AMERICAN IMMIGRATION LAWYERS ASSOCIATION

Practice Pointer

H-1B Specialty Occupation RFE Toolbox

By AILA's USCIS HQ (Benefits Policy) Committee[1]

(Updated 2/18/21)[2]

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In the first quarter of fiscal year (FY) 2019, USCIS issued a Request for Evidence (RFE) in approximately 60% of H-1B petitions filed.[3] Alleged failure by petitioners to prove that a position qualifies as a "specialty occupation" was the number one reason cited by USCIS for H-1B RFEs in 2018.[4] Indications are that high RFE rates will continue for the foreseeable future.[5] This toolbox is offered as a resource for finding materials to use in response to specialty occupation RFEs. The toolbox contains links to AILA Practice Pointers, helpful Occupational Outlook Handbook language, government and non-government resources, citations, case law, and practical tips, among other things, that may be useful in crafting a successful response to a specialty occupation RFE. It is not meant to be exhaustive, nor to be a substitute for an attorney's own research.

An important note regarding case law: USCIS frequently cites cases in support of a false proposition; more simply, the case does not say what USCIS claims it does. Attorneys should

[1] Special thanks to AILA USCIS HQ (Benefits Policy) Committee members Dagmar Butte, Rob Cohen, Robin O'Donoghue, Bennett Savitz, Suzanne Seltzer, Nicole Simon, and Rita Sostrin for their assistance in the preparation of this practice pointer.

[2] This document was last updated on November 11, 2020. All substantive updates since the March 3, 2020 version are reflected in blue font.

[3] *H-1B Quarterly RFEs: FY2015-FY2019 Q1 Top 30 Employers*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/BAHA/h-1B-quarterly-requests-for-evidence-2015-2019-Q1-top-30-employers.pdf.

[4] *Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/tools/reports-studies/reports-and-studies.

[5] *I-129 – Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Month, and Case Status: October 1, 2014 – June 30, 2020*, U.S. CITIZENSHIP & IMMIGRATION SERV., https://www.uscis.gov/sites/default/files/document/data/I129_Quarterly_Request_for_Evidence_FY2015_FY2020_Q3.pdf

therefore read any case cited in an RFE, as that may itself be a powerful tool in refuting USCIS's erroneous claims.

AILA Practice Pointers on H-1B Wage Level Issues

- *Responding to H-1B RFEs Raising Level 1 or Level 2 Wage Issues*, AILA Doc. No. 17090132.

This practice pointer provides legal strategies, tips, and guidance for responding to RFEs and NOIDs raising Level 1 and Level 2 wage issues.

- *AAO Sheds Light on H-1B Wage Level Issue*, AILA Doc. No. 18031236.

In this practice pointer, AILA provides a summary of two AAO non-precedent decisions that give insight into how to build a winning argument when faced with an H-1B wage level challenge from USCIS.

- *Key Takeaways from H-1B Wage Level and Specialty Occupation Documents Released in FOIA Lawsuit*, AILA Doc. No. 20052035.

In this practice pointer, members of AILA's FOIA Committee reviewed documents USCIS released in 2019 based on a FOIA lawsuit and summarized some of their key takeaways of those documents. The key takeaways are divided into three sections: wage leveling issues, specialty occupation issues, and ancillary issues.

Occupational Outlook Handbook (OOH)

- *AILA Practice Pointer: Gain a Better Understanding of the OOH*, AILA Doc. No. 18032635.

In this practice pointer, AILA's VSC and DOL Liaison Committees provide an overview of the OOH in order to assist with preparing responses to USCIS RFEs based on educational requirements for H-1B specialty occupations.

OOH Disclaimer: Language in the OOH itself can be helpful in countering RFEs which state that because of particular language in the OOH with regard to a particular occupation, the particular position is not one for which a "baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry."

The disclaimer in the OOH notes:

> Many trade associations, professional societies, unions, industrial organizations, and government agencies provide career information that is valuable to counselors and jobseekers. For the convenience of Occupational Outlook Handbook (OOH) users, some of these organizations and their Internet addresses are listed at the end of each occupational profile. Although these references were carefully compiled, the Bureau of Labor Statistics (BLS) has neither the authority nor the facilities to

investigate the organizations or the information or publications made available to BLS. As a result, BLS cannot guarantee the accuracy of such information and the listing of an organization does not constitute in any way an endorsement or recommendation by BLS, either of the organization and its activities or of the information the organization may supply. Each organization has sole responsibility for whatever information it issues.

