

The USCIS's March 31, 2017 Computer Programmer Memo: A Pre-textual, Improper Conclusion, or a Legally Supported Policy Position?

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Somewhere along the spectrum between cynicism and loyalism lies a point of critical analysis that offers an objective analysis. The goal of this article is provide a fair evaluation of the USCIS's March 31, 2017 Computer Programmer memorandum and the policy positions it entails.

Legal arguments about U.S. immigration law can be challenging because of the nature of the law itself. The Immigration and Nationality Act of 1952 ("INA") serves as the foundation of present immigration law, codified at Title 8 of the U.S. Code.¹ Over time, there have been substantive amendments to the INA, such as Immigration Act of 1990 that created the current definition of the H-1B category.² There have also been smaller scale amendments to visa programs. Visa categories, like the H-1B, are subject to extensive federal regulations by three principal agencies, the USCIS, the U.S. Department of Labor, and the U.S. Department of State. Additionally, these federal agencies regularly issue various forms of policy guidance, such as policy memoranda.

One of the most challenging tasks can be making sense of policy guidance that can greatly impact the outcomes of hundreds or even thousands of petitions and applications. The USCIS's March 31, 2017 Policy Memorandum rescinding the December 22, 2000 memorandum titled "Guidance memo on H-1B computer related positions" issued to Nebraska Service Center ("NSC") employees is a recent example (referred to as the "Computer Programmer Memo").³

Content of Computer Programmer Memo

The Computer Programmer Memo first references the USCIS alert issued on July 1, 2016 informing the public that the NSC would begin accepting Form I-129 for H-1B and H-1B1 (Chile/Singapore Free Trade) petitions if the petitioner requested a "Continuation of previously approved employment without change with the same employer."⁴ On August 5, 2016, the USCIS issued a reminder to the public and stated that these petitions must be filed with the NSC after August 31, 2016.⁵ According to the USCIS on March 31, 2017, there was concern that the USCIS officers at the NSC may inadvertently follow the December 2000 memorandum and create inconsistent adjudications among three USCIS Service Centers.⁶ Therefore, the USCIS

¹ Chapter 1 - Brief History of Immigration Laws, pg. 5, Kurzban's Immigration Law Sourcebook, 15th Ed. (2016).

² *Id.* at pg. 6.

³ USCIS, Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions," PM-602-0142 (Mar. 31, 2017), published on AILA InfoNet at Doc. No. 17040300.

⁴ USCIS Alert, "Nebraska Service Center to Accept Certain H-1B Petitions," (July 1, 2016), <https://www.uscis.gov/news/alerts/nebraska-service-center-accept-certain-h-1b-petitions> (accessed on May 25, 2017).

⁵ USCIS E-mail, "Reminder: H-1B Workload Transfer Transition Period Ends Aug. 31, 2016," (Aug. 5, 2016), pg. 1.

⁶ USCIS, Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions," PM-602-0142 (Mar. 31, 2017), pg. 1.

took the action because the December 2000 memorandum was “not an accurate articulation of current agency policy.”⁷ The USCIS claimed concern that the December 2000 memorandum was obsolete, but more importantly, it did not “fully or properly articulate the criteria that apply to H-1B specialty occupation adjudications.”⁸

The USCIS took issue with two key points relating to the reliance on the U.S. Department of Labor’s *Occupational Outlook Handbook*⁹ section covering the Computer Programmer occupation by stating:

- “While the memorandum stated that most programmers had a bachelor’s degree or higher based on the information provided in the *Handbook*, that information is not particularly relevant to a specialty occupation adjudication if it does not also provide the specific specialties the degrees were in and/or what, if any, relevance those degrees had to the computer programmer occupation.”
- “... the 2000-01 edition did not make a distinction [between duties performed by those with a 4-year and 2-year degree] and described all programmers as sharing a fundamental job duty, i.e., writing and testing computer code. According to the current version of the *Handbook*, this is still the case; and individuals with only an “associate’s degree” may still enter these occupations. [citing 2016-17 OOH] As such, it is improper to conclude based on this information that USCIS would “generally consider the position of programmer to qualify as a specialty occupation.”¹⁰

The USCIS then critiqued the December 2000 memorandum for failing to distinguish between entry-level positions and more senior, complex, specialized, or unique positions, but left open the possibility that a computer programmer could qualify for an H-1B by stating:

- “... while the fact that some computer programming positions may only require an associate’s degree does not necessarily disqualify all positions in the computer programmer occupation (viewed generally) from qualifying as positions in a specialty occupation,...”¹¹

However, the agency then asserted that “... an entry-level computer programmer position would not generally qualify as a position in a specialty occupation because of the plain language of the statutory and regulatory definition of “specialty occupation.”¹²

⁷ *Id.*

⁸ *Id.* at pg. 2.

