPTIONAL - Position Description:

You describe the duties of the proffered position as follows:

> If the adjudicator feels it is essential to the analysis, the duties or a summary of the duties may be described here. But, it is not absolutely necessary.
>
> If you quote the petitioner's description of duties, indent 0.5" from Left & Right margins.

END OPTIONS – Begin discussion of the four criteria

When attempting to establish whether the position is a specialty occupation you must show that the position meets one of four criteria. 8 C.F.R. 214.2(h)(4)(iii)(A) lists the four criteria as:

> **(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;**

USCIS recognizes the Occupational Outlook Handbook (OOH), a publication of the United States Department of Labor, as an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses. You have certified a Labor Condition Application (LCA) with the Department of Labor (DOL) that the proffered position is a [Insert the occupation listed in the LCA]. An analysis of the proposed duties also reveals that the duties appear to be within the section pertinent to the occupation listed under the title [Insert Specific Position Title from the OOH] in the OOH, 2012-2013 edition.

OPTIONAL - Duties Described in the OOH:

The OOH describes the duties of a [Insert Specific OOH Position Title], in part, as follows:

> If the adjudicator feels it is essential to the analysis, the duties, or a summary of the duties, may be described here. However, it is not absolutely required.
>
> If you quote the OOH, indent 0.5" from Left & Right margins.

REQUIRED - Training Described in the OOH:

The OOH describes the training and other qualifications required for [Insert Specific OOH Position Title], in part, as follows:

> Cite the training and other qualifications as provided in the OOH that indicate that a baccalaureate degree is not the normal minimum requirement.
>
> If you cite the OOH, indent 0.5" from left & right margins.

As shown in the OOH, although a baccalaureate level of training is [Insert as appropriate: ...preferred, ...generally required, ...etc.], the position of [Insert Specific OOH Position Title] is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal, minimum for entry into the occupation. There is no apparent standard for how one prepares for a career as a [Insert Position] and no requirement for a degree in a specific specialty. The requirements appear to vary by employer as to what

course of study might be appropriate or preferred. As a result, the proffered position cannot be considered to have met this criterion.

> **(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;**

USCIS will discuss this criterion in two parts as follows:

> **2a. Degree Requirement is Common to the Industry in parallel Positions among similar Organizations**

Factors often considered by USCIS when determining the industry standard include: whether the OOH reports that the industry requires a degree; whether the industry's professional association has made a degree a minimum entry requirement; whether letters or affidavits from firms or individuals in the industry attest that such firms routinely employ and recruit only degreed individuals; or copies of job announcements from similar organizations as the petitioner. Shanti, Inc. v. Reno, 36 F.Supp.2d 1151, 1165 (D.Min. 1999) [*quoting* Hird/Blaker Corp. v. Slattery, 764 F.Supp. 872, 1102 (S.D.N.Y. 1991)].

The conclusions about a degree requirement for [Enter specific OOH job title] as shown in the OOH were discussed in the previous section.

2a. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

You have submitted no evidence to demonstrate that a degree in a specific field of study is common to the [Identify the type of industry in which the petitioner is involved, e.g.: ...import/export...dental practice...residential home care...liquor store...gas station...dry cleaner...] industry in parallel positions among similar organizations. Accordingly, this criterion will not be discussed further.

2a. SAMPLE ANALYSIS 2 OF 4 - Job listings submitted but insufficient:

Although you submitted [... one... two...twelve...thirty...etc....] job listings, none of the listings is sufficient evidence of a degree requirement being common to the industry in parallel positions among similar organizations.

Option 1 of 4 - Employers not recognized: Further, it is difficult to ascertain whether the employers who published these announcements are similar to your organization.

Option 2 of 4 – Employers recognized but unlike the petitioner: Also, the job listings are from employers dissimilar to your organization.

Option 3 of 4 - Job Announcements DO NOT specify a required educational background:

More importantly, while they all require a bachelor's degree, the majority of the announcements do not specify a required educational background.