The OOH describes the job outlook over a projected 10-year period for occupations across the nation; consequently, short-term labor market fluctuations and regional differences in job outlook generally are not discussed. Similarly, the OOH provides a general, composite description of jobs and cannot be expected to reflect work situations in specific establishments or localities. **The OOH, therefore, is not intended to, and should never, be used for any legal purpose**. For example, the OOH should not be used as a guide for determining wages, hours of work, the right of a particular union to represent workers, appropriate bargaining units, or formal job evaluation systems. Wage data in the OOH should not be used to compute the future loss of earnings in adjudication proceedings involving work injuries or accidental deaths.

BLS has no role in establishing educational, licensing, or practicing standards for any occupation; any such standards are established by national accrediting organizations and are merely reported by BLS in the OOH. The education information in the OOH presents the typical requirements for entry into the given occupation and does not describe the education and training of those individuals already employed in the occupation. **In addition, education requirements for occupations may change over time and often vary by employer or state.** Therefore, the information in the OOH should not be used to determine if an applicant is qualified to enter a specific job in an occupation.[6]

Caselaw

Below is a selection of cases, available to date, that contains the most effective judicial language that addresses commonly raised specialty occupation RFE issues. Additional related resources are listed in the next section. When utilizing these resources, we encourage practitioners to conduct independent research to ensure that they have access to the most recent decisions.

- *Altimetrik Corp. v. USCIS*, Case No. 18:2019-cv-11755 (E.D. Mich., September 30, 2019). Plaintiff's Motions for Summary Judgment were denied, and the case was dismissed. Plaintiff submitted lists of job duties associated with the specialty occupation positions the individual beneficiaries were to fill and evidence of numerous ongoing projects on which any of the individuals could perform work in a specialty occupation position. But, according to USCIS, Plaintiff did not provide evidence connecting the proposed positions to specific projects. The Court agreed with USCIS that listing job duties corresponding with a specialty position is not enough to meet the evidentiary burden, nor is the word of a

[6] *Disclaimer*, BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, https://www.bls.gov/ooh/about/disclaimer.htm (emphasis added).

human resources professional or other company official alone sufficient evidence to establish a specialty occupation. Citing *Fast Gear*, 116 F.Supp.3d at 846, the Court found that an employer, "cannot simply state that it will employ an individual to perform duties that are characteristic of [a Software Developer] in order to obtain a visa." The Court further explained that the Plaintiff must prove both that the position is characteristic of a Software Developer, and that it is making the offer of employment because it has a business need for such a position. The Court found that in the petitions it submitted, Plaintiff did not link the beneficiaries to the contracts and statements of work submitted and for four of the beneficiaries, failed to submit any evidence showing that those projects actually existed as non-speculative work.

- *Next Generation Technology v. Johnson*, 328 F. Supp. 3d 252 (S.D.N.Y. 2017) confirmed that, where the OOH specifies that *most workers* within the field have a bachelor's degree, even if some do not, a rational interpretation and "fair reading" of the OOH is that it is a normal requirement for the position.

- *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012). "The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has obtained the credentialing indicating possession of that knowledge."

- *Royal Siam Corp. v. Chertoff*, 484 F. 3d 139 (1st Cir. 2007) is often cited by USCIS for the proposition that the degree must relate directly to the duties and responsibilities of the particular position. This case cites *Tapis Intern v. INS* holding that "although a general-purpose bachelor's degree, such as a business administration degree, may be a legitimate prerequisite for a particular position, requiring such a degree, without more, will not justify the granting of a petition for an H-1B specialty occupation visa." In other words, spell out the nexus between the coursework and the degree, or any additional requirements.

- *Tapis Intern. v. INS*, 94 F. Supp. 2d 172 (D. Mass. 2000). Cited in *Residential Finance*, this case has good language about equivalent degrees and not necessarily having a major for every job, thereby finding that the position was a specialty occupation since an employer can show that it requires a certain type of bachelor's degree in addition to specialized experience or training.

- *Matter of Michael Hertz Associates*, 19 I&N Dec. 558, 560 (Comm'r 1988) recognizes that occupations evolve over time, and a position that previously did not qualify as a specialty occupation may today be recognized as one.

- The decision in *Matter of Treasure Craft* 14 I&N Dec. 190 (September 7, 1972) is regularly relied on by USCIS for the principle that it is not sufficient merely going "on record" with an assertion or affidavit as to an element of a petition that must be proved. *Treasure Craft* involved an employment-based petition where the employer simply asserted that it would be providing training not available in Mexico, with no evidence of unavailability in the record and with contrary evidence that the beneficiaries were already trained and qualified.