⁹ *Occupational Outlook Handbook*, <https://www.bls.gov/ooh/>. The Occupational Outlook Handbook (OOH) provides information on what workers do; the work environment; education, training, and other qualifications; pay; the job outlook; information on state and area data; similar occupations; and sources of additional information, for 329 occupational profiles covering about 83 percent of the jobs in the economy. <https://www.bls.gov/ooh/about/ooh-faqs.htm>. Referred to as “OOH” in this article.

¹⁰ USCIS, Rescission of the December 22, 2000 “Guidance memo on H1B computer related positions,” PM-602-0142 (Mar. 31, 2017), pg. 2, (emphasis added).

¹¹ *Id.* at pg. 3.

¹² *Id.* (emphasis added).

In its closing paragraph, the USCIS states that although a person may be employed as a computer programmer and may use IT skills and knowledge to help an enterprise achieve its goals, it is not sufficient to establish the position as a “specialty occupation,” and that a petitioner may not rely solely on the *Handbook* to meet its burden for computer programmer positions.¹³ The petitioner must instead establish specialty occupation through another of the criteria in 8 C.F.R. §214.2(h)(4)(iii).¹⁴

Additional Points Referenced in the Computer Programmer Memo

In addition to the USCIS’s detailed review of the December 2000 memorandum, it obliquely referenced Labor Condition Applications, DOL wage guidance, and cited a federal court case discussing general-purpose bachelor’s degrees, which are discussed below.¹⁵

Answers and Questions regarding the Computer Programmer Memo

The USCIS provided clear answers to three questions. First, for anyone relying upon that December 2000 memorandum, stop. Second, the USCIS has formally adopted a policy position that one cannot rely upon the *Computer Programmer, Occupational Outlook Handbook*¹⁶ to establish that a position meets the criteria at 8 C.F.R. §214.2(h)(4)(iii)(A)(1) that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position.¹⁷ Third, computer programmer positions are not necessarily disqualified from being considered specialty occupations.¹⁸

The Computer Programmer Memo raised several additional, significant questions without meaningful legal discussion or analysis. Without more, one is left to ponder and attempt to read between the lines when considering the following questions:

1. OOH – If the USCIS believes that the current language in the OOH for Computer Programmers does not support a finding of a specialty occupation under 8 C.F.R. §214.2(h)(4)(iii)(A)(1), how much weight will comparable OOH-based arguments be given for either closely-related occupations or non-related occupations?
2. Level I Wages – What is the USCIS’s articulation of agency policy regarding the use of Level I wages for purposes of the Labor Condition Application requirement?
3. Specialty Occupation – How does the analysis in the Computer Programmer memorandum impact the USCIS’s articulation of its policy in determining if a position is a specialty occupation?

¹³ *Id.*

¹⁴ *Id.* at pgs. 3-4.

¹⁵ *Id.* at pgs. 3-4, footnotes: 6 and 8.

¹⁶ See: <https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm#tab-4> (accessed on May 26, 2017).

¹⁷ USCIS, Rescission of the December 22, 2000 “Guidance memo on H1B computer related positions,” PM-602-0142 (Mar. 31, 2017), pg. 2.

¹⁸ *Id.* at pg. 3.

4. Legal Support – Are these apparent articulations of policy supported by the plain language the relevant statutes, regulations and their respective legislative and regulatory histories?