Option 4 of 4 - Job Announcements DO specify an educational background but do not limit the field of study:

Although some of the announcements do specify an educational background, they do not limit the field of study to a particular field that is appropriate to the proffered position, such as [Choose Or Add: ...business ...science ...computers ...engineering...], but allow for a wide variety of backgrounds to include [Choose Or Add:...liberal arts, ...sociology, ...psychology, ...literature, ...journalism, ...philosophy ...advertising ...public affairs ...public speaking ...English ...political science ...and ...creative and technical writing.... And So On]

2a. SAMPLE ANALYSIS 3 OF 4 - No documentation submitted from industry-related professional associations, firms, or individuals:

In addition, you submitted no documentation that any industry-related professional association has made a bachelor's degree a requirement for entry into the field. Further, you have not submitted letters or affidavits from firms or individuals in the [Identify the type of industry in which the petitioner is involved, e.g.: ...import/export...dental practice...residential homecare...liquor store...gas station...dry cleaner...] industry which attest that such businesses routinely employ and recruit only degreed individuals. Also, no other evidence was submitted that is sufficient to establish that the degree requirement is common to the industry in parallel positions among similar organizations. Accordingly, you have not met this criterion.

2a. SAMPLE ANALYSIS 4 OF 4 - Documentation was submitted from industry-related professional associations, firms, or individuals but does not specify that a baccalaureate degree in a specific specialty is required:

Although, the record contains letters from [...one...two...five...etc.] [Choose Or Add: representatives of businesses and/or professors ...etc.] who state that a bachelor's degree is required for [Insert Job Title] positions, none of these individuals specify that a baccalaureate degree in a specific specialty is required.

[Optional:] Further, the record does not include sufficient evidence to substantiate that the business representative(s) and/or professor(s) are associated with your industry.

In this case the evidence does not establish that these individuals hold a degree in a particular field related to the proffered position. Also, the record does not establish the individuals' qualifications or their experience giving such opinions, and the basis for conclusions supported by copies of citations of any research material.

[Final Conclusion for all Sample Analysis in Criterion 2a:]

As such, you have not submitted sufficient documentation to show that the degree requirement is common to the industry in parallel positions among similar organizations.

2b. Complexity and Uniqueness of the Proffered Position.

As an alternative to demonstrating that the degree requirement is common to the industry in parallel positions among similar organizations, you may show that the proffered position is so complex or unique that it can be performed only by an individual with a degree. 8 C.F.R. 214.2(h)(4)(iii)(A)(2).

2b. SAMPLE ANALYSIS 1 OF 4 - No evidence submitted for this criterion:

In the present petition, you have not submitted sufficient documentation to show that this position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them.

2b. SAMPLE ANALYSIS 2 OF 4 - Described duties are generic in nature:

You submitted a breakdown of the job duties for the proffered position along with the percentage of time that the beneficiary will spend on the various duties. However, the submitted list of duties is generic in nature and provides no further detail as to the unique or complex nature of the proffered position. This breakdown is not viewed as sufficient to establish that the proffered position is more unique or complex than other similar positions within the same industry. Without additional evidence showing the unique or complex nature of the position, or how this position differs from other similar positions within the same industry, you have not met this criterion.

2b. SAMPLE ANALYSIS 3 OF 4 - Proffered position not as complex as listings:

You have not demonstrated that the job duties in the proffered position are as complex as those listed in the advertised positions. For example, the duties of the job listings include [List THOSE Duties from the job listings that are more complex than the duties of the proffered position: e.g...."budgeting, training, supervising staff, monitoring and managing a national, regional, or local sales program, etc.,...."], all of which are more complex than the proffered position.