The petitioner stated that the relevant regulation, 8 C.F.R. 214.2(h)(2)(iii), only required a simple statement that the training was unavailable outside of the U.S. Given the nature of the petition, this assertion was rejected. In other cases, where the explanation as to availability of training overseas was reasonable and logical, the statement of the petitioner was accepted. *See Matter of St. Pierre,* 181 I&N Dec 308 (June 30, 1982). The principle in *Matter of Treasure Craft* is not that a statement or affidavit is not evidence or that it must always be corroborated by additional evidence. Rather, the proposition in *Treasure Craft* is that absent an appropriate context, it is not in and of itself, determinative. Even in those cases which build upon *Treasure Craft* and indicate that corroborating evidence was necessary, it was within the context of the evidentiary concerns relevant to that specific petition and the special circumstances associated with it. *See Matter of Soffici*, 22 I&N Dec. 158 (AAO 1998) (tracking the source of funds for an EB-5 investment). For more information about *Matter of Treasure Craft*, please see this detailed case summary provided by AILA's USCIS HQ (Benefits Policy) Committee.

As noted above, *Residential Finance* stands for the proposition that *"it is the knowledge and not the degree that is important."* The following cases further support this proposition:

- *CARE v. Nielsen*, Case No. 1:18-cv-04666 - Document 33 (N.D. Ga. 2020). The Court overturned and remanded two consecutive H-1B denials for an Impact Data Analyst (classified as Operations Research Analyst), where USCIS disregarded evidence provided by the petitioner and two experts confirming specialty occupation. The Court relied heavily on both *Residential Finance* and *Relx*, as well as its own assessment of the evidence, testimony, and concluded that USCIS disregarded valid and credible evidence in making its decision. Specifically, USCIS dismissed expert letters without an explanation (other than a generic site to *Matter of Caron International*), which the Court found arbitrary and capricious. In fact, the Court sided with expert statements that where a degree in an occupation is not offered, or its duties could be performed by completing more than one degree, "an assessment of whether specialized coursework in a particular degree satisfies [the legal standard] is essential." *CARE* also addressed the issue of payment of a Level 1 salary, confirming that it is not determinative of whether a job is a specialty occupation. Rebutting USCIS's conclusion that "physicians or architects…would be specialty occupations at entry level…" but an Operations Research Analyst would not, the Court stated: "[I]t is at this moment that Defendants reveal the fundamental flaw in their reasoning…Defendants' position that the Impact Data Analyst position is unlike an architect or physician is undermined by the O*NET, which categorizes 'Architects,' 'Physicians,' and 'Operations Research Analysts' *all* as Job Zone 5…CARE's Impact Data Analyst position qualifications could potentially be met by an applicant with a higher education degree in one *or more* highly technical fields essential to impact data analysis."

- *Taylor Made Software, Inc. v. Cuccinelli*, Case No. 1:19-cv-00202-RC (D.D.C. March 31, 2020). The Court considered USCIS's interpretation of the test for specialty occupation as it relates to 8 CFR 214.2 (h)(4)(iii)(A) and the attainment of at least a bachelor's degree in a specific specialty with respect to Computer Systems Analysts. While the Court agreed that this meant "there has to be some connection between the degree and the requirements for the position," it agreed with holdings in *RELX v. Baran* and *Residential Finance Corp. v. USCIS* that this does not mean the degree is restricted to solely one academic discipline.

The Court then analyzed the four regulatory factors, and while it found that the Agency did not act arbitrarily and capriciously with respect to prongs two through four, it did take issue with the first prong of whether a degree is normally required. The Court rejected USCIS's conclusion that because the OOH allows for the possibility that some Computer Systems Analysts do not hold at least a bachelor's degree, this means that Computer Systems Analysts are not normally required to have earned at least a bachelor's degree in a specific specialty. In fact, the Court concluded that the language in the OOH actually supports the opposite conclusion: "The fact that 'some firms' hire analysts with general business or liberal arts degrees does not prove – or even suggest – that a specialty degree is not 'normally' required." The Court added that the OOH also noted that most of the degrees for Systems Analysts are in Computer Science and some even require a master's degree, and concluded that while this is not necessarily determinative, read in context, "…it does imply that a specialized bachelor's degree is the typical baseline requirement." The Court concluded: "If USCIS wants to discount OOH evidence indicating *both* that a specialty degree requirement is 'common' and that 'most' people in the position have a degree in a computer-related field, it cannot simply rely on the OOH's recognition that an unspecified number of contrary cases exist."