The Law

The Immigration and Nationality Act (“INA”) defines an H-1B as someone who is coming temporarily to the United States to perform services in a specialty occupation described in section 214(i)(1) and 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).^{19, 20}

INA §214(i)(1) includes requirements for the occupation and lists the means by which one may qualify. An H-1B occupation must be a “specialty occupation” and requires: a 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 (or its equivalent) as a minimum for entry into the occupation in the United States.²¹ The INA provides three ways to qualify for an H-1B occupation: (1) full state licensure for the occupation, if required, (2) the completion of a bachelor's or higher degree in the specific specialty, or its equivalent, and (3)

¹⁹ INA §101(a)(15)(H)(i)(b), 8 U.S.C. §1101(a)(15)(H)(i)(b) subject to section 212(j)(2), who is coming temporarily to the United States to perform services (other than services described in subclause (a) during the period in which such subclause applies and other than services described in subclause (ii)(a) or in subparagraph (O) or (P)) in a specialty occupation described in section 214(i)(1)... and 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).

²⁰ For additional background on the current/post-1989 H-1B standard, see USCIS, *Adjudicators Field Manual*, Chapter 31.1(b) Prior laws, “In 1990, athletes and entertainers, as well as prominent persons in business, science and education were separated into the new O and P categories as a result of Pub. L 101-649, and the definition of H-1B changed from an alien of “distinguished merit and ability” to one coming to perform “services in a specialty occupation.” ... Further, the new law imposed a “labor condition application” provision that required the employer to pay any H-1B worker the higher of the actual or prevailing wage for the occupation in the local area of employment.”

²¹ INA §214(i)(1), 8 U.S.C. §1184(i)

(1) Except as provided in paragraph (3), for purposes of section 101(a)(15)(H)(i)(b), section 101(a)(15)(E)(iii), and paragraph (2), the term "specialty occupation" means 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.

(2) For purposes of section 101(a)(15)(H)(i)(b), the requirements of this paragraph, with respect to a specialty occupation, are--

- (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.

(3) For purposes of section 101(a)(15)(H)(i)(b1), the term "specialty occupation" means an occupation that requires-

- (A) theoretical and practical application of a body of 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.

experience in the specialty equivalent to the completion of such degree, and recognition of expertise in the specialty through progressively responsible positions relating to the specialty.²²

It is important to note that the legislative history on the H-1B included the following statement: “The bill recognizes that certain *entry-level* workers with highly specialized knowledge are needed in the United States and that sufficient U.S. workers are sometimes not available.”²³

Following the passage of the Immigration Act of 1990²⁴ (“IMMACT”), the USCIS issued proposed regulations on July 11, 1990, which it finalized on December 2, 2011.²⁵ The final regulations relevant to the definition and determination of a specialty occupation are:

8 C.F.R. §214.2(h)(1)(ii)(B) An H-1B classification applies to an alien who is coming temporarily to the United States: (1) To perform services in a specialty occupation (except agricultural workers, and aliens described in section 101(a)(15)(O) and (P) of the Act) described in section 214(i)(1) of the Act, that meets the requirements of section 214(i)(2) of the Act, and for whom the Secretary of Labor has determined and certified to the Attorney General that the prospective employer has filed a labor condition application under section 212(n)(1) of the Act.

8 C.F.R. §214.2(h)(4)(i)(A) Types of H-1B classification. An H-1B classification may be granted to an alien who: (1) Will perform services in a specialty occupation which requires theoretical and practical application of a body of highly specialized knowledge and attainment of a baccalaureate or higher degree or its equivalent as a minimum requirement for entry into the occupation in the United States, and who is qualified to perform services in the specialty occupation because he or she has attained a baccalaureate or higher degree or its equivalent in the specialty occupation.

8 C.F.R. § 214.2(h)(4)(ii) Definitions. *Specialty occupation* means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in

²² *Id.* Note: Utilization of experience in lieu of education requires “recognition of expertise in the specialty” and can be proved by “recognition of expertise by at least two recognized authorities in the same specialty occupation” (8 C.F.R. §214.2(h)(4)(iii)(D)(5)).

²³ House Report (Judiciary Committee), No. 101-723(I) at p. 67 (Oct. 26, 1990) (Located 1990 U.S.C.C.A.N. 6710, 6747) (emphasis added). The USCIS and the Administrative Appeals Office have previously accorded deference to legislative history in adjudicating other business immigration petitions (ex. L-1B, specialized knowledge workers in *Matter of* [name not provided], WAC 07 277 53214, pgs. 15-24, (AAO, July 22, 2008), published on AILA InfoNet at Doc. No. 08081964).