2b. SAMPLE ANALYSIS 4 OF 4 - Assertions of counsel do not constitute evidence:

In the instant petition, counsel asserts that the position is complex and unique; however, no documentary evidence is provided to support this statement. Mere assertions of counsel do not constitute evidence. Matter of Obaigbena, 19 I. & N. Dec. 533, 534 (BIA 1988); Matter of Ramirez-Sanchez, 17 I. & N. Dec. 503, 506 (BIA 1980); Matter of Laureano, 19 I. & N. Dec. 1, 3 (BIA 1983). USCIS must look to the plain language of the documents executed by the petitioner and not to subsequent statements of counsel. Matter of Izumii, 22 I. & N. Dec. 169 (Assoc. Comm. Examinations 1998). Without additional evidence, you have not established this criterion.

[Final Conclusion for all Sample Analysis in Criterion 2b:]

As such, you have not submitted sufficient documentation to show that this position involves duties seen as either unique or complex so that only an individual with a degree in a specific specialty could perform them.

(3) The employer normally requires a degree or its equivalent for the position;

(3) SAMPLE ANALYSIS 1 OF 4 - New Position - No evidence provided:

[Choose One: You have not hired anyone previously for the proffered position. ...Or... You had no evidence to present on this issue, as this is the first offering of the proffered position.] As such, you have not established this criterion.

(3) SAMPLE ANALYSIS 2 OF 4 - Long-standing Position – No evidence submitted to show it normally requires a degree:

Although your organization has been established since [Year], you have not demonstrated that you have, in the past, required the services of individuals with baccalaureate or higher degrees in a specific specialty such as [Insert Degree Requirement: e.g., ...marketing ...math ...business administration ...etc....], for the offered position. Your assertion that your past and present job announcements specified a minimum of a baccalaureate degree in the field of [Insert Field of Study: e.g., ...sales ...marketing ...etc....] is noted.

The record, however, contains no corroborating documentation, such as a list of the names of your past [Insert Job Title: e.g., ...sales representatives ...clerks ...etc....], proof of their employment, and evidence of their educational backgrounds.

Since the burden of proof to establish eligibility for benefits sought rests with you, the petitioner, under section 291 of the Act to accord the beneficiary with a specific visa classification, simply going on record with unsupported statements without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these

proceedings. Matter of Treasure Craft of California, 14 I. & N. Dec. 190 (Reg. Comm. 1972).

(3) SAMPLE ANALYSIS 3 OF 4 - Position does not meet the statutory definition of specialty occupation:

In this case, although you claim to have hired only individuals with a bachelor's degree or higher in [Insert Field of Study: ...Business Administration, Economics, Marketing,...etc.] the position, nevertheless, does not meet the statutory definition of specialty occupation. The position, itself, does not require the theoretical and practical application of a body of highly specialized knowledge. Therefore, even though you have required a bachelor's degree in the past, the position still does not require a bachelor's degree in a specific specialty. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000). To interpret the regulations any other way would lead to illogical results.

(3) SAMPLE ANALYSIS 4 OF 4 - Employer's Self-imposed Standards – Use this only for positions that are obviously not specialty occupations, such as auto & aircraft mechanics, plumbers, carpenters, construction workers, child day-care workers, dishwashers, etc.:

Although you assert that you normally require a baccalaureate degree for the proffered position, your reasoning is problematic when viewed in light of the statutory definition of specialty occupation.

Your creation of a position with an obligatory bachelor's degree requirement will not conceal the fact that the position is not a specialty occupation. USCIS must examine the ultimate employment of the alien, and determine whether the position qualifies as a specialty occupation.

The critical element is not the title of the position or an employer's self-imposed standards, but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's degree in the specific specialty as the minimum for entry into the occupation as required by the Act. Defensor v. Meissner, 201 F.3d 384, 387 (5th Cir. 2000). To interpret the regulations any other way would lead to illogical results.

If USCIS was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor's degree could be brought into the United States to perform a menial, non-professional or an otherwise non-specialty occupation, so long as the employer required all such employees to have bachelor's degrees. See id at 388. See also Matter of Michael Hertz Associates 19 I. & N. Dec. 558 (Comm. 1988) (The requirement of a college degree for the sake of general education, or to obtain what an employer perceives to be a higher caliber employee, also does not establish eligibility).