- *3Q Digital, Inc. v. USCIS,* Case No. 1:19-cv-00579 (D.D.C. March 6, 2020). 3Q Digital won the specialty occupation argument in District Court for a Search Engine Marketing Account Manager (SOC Computer Occupations, All Other/Search Marketing Strategists), which required a bachelor's degree in Economics, Marketing, or Business. The Court held that "…using the OOH over the O*NET report is arbitrary and capricious…" noting that "…it is true that O*NET does not provide a dispositive list of majors…but to do so would actually be contrary to 8 USC §1184; the statute's definition of 'specialty occupation' includes not only a formal degree, but also the 'equivalent' of that degree, which could include specialized training outside of a formal academic setting." The Court further found it dipositive that "…the O*NET report shows that Search Marketing Strategists positions regularly require knowledge…" in a specific area.

- *India House, Inc. v. DHS,* Case No. 1:19-cv-296-MSM-PAS (D.R.I. 2020). The Court overturned the denial of a second H-1B extension request, where USCIS failed to argue that the initial approval and first extension were not in error, finding that "USCIS's failure to follow its own precedent…remains a mystery here" and "The government here offers no reason to explain how a Hospitality Management degree can be a 'specific' degree one day, and not a 'specific degree' the next." The Court also distinguished this case from Royal Siam on several counts, including that the degree in question contained few liberal arts classes and was specifically focused on "management in the particular industry of food service and hotels" as opposed to "a business administration degree" which Royal Siam found to be a "general purpose" degree. The Court also held that the AAO's rejection of vacancy advertisements was erroneous, finding that "It is unreasonable to demand that the plaintiffs undertake an in-depth analysis of the business entities advertising for similar positions: it is enough to show that they do. The similarity of the positions is evident on their face and in the descriptions contained in the advertisements."

- *Relx, Inc. v. Baran*, 297 F. Supp 3rd 41 (D.D.C. 2019). USCIS denied the H-1B petition on the sole grounds that Relx (d/b/a LexisNexis) failed to show that the position (Data

Analyst) qualified as a specialty occupation under the regulations. The Court granted plaintiff's motion for summary judgement and directed USCIS to approve the H-1B, rejecting the USCIS position that a position in which multiple fields of education are suitable does not qualify as a specialty occupation. Rather, the Court held that "This position is untenable. There is no requirement in the statute that only one type of degree be accepted for a position to be specialized. The statute and regulations simply require that a 'position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a bachelor's or higher degree in the specific specialty [is a] minimum requirement for entry into the occupation.' In other words, if the position requires the beneficiary to apply practical and theoretical specialized knowledge and a higher education degree it meets the requirements. Nowhere in the statute does it require the degree to come solely from one particular academic discipline."

- *Raj and Company v. USCIS*, 85 F. Supp. 3d 1241 (W.D. Wash. 2015). USCIS had denied the H-1B petition on the sole grounds that Raj failed to show the position (a Market Research Analyst position) qualified as a specialty occupation under the regulations. The Court granted plaintiff's summary judgment motion and directed USCIS to approve the H-1B. The Court agreed it was appropriate for USCIS to define "specialty occupations" as those which require a degree in a specific specialty (as opposed to a generalized degree), but citing *Residential Finance*, found USCIS abused its discretion in relying on the OOH to determine that a baccalaureate or higher degree is not "normally the minimum requirement for entry into a particular position" under the regulations. "Here too, the Court finds that the evidence in the record shows that the proffered position requires as a minimum for entry a specialized degree in 'market research,' or where no such degree is available, an equivalent technical degree accompanied by relevant coursework in 'statistics, research methods, and marketing.'"

- *Irish Help at Home LLC v. Melville*, 2015 WL 848977 (N.D. Cal. 2015). The Court granted USCIS's motion for summary judgement and upheld the USCIS decision that the position of Deputy Controller at Irish Help at Home LLC is not a specialty occupation. With regard to whether a baccalaureate or higher degree is normally required for the position, the Court distinguished *Residential Finance*, nothing that "[u]nlike in *Residential Finance*, the record does not support that the Irish Help's deputy controller position is a distinct occupation, or that it requires a specialized course of study. Rather, the record indicates that the deputy controller position may be satisfied with a bachelor's degree in a more general field of study, such as business administration." The Court also found that Irish Help at Home LLC had not satisfied any of the other "specialty occupation" prongs. Of note, the Court found that USCIS properly discounted job listings submitted by Irish Help at Home LLC, as "none of the job listings submitted by Irish Help established that a degree requirement exists for deputy controllers in the home healthcare industry among 'similar organizations.'" Additionally, the Court noted that USCIS properly determined that the Level 1 wage listing on the LCA undermined the "unsupported" claim that the position was complex or unique.