²⁴ Immigration Act of 1990 (IMMACT), Pub. L No. 101-649, 104 Stat. 4978 (Nov. 29, 1990).

²⁵ 56 Fed. Reg. 31553 (July 11, 1991) and 56 Fed. Reg. 61111 (Dec. 2, 1991).

a 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)(iii) Criteria for H-1B petitions involving a specialty occupation. (A) Standards for specialty occupation position. 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.

The proposed regulations for IMMACT covering the revised H-1B category included a discussion of the “cross-over” of definitions and standards relating to a “specialty occupation.”²⁶ Specifically, the legacy Immigration and Nationality Service (“INS”) stated:

- The definition and standards for an alien in a specialty occupation mirror the Service’s current requirements for aliens who are members of the professions; and
- This proposed rule amends regulations at 8 CFR 214.2(h)(4)(iii) to change all references to “profession” to “specialty occupation” and to specify the same standards for qualifying as an alien in a specialty occupation that were indicated for an alien who is a member of the professions under existing regulations.^{27, 28}

The INS further clarified the intended method for making determinations and the scope of acceptable H-1B occupations in its final regulations for IMMACT.²⁹ The INS’s comments were made in response to commenters suggesting that prominent businessmen should be included in the definition of specialty occupation. The INS stated:

²⁶ 56 Fed. Reg. 31553, 31554 (July 11, 1991).

²⁷ *Id.*

²⁸ In discussing the meaning of a professional position, a pre-IMMACT decision, *Matter of Caron International, Inc.*, I&N Dec. 791 (Comm. 1988) stated the following: “The clearest common denominator for professional standing is at least a baccalaureate degree awarded for academic study in a specific discipline or a narrow range of disciplines.” (emphasis added) (In *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1164 (D. Minn. 1999), the court found that the INS’s treatment of precedent developed under the “profession” standard as relevant to the interpretation of the “specialty occupation” standard was not clearly erroneous nor inconsistent with the regulations).

²⁹ 56 Fed. Reg. 61111, 61112 (Dec. 2, 1991).

- Business may be accorded classification as H-1B aliens as long as the statutory requirements for the classification are met. That determination will be based upon a case-by-case review of the position.
- The regulation, in providing examples of recognized fields of endeavor, does include “business specialties.” We also note that the list of fields of endeavor are included in the regulation as examples. That list is by no means exhaustive.^{30, 31}

Finally, the USCIS must utilize the appropriate standard of proof - the preponderance of evidence standard. This standard has been reaffirmed in two USCIS memoranda and in USCIS adopted decisions.³² A preponderance of the evidence means:

The standard of proof should not be confused with the burden of proof. The standard of proof applied in most administrative immigration proceedings is the “preponderance of the evidence” standard. Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof. *See U.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring).³³

When submitting an H-1B petition, the petitioner must show by a preponderance of the evidence that the proffered position qualifies as a specialty occupation. As in other visa classifications administered by USCIS, the preponderance of the evidence standard requires that a petitioner show that what it claims is more likely the case than not. This is a lower standard of proof than both the standard of “clear and convincing evidence,” as well as the “beyond a reasonable doubt” standard that applies to criminal cases.³⁴

Although the petitioner bears the burden of proof, the standard of proof in determining a specialty occupation is the “preponderance of the evidence.” As a result, the petition should be granted if it is more likely than not (or a greater than 50% probability) that the Petitioner and the Beneficiary satisfies the H-1B requirements. *Adjudicator’s Field Manual (AFM) Chapter 11.1(c)*. The AFM provides the same mandate to adjudicators:

...[E]ven if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is “probably true” or “more likely than not,” the applicant or petitioner has satisfied the standard of proof.

³⁰ *Id.*

³¹ 8 C.F.R. §214.2(h)(4)(ii) – Explicitly references “business specialties.”

³² *See*: USCIS Memorandum. M. Aytes, “Delegation of Authority for I-751, ‘Petition to Remove Conditions on Residence’” (Jan. 11, 2006), *published on* AILA InfoNet at Doc. No. 06021313 (*posted* Jan. 21, 2006); USCIS Memorandum, “Adjudication of H-1B Petitions for Nursing Occupations” (July 11, 2014), *published on* AILA InfoNet at Doc. No. 14072241 (*posted* July 22, 2014); and *Matter of Chawathe* (AAO Jan. 11, 2006).

³³ Aytes Memo, *supra*. (emphasis added).

³⁴ 2014 Nurse Occupation Memo, *supra*. (emphasis added).

If an employer presents relevant, probative and credible evidence to demonstrate that the position is a specialty occupation, the USCIS must apply a preponderance of the evidence standard when evaluating the evidence regarding these issues. In applying this standard, based upon the probative and relevance provided, the H-1B petition should be approved under the H-1B regulations.

Does the Law Support Approval of an H-1B Petition for Entry-level Computer Programmers?

As a preliminary matter, there are two current issues that have impacted a wide spectrum of H-1B visa petitions.

Issue One, Entry-level Wage Issues - H-1B petitions that are based upon a Labor Condition Applications utilizing a Level I wage have generated much controversy because of instances in which H-1B workers are performing job duties not in line with Level I wages. For example, in 2012, an IT contractor employer was found to have made material misrepresentations when placing employees in positions that were not entry-level at Level I wages, among other violations of immigration regulations.³⁵ Thus, one should keep this history in mind while evaluating this question and the Computer Programmer Memo.

The USCIS's regulations require that an employer obtain a certified Labor Condition Application from the DOL.³⁶ Sponsoring employers must attest that they will pay the "required wage rate" to H-1B nonimmigrants, which is the greater of the "actual wage rate" or the "prevailing wage."³⁷ The "actual wage" is the wage rate paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question.³⁸ Where there are other employees with substantially similar experience and qualifications in the specific employment in question--i.e., they have substantially the same duties and responsibilities as the H-1B nonimmigrant--the actual wage shall be the amount paid to these other employees. Where no such other employees exist at the place of employment, the actual wage shall be the wage paid to the H-1B nonimmigrant by the employer.³⁹

After establishing the actual wage, the employer must then establish the "prevailing wage" based upon the best information for the occupational classification in the area of intended employment at the time of filing the Labor Condition Application ("LCA").⁴⁰ If there is a collective bargaining agreement which was negotiated at arms-length between a union and the employer which contains a wage rate applicable to the occupation, that wage rate shall be the

³⁵ *Administrator v. Sirsai, Inc.*, ARB No. 2011-LCA-00001, Final Decision & Order (ARB July 27, 2012), published on AILA InfoNet at Doc. No. 12080855.

³⁶ 8 C.F.R. §214.2(h)(4)(i)(B)(1).

³⁷ 20 C.F.R. §655.731(a).

³⁸ 20 C.F.R. §655.731(a)(1).

³⁹ *Id.*

⁴⁰ 20 C.F.R. §655.731(a)(2).

prevailing wage.⁴¹ In the absence of an applicable collective bargaining agreement, an employer must use one the following sources shall be used to establish the prevailing wage:⁴²

- Office of Foreign Labor Certification, National Processing Center (NPC) determination,⁴³
- Wage determination issued pursuant to the provisions of the Davis-Bacon Act, 40 U.S.C. 276a et seq. (see 29 CFR part 1), or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq. (see 29 CFR part 4),⁴⁴
- Prevailing wage survey for the occupation within the area of intended employment published by an independent authoritative source,⁴⁵ or
- Another legitimate source of wage information.⁴⁶

Once the prevailing wage rate is established, the H-1B employer then shall compare this wage with the actual wage rate for the specific employment in question at the place of employment and must pay the H-1B nonimmigrant at least the higher of the two wages.⁴⁷

Given that Office of Foreign Labor Certification, National Processing Center prevailing wage determinations take roughly two to three months to obtain, many non-union H-1B employers utilize independent wage surveys or another legitimate source of wage information. The DOL provided its current policy guidance on prevailing wage determinations in November of 2009, which covers these authorized options.⁴⁸

Use of independent wage surveys are subject to a number of conditions.⁴⁹ Many larger employers may purchase or subscribe to wage surveys for utilization in establishing wage rates throughout an organization. Employers also have the option of utilizing the services of companies that provide independent wage survey data. So long as the wage survey utilized meets the DOL's regulations and accurately reflects the job duties performed by the H-1B employee, it may be advantageous to utilize this prevailing wage source option.