- *Innova Solutions, Inc. v. Baran*, 338 F. Supp. 3d 1009 (N.D. Cal. 2018). The Court granted USCIS's motion for summary judgement and upheld the USCIS decision that the position of Technical Recruiter at Innova Solutions is not a specialty occupation. With regard to

whether a baccalaureate or higher degree is normally required for the position, the Court distinguished *Tapis Intern* and *Residential Finance*, nothing that "[u]nlike *Tapis*, the record presented here does not indicate that USCIS construed the OOH Human Resources Specialists profile as being limited to a specific field in which no degree is available. Unlike *Residential Finance*, nothing in the record indicates that the Technical Recruiter position is a distinct occupation requiring a specialized course of study. Rather, USCIS concluded that the Technical Recruiter position is not a 'specialty occupation' because the OOH indicates that a Human Resources Specialist position does not require a degree *only* in a specific specialty." The Court also found that Innova Solutions had not satisfied any of the other "specialty occupation" prongs.

- *Health Carousel, LLC v. Bureau of Citizenship and Immigration Services*, Case No. 1:2013-cv-00023 (S.D. Ohio 2014). The Court upheld USCIS's H-1B denial that an International Recruiter is not a specialty occupation. In contrast to *Residential Finance*, where the Court found it "most bewildering" that USCIS rejected the evidence that the beneficiary would actually be performing the specific job duties listed in the record despite no evidence to the contrary and no other apparent reason for failing to credit the evidence on the record, the AAO noted numerous times in the *Health Carousel* denial that it was Health Carousel's certification of the LCA for a Level I, entry-level position which "undermines the credibility of the petition, and, in particular, the credibility of the petitioner's assertions regarding the demands, level of responsibilities and requirements of the proffered position." It clearly was the designation on the LCA, at odds with Health Carousel's description of the position, which provided a reason for the AAO to fail to credit the evidence on the record.

- *Xiaotong Liu et al. v. Kathy A. Baran et al.,* Case No. 8:2018-cv-00376 (C.D. Cal. 2018). The Court upheld USCIS's H-1B denial based on its conclusion that an Event Manager is not a specialty occupation. The Court distinguished from *Residential Finance* by noting that - "[h]ere, while the OOH indicates that "other common fields of study include communications, business, and business management," it does not suggest that any particular course work is essential; rather, it indicates that "[p]lanners who have studied meeting and event management or hospitality management may start out with greater responsibilities than those from other academic disciplines." While Liu herself has experience with particular course work that may be relevant to the Event Manager position, the Court does not find that the government abused its discretion by finding that there is "no requirement for a degree in a specific specialty."

- *China Southern Airlines Co. Ltd. v. Donna Campagnolo*, Case No. 8:2013-cv-00857 (C.D. Cal. 2013). The Court granted plaintiff's summary judgment motion and directed USCIS to approve the H-1B. The Court cited *Residential Finance* and concluded that in this case, "[t]he AAO relied on the 2012–13 edition of the Occupational Outlook Handbook by the Bureau of Labor Statistics, which states that 'Market research analysts typically need a bachelor's degree in market research or a related field.' The AAO did not satisfactorily explain why the position, under the Handbook it relied on, failed to satisfy the relevant regulations. Overall, particularly compared to other aspects of our immigration policy concerning those far less educated, the Court believes it is an abuse of discretion to deny a

visa to this highly educated person whose employer has gone through the process to permit the person to work legally."

Additional Related Resources: Challenging H-1B Denials in Federal Court

Below are additional related resources that may be helpful regarding challenging H-1B denials in Federal Court.

- *Challenging H-1B Denials in Federal Courts: Trends and Strategies* by Hun Lee and Stephen Yale-Loehr, AILA Doc. No. 19120500.

This article presents litigation trends in H-1B adjudications and offers strategies for immigration attorneys considering litigation to challenge an H-1B denial. Reprinted to the AILA website with permission.

- Mother Jones article - *How I Tracked an Explosion in Lawsuits Against Trump's Immigration Policies* by Sinduja Rangarajan, available at AILA Doc. No. 19120500.

In 2019, Sinduja Rangarajan, a reporter from Mother Jones, built a database of more than 100 H-1B-related lawsuits filed against USCIS since 2006. It is not exhaustive, but it is a comprehensive database combining both publicly available and privately obtained documents that provide a quantitative and qualitative picture of how the Trump administration has implemented its H-1B policies, and the unprecedented legal challenges to those policies.