⁴¹ 20 C.F.R. §655.731(a)(2)(i) and Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, pg. 5, https://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf, posted on AILA InfoNet at Doc. No. AILA Doc. No. 10010468.

⁴² 20 C.F.R. §655.731(a)(2)(ii).

⁴³ 20 C.F.R. §655.731(a)(2)(ii)(A). Note: In all situations where the employer obtains the determination from the NPC, the Department will deem that determination as correct as to the amount of the wage.

⁴⁴ 20 C.F.R. §655.731(b)(3)(i).

⁴⁵ 20 C.F.R. §655.731(a)(2)(ii)(B) and 20 C.F.R. §655.731(b)(3)(iii)(B).

⁴⁶ 20 C.F.R. §655.731(a)(2)(ii)(C) and 20 C.F.R. §655.731(b)(3)(iii)(C). Note: The employer will be required to demonstrate the legitimacy of the wage in the event of an investigation.

⁴⁷ 20 C.F.R. §655.731(a)(3).

⁴⁸ U.S. Department of Labor, Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, pg. 5, https://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf.

⁴⁹ 20 C.F.R. §655.731(b)(3)(iii)(B).

Employers may also utilize the DOL's wage data, made publicly available online.⁵⁰ In doing so, one must follow the DOL's 2009 policy guidance.⁵¹ If the job offer is for an occupation not covered by a collective bargaining agreement and the employer does not choose to provide a survey or request use of a current wage determination in the area under the Davis-Bacon or McNamara-O'Hara Service Contract Acts, the wage component of the Bureau of Labor Statistics ("BLS"), Occupational Employment Statistics ("OES") Survey shall be used to determine the prevailing wage for an employer's job offer.⁵² The OES survey is a national survey managed by the Bureau of Labor Statistics which provides a large enough sample to allow BLS to determine a prevailing wage for most occupations in every area of intended employment in the United States.⁵³ The DOL determines prevailing wage amounts by selecting one of the four wage levels for an occupation based on a comparison of the employer's job requirements to the occupational requirements: tasks, knowledge, skills, and specific vocational preparation (education, training, and experience) generally required for acceptable performance in that occupation.⁵⁴

Congress established the four wage level system in 2004, at the same time it took the following actions with respect to the H-1B visa category: i) reinstated the U.S. worker training at the \$1,500/\$750 amounts, ii) imposed the \$500 anti-fraud fee, iii) increased the prevailing wage requirement from 95% to 100%, and iv) expanded the DOL's investigative authority.⁵⁵ The DOL was directed to provide four levels commensurate with experience, education, and the level of supervision.⁵⁶

On August 1, 2005, the DOL issued a *Frequently Asked Questions* ("FAQ") guidance document as part of the implementation of the H-1B Visa Reform Act of 2004.⁵⁷ The DOL FAQ document included three relevant questions associated with the use of Level I wages:

⁵⁰ Foreign Labor Certification Data Center, Online Data Center, <http://flcdatacenter.com/> (accessed on May 27, 2017).

⁵¹ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, pg. 3, "The step-by-step process described in Section II. B. represents the approach for determining the appropriate prevailing wage. All prevailing wage determinations shall start with an entry level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker only after considering the experience, education, and skill requirements of an employer's job description (opportunity)."

⁵² *Id.* at pg. 6.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *L-1 Visa and H-1B Visa Reform Act of 2004 (Omnibus Appropriations Act for FY 2005)*—[PL No. 108-447, div. J, title IV; 118 Stat. 2809, 3353-57 (Dec. 8, 2004)], SEC. 423. H-1B PREVAILING WAGE LEVEL. Section 212(p) of the Immigration and Nationality Act (8 U.S.C. 1182(p)) is amended by adding at the end the following: "(3) The prevailing wage required to be paid pursuant to subsections (a)(5)(A), (n)(1)(A)(i)(II), and (t)(1)(A)(i)(II) shall be 100 percent of the wage determined pursuant to those sections. "(4) Where the Secretary of Labor uses, or makes available to employers, a governmental survey to determine the prevailing wage, such survey shall provide at least 4 levels of wages commensurate with experience, education, and the level of supervision. Where an existing government survey has only 2 levels, 2 intermediate levels may be created by dividing by 3, the difference between the 2 levels offered, adding the quotient thus obtained to the first level and subtracting that quotient from the second level."

⁵⁶ *Id.*

⁵⁷ Employment and Training Administration, Prevailing Wage Determinations for Nonagricultural Programs, Frequently Asked Questions, Aug. 1, 2005, published on AILA InfoNet at Doc. No. 05081067.

V. Wage Determinations Using Occupational Employment Statistics (OES) Wage Data

1. **Question:** What is the difference between the four wage levels?

Answer: When the OES survey is used to determine the prevailing wage, the wage rate will be based on four wage levels corresponding with experience, education, and the level of supervision. The Prevailing Wage Determination Policy Guidance for Nonagricultural Immigration Programs provides the step-by-step procedure for selecting the appropriate wage level for prevailing wage purposes. However, the step-by-step procedure is not intended to be applied in an automated fashion. The wage level chosen should be consistent with the wage level definitions.

2. **Question:** Are certain O*NET-SOC occupations always considered to warrant a prevailing wage determination above a level I?

Answer: No. All O*NET-SOC occupations encompass all four wage levels. Determining the appropriate wage level depends on full consideration of the experience, education, and skills required by the employer as indicators of the complexity of the job duties, the level of judgment, the amount of supervision given, and the level of understanding required to perform the job. If the employer's requirements are such that the job opportunity is for an entry-level worker, the wage level would be a level I.

6. **Question:** Does the placement of the position in the employer's hierarchy determine the appropriate wage level?

Answer: The location of the job within the employer's internal organizational structure might be one factor in determining the appropriate wage level. Workers at a lower level are more likely to be working under closer supervision and performing work that is routine in nature. The experience, education, and amount of supervision described in the employer's requirements are the primary determinants. The step-by-step process provided in the guidance is not intended to be an automatic process. The wage level assigned to the prevailing wage request should be commensurate with the wage level definitions.

The DOL provides general descriptions of what it subjectively believes the wage levels represent; descriptions of Level I and Level II are included below:

Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for

training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Level II (qualified) wage rates are assigned to job offers for qualified employees who have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years of education and/or experience that are generally required as described in the O*NET Job Zones.

It is important to note that, aside from the listing of the descriptions of these levels, they are not explicitly referenced elsewhere in the 2009 policy guidance, nor are they specifically referenced in the DOL's step-by-step wage determination process in Appendix A: OES Prevailing Wage Guidance.⁵⁸

The DOL/NPWHC must exercise judgment when making prevailing wage determinations. The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity."⁵⁹ The DOL's principal direction is clearly stated: "The employer's requirements for experience, education, training, and special skills shall be compared to those generally required for an occupation as described in O*NET and shall be used as indicators that the job opportunity is for an experienced (Level II), qualified (Level III), or fully competent (Level IV) worker and warrants a prevailing wage determination at a higher wage level."⁶⁰ The factors of complexity of tasks, independent judgment required, and amount of close supervision received are, to a large degree, already accounted for within the detailed, five-page, step-by-step instructions associated with the Check Sheet. Therefore, it is reasonable that the DOL could make a judgment call to make a determination that is either above or below the Check Sheet calculation.

If an employer seeking to sponsor and entry-level computer programmer utilizes the DOL's determination process, it is possible to derive a Level I wage level for a Computer Programmer position⁶¹ requiring the following:

- No work experience;

⁵⁸ *Id.*

⁵⁹ *Id.*, Appendix A, pg. 5.

⁶⁰ *Id.*, Appendix A, pg. 1.

⁶¹ Note: The DOL provides the following sample position titles for the occupation of Computer Programmer: Analyst Programmer, Applications Developer, Computer Programmer, Computer Programmer Analyst, Internet Programmer, Java Developer, Programmer, Programmer Analyst, Software Developer, Web Programmer. <https://www.onetonline.org/link/summary/15-1131.00> (accessed May 27, 2017).

- Bachelor’s degree, or the equivalent, in Information Systems, Information Technology, Computer Science, Engineering, or a closely-related degree;⁶²
- Utilization of skills in an entry-level capacity that are included within the listing of 46 items in the O*Net, Details Report and developed during an IT-related degree program;⁶³ and
- No supervisory duties.