Government Resources

- CareerOneStop - www.careeronestop.org

CareerOneStop is sponsored by the U.S. Department of Labor's Employment and Training Administration and is a resource that can be used to show the degrees and fields for various occupations. Make sure to perform the search under the "Explore Careers" menu, www.careeronestop.org/ExploreCareers/explore-careers.aspx, rather than the general search window at the top. The data goes beyond the O*NET and is often different, so be sure to analyze whether the additional data helps or hurts. Unlike the O*NET, CareerOneStop often provides major degree fields that support a specialty occupation argument.

- USAJobs.gov - www.usajobs.gov

On this site, you can search for government positions with similar duties and requirements to positions subjected to specialty occupation RFEs.

- GovernmentJobs.com - https:/www.governmentjobs.com

This site is a government sector job board where individuals can search public sector job openings by title or keyword to find government positions with similar duties and requirements to positions challenged in specialty occupation RFEs.

- H-1B Employer Data Hub - https://www.uscis.gov/h-1b-data-hub

The H-1B Employer Data Hub includes data from fiscal year 2009 through the first quarter of fiscal year 2019 on employers who have submitted petitions to employ H-1B workers. Data can be queried by fiscal year, employer name, city, state, zip code, and NAICS code. The H-1B Employer Data Hub has data on the first decisions USCIS makes on petitions for initial and continuing employment. It identifies employers by the last four digits of their Federal Employment Identification Number (FEIN). You can download annual and query-specific data in .csv format. For more information on the data, visit USCIS's https://www.uscis.gov/tools/reports-studies/understanding-our-h-1b-employer-data-hub webpage.

- DOL OFLC Performance Data - https://www.foreignlaborcert.doleta.gov/performancedata.cfm

The Office of Foreign Labor Certification (OFLC) generates program data with regard to its processing of Labor Certification and Labor Condition Applications. The above link provides OFLC's annual reports, selected statistics by program, and cumulative quarterly and annual releases of program disclosure data to assist with external research and program evaluation. The reports include various helpful statistics with regard to LCA submissions, including listings of the occupations and SOC Codes that are used most often for H-1Bs.

- Mathematics & Engineering in Computer Science - https://nvlpubs.nist.gov/nistpubs/Legacy/IR/nbsir75-780.pdf

A 1975 Report published by the U.S. Department of Commerce's Institute for Computer Sciences and Technology, National Bureau of Standards. It is a 98-page document full of useful quotes about how engineering, math, and computer science are related fields

Non-Government Resources

- LinkedIn - https://www.linkedin.com

LinkedIn may be useful for two purposes. In some cases, providing the educational qualifications of specific individuals, such as colleagues of the H-1B beneficiary at the same organization in the same role, can be useful in responding to specialty occupation RFEs. However, employers are not always willing to share information about their other employees. Often, the information is publicly available on LinkedIn. Search for profiles of specific individuals or employees of specific companies at: https://www.linkedin.com/search. In addition to individuals at the same entity, it is also possible to search LinkedIn for specific job titles at: https://www.linkedin.com/jobs.

- Ferguson's Career Guidance Center – https://www.infobase.com/product/schools/fergusons-career-guidance-center-2/

The Center provides research on thousands of professions, including the education/training normally required. This subscription-based service may be particularly useful in proving the "normal" requirements for positions that are not covered by the OOH or for position for which the OOH does not provide specifics as to the degree requirement.

- ExploreHealthCareers - https://explorehealthcareers.org

This website provides detailed descriptions of health-related jobs and requirements for entry into those jobs.

- University Catalogs, Programs, and Institutes

University course catalogs may contain helpful information regarding why certain courses are relevant to various degrees. Additionally, many universities have established programs and institutes for emerging and interdisciplinary fields. The websites for these programs and institutes provide detailed information about the educational requirements for entry into jobs in those fields. For example, the following is a sample of results from a search for "Data Science Institute":

Columbia University: https://datascience.columbia.edu/

Ohio State University: https://news.osu.edu/ohio-state-creates-institute-dedicated-to-data-science-and-analytics/

University of Michigan: https://midas.umich.edu/

AILA Practice Pointer on Accepting Expert Testimony

- *Expert Opinion Testimony – Yes, It's Evidence USCIS Should Consider!*, AILA Doc. No. 19032230.