According to the DOL’s Check Sheet, all prevailing wage determinations start with a Level I determination.⁶⁴ The absence of an experience requirement in this hypothetical position does not add a “point” to the determination.

Directions for the educational requirement are:

Step 3 – Complete the Education Section of the Worksheet

Compare the education requirement generally required for an occupation to the education requirement in the employer’s job offer. Determine if the level required by the employer’s job offer is greater than what is generally required.

*Professional Occupations by O*NETSOC category and the related education and training category code are listed in Appendix A to the Preamble of the PERM regulations. The education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations. A listing of occupations designated as professional occupations and the related education and training category can be found in Appendix D of this document.*

For professional occupations:

*If the education required on the prevailing wage determination request form is equal to or less than the usual education contained in **Appendix D**, make no entry in the Wage Level Column.*

*If the education required on the prevailing wage determination request form is more than the usual education contained in **Appendix D** by one category, enter a 1 on the worksheet in the Wage Level Column.*

*If the education required is more than the usual education contained in **Appendix D** by more than one category, enter a 2 on the worksheet in the Wage Level Column.*

⁶² This educational requirement is in line with that discussed in *Matter of Caron International, Inc.*, I&N Dec. 791 (Comm. 1988), stating the following: “The clearest common denominator for professional standing is at least a baccalaureate degree awarded for academic study in a specific discipline or a narrow range of disciplines.”

⁶³ <https://www.onetonline.org/link/details/15-1131.00> (accessed May 27, 2017).

⁶⁴ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, Appendix A, pg. 1.

Example: If the occupation generally requires a Bachelor's degree and the employer's job offer requires a Master's degree, enter a 1; if the job offer requires a Ph.D., enter a 2.⁶⁵

In this instance, the DOL assigned the Computer Programmer occupation an Education & Training Category Code of 5, which is designated as: *Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of fulltime equivalent academic work.*⁶⁶ The hypothetical degree requirement does not add a “point” to the determination.

The relevant sections of the directions for the skill requirements are:

Step 4 – Complete the Special Skills and Other Requirements Section of the Worksheet

Review the job title, job description (duties), and special requirements on the prevailing wage determination request form to identify the tasks, work activities, knowledge, and skills required.

*Make note of machines, equipment, tools, or computer software used. Consider how the employer's requirements compare to the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples. Consider whether the employer's requirements indicate the need for skills beyond those of an entry-level worker.*

*In situations where the employer's requirements are not listed in the O*NET Tasks, Work Activities, Knowledge, and Job Zone Examples for the selected occupation, then the requirements should be evaluated to determine if they represent special skills. The requirement of a specific skill not listed in the O*NET does not necessitate that a point be added. If the specific skills required for the job are generally encompassed by the O*NET description for the position, no point should be added. However, if it is determined that the requirements are indicators of skills that are beyond those of an entry-level worker, consider whether a point should be entered on the worksheet in the Wage Level Column.*⁶⁷

In this instance, skill requirements are at an entry-level capacity, included within the listing of 46 items in the O*Net, Details Report, and developed during an IT-related degree program should not add a “point” to the determination.

⁶⁵ *Id.*, Appendix A, pgs. 2-3 (emphasis added).

⁶⁶ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, Appendix D: Professional Occupations Education and Training Categories, pgs. 1 and 5. Note: The referenced SOC Code, 15-1021 is no longer in use and the DOL directs the public to please use 15-1131.00 (Computer Programmers) instead, <https://www.onetonline.org/find/quick?s=15-1021> (accessed on May 27, 2017).

⁶⁷ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, Appendix D: Professional Occupations Education and Training Categories, pgs. 3-5.

Many medium-sized and larger software and technology companies recruit for entry-level positions with these types of requirements. After beginning employment, these employers typically provide familiarization with the organization's products and services, then have the employees perform entry-level job duties under the supervision of senior personnel. Over time, these employees increase their skills and abilities and advance to positions that involve less intensive supervision. Additionally, some organizations will utilize third-party organizations to provide IT workers to supplement internal teams by providing comparable entry-level job duties. Therefore, following the DOL's 2009 policy guidance, an employer can fairly determine that a Level I wage is applicable