This practice pointer provides legal strategies, tips, and guidance, including relevant case law, for responding to RFEs and NOIDs that reject expert opinion letters. Additionally, the following cases not included in the AILA Practice Pointer that are helpful in this regard:

- *Berardo v. USCIS*, 19-cv-01796-SB (D. Or. October 20, 2020). The Court found that USCIS's failure to consider probative evidence and failure to make "apples-to-apples" comparisons of the evidence it did consider was arbitrary and capricious. The Court noted that USCIS was not free to disregard expert letters and industry corroborating materials and needed to provide a rational explanation for any evidence it did choose to disregard. In sum, the Court concluded, "From the initial denial to the final denial, the outcome of Berardo's petition appears to have been preordained, and the final denial does not reflect a serious evaluation of Berardo's evidence…"

- *Rubin v. Miller*, 19-cv-04320 (S.D.N.Y. August 13, 2020). The Court stated, "…while the [denial] appropriately considered whether the opinion letters included specific information regarding the importance and impact of Rubin's research, USCIS's finding that the letters did not contain this information is plainly contrary to the evidence…USCIS's decision was therefore arbitrary and capricious."

- *Chursov v. Miller*, 18-cv-2886 (S.D.N.Y. May 13, 2019). The Court referenced several expert letters submitted by Plaintiff and dismissed by USCIS and concluded that they were

valid evidence. The Court also confirmed that "solicited" letters obtained specifically in support of the case are admissible evidence.

- *Visinscaia v. Napolitano*, 4 F. Supp. 3d, 134 (2013). The Court specifically acknowledged expert reference letters as valid evidence, but stated that they must be sufficiently detailed to meet the burden of proof.

- *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995). "The INS' failure even to consider these affidavits is clear evidence that it did not adequately evaluate the facts before it. … Better evidence … would be difficult to find, yet the INS did not even mention it in its decision."

Preponderance of the Evidence Standard Caselaw

While not limited to H-1B specialty occupation RFEs, a discussion of the burden of proof may be helpful.

- *Matter of Martinez*, 21 I&N Dec. 1035, 1036 (BIA 1997). "In visa petition proceedings, the burden is on the petitioner to establish the claimed relationship. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966). The petitioner must prove by a preponderance of evidence that the beneficiary is fully qualified for the benefit sought."

- *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). "Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true."

Citations and Caselaw Requiring USCIS to Review All Submitted Evidence

- 5 USC §706(2)(A) and (E) of the Administrative Procedure Act requires courts to "hold unlawful and set aside agency action, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "unsupported by substantial evidence."

- 8 CFR §103.2(b)(1): "Any evidence submitted in connection with a benefit request is incorporated into and considered part of the request."

- Chapter 33.4(d) of the Adjudicator's Field Manual instructs adjudicators to consider the totality of the evidence submitted.

- *Buletini v. INS*, 860 F. Supp. 1222; 1994 U.S. Dist. LEXIS 12259. "The Director's failure to consider all of the relevant evidence submitted by plaintiff constitutes an abuse of discretion."

- *Muni v. INS*, 891 F. Supp. 440 (N.D. Ill. 1995) provided multiple examples of legacy INS's failure to review all submitted evidence and concludes that it constituted an abuse of discretion.

- *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F. 3d 113, 119 (2d Cir. 2013). "[A]n agency's decision must reveal a rational connection between the facts found and the choice made."

- *Chursov v. Miller*, 18-cv-2886 (May 13, 2019 S.D. NY). "Rather than considering Chursov's submission as a whole, the agency's review excessively focused on the significance of individual components of the submission. The failure to adequately consider the totality of the submission was arbitrary and capricious."

- *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 997 (S.D. Ohio 2012). "These errors are not the essentially inconsequential lapses that [USCIS] suggests. Instead, they constitute a litany of incompetence that presents fundamental misreading of the record, relevant sources, and the point of the entire petition. If [USCIS] is going to deny a petition …, it should afford Plaintiff and [Beneficiary] a bare minimum level of professionalism, diligence, and reasoning. … A petition should be decided on the actual record, utilizing the correct portions of relevant resources, and for the actual position to be filled. Defendant has failed to meet this fundamental threshold for rational decision-making and has instead engaged in conduct that cannot be separated from the taint of the foregoing errors."

- In *Barchart.Com v. Koumans*, Case No. 19-cv-00556 (APM), USCIS had failed to consider a letter from the employer's Senior Program Manager on the issue of "Specialty Occupation." The U.S. District Court for the District of Columbia, ruled for the Plaintiff, finding that USCIS had failed to consider all of the relevant evidence before it and found this failure to be arbitrary and capricious. In relevant part the Court found:

> Perhaps the most significant piece of evidence among the supplemental materials that Plaintiff submitted was the declaration from Ethan Robinson, Plaintiff's Senior Program Manager. See CAR at 136–37. The Robinson Declaration provides additional background on Barchart's operations, Reis's job duties, his significance to the company, and, critically, the ways in which Reis's finance degree is necessary for his job. Id. It also offers a specific example of one of Reis's recent projects and why his financial expertise and his fluency in Portuguese proved important…nowhere in reaching [its] conclusion did the agency acknowledge the Robinson Declaration, let alone grapple with its substance. In other words, the agency failed to consider the key piece of evidence—the Robinson Declaration—that Plaintiff submitted to explain why Reis's position requires at least a bachelor's degree. This omission was arbitrary and capricious. See *Butte Cty.*, 613 F.3d at 194 ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary agency action within the meaning of [5 U.S.C.] § 706"); *Comcast Corp. v. FCC*, 579 F.3d 1, 8 (D.C. Cir. 2009) (holding that an agency rule was arbitrary and capricious when the agency

> "failed to 'examine the relevant data and articulate a satisfactory explanation for its action'" (alterations in original) (quoting *Fresno Mobile Radio v. FCC*, 165 F.3d 965, 168 (D.C. Cir 1999))).

Practical Tips

- "All Other" O*NET Classifications

According to the Department of Labor (DOL), occupations ending with "All Other" contain "residual occupations," or those that are more specialized and do not readily fit within the O*NET classification system. Ironically, RFEs typically take the opposite position, arguing that a Labor Condition Application (LCA) with a SOC O*NET classification ending in "99", i.e. – XX-XX99, corresponds to an Occupational Title that includes "All Other," one with a more general description in the Occupational Outlook Handbook's (OOH). On that basis, the RFE will assert that "*USCIS is unable to determine if the position requires a minimum of a bachelor's degree in a specific specialty, or its equivalent."*

It may be useful to remind USCIS that its reliance on the "All Other" category is misplaced. We are now assisted by the DOL's new FLAG portal, which allows for subclassifications, such as XX-XX99.01. Nevertheless, should USCIS fixate on the "All Other" description, the numerous authoritative sources listed above under "Government Resources" and "Non-Government Resources" often provide much more specific and up-to-date job descriptions. These resources, coupled with a detailed statement of the actual job duties and minimum requirements necessary to perform those duties and a description of the beneficiary's relevant bachelor's and/or master's degree coursework that provided the theoretical knowledge required to perform the anticipated job duties, should support a finding that the position qualifies as a specialty occupation.

Finally, as noted above, you should use the "Occupational Outlook Handbook (OOH)" section above to advise USCIS that the OOH is not intended to establish minimum educational entry requirements.

- Using Work Product, Diagrams, PowerPoints, Technical Documentation, Etc.

Providing samples of the beneficiary's work product, diagrams, PowerPoint presentations, technical documentation, etc., may demonstrate the complexity and/or uniqueness of a position. You can introduce this evidence by stating that the position is complex and/or unique, with responsibilities and tasks that can only be performed by an individual with the specific degree. After describing the complexity and/or uniqueness of the position, you can state that you are providing descriptions and examples of projects on which the beneficiary has worked and in which the beneficiary will continue to be involved, further demonstrating the complex and/or unique challenges that the position often presents. For new employment, you can provide examples of the same type of evidence for future projects on which the beneficiary will work.

Of course, you need to make sure that you obtain permission from the petitioner to disclose the information you are providing, as there may be other considerations preventing such disclosure. However, it may still be possible to provide redacted information, as the information is being

provided to demonstrate the complexity of the position, rather than for the substance of the information itself.

- Prior Adjudications

Although the Service no longer gives deference to its prior adjudications, it is worth noting if the beneficiary was approved for an H-1B for the exact same occupation on four previous occasions and/or has an approved EB-3 I-140/EB-2 I-140 that indicated the minimum requirement for the position is either a bachelor's degree/master's degree or a bachelor's degree plus five years of experience in the related field. Therefore, both USCIS and DOL have previously agreed that the offered position qualifies as an occupation that at minimum requires a bachelor's degree conferring a body of specialized knowledge for entry into the occupation.

Depending on the dates of the prior approvals, you can also add the following: "Of these approvals, [Insert Number] were approved AFTER both the issuance of the Buy American Hire American Executive Order and the Rescission of Deference Memo, and associated policy changes related thereto."

- If You See Something, Say Something!

This H-1B specialty occupation RFE toolbox is intended to be a living document. It is being maintained by volunteer committee members who will change from year to year and who will not be aware of everything that could be useful. As a result, we are asking users of the toolbox to submit any useful tips and tricks they wish to share, references to resources (both publicly available and pay-to-play), and citations to important cases to AILA's USCIS HQ (Benefits Policy) Committee via the committee's webpage on the AILA website (AILA Doc. No. 16072893) by submitting a message in the "Report a Trend" section of the committee's webpage. Please provide a brief summary of the material you are suggesting and how you believe it will contribute to the toolbox. Thank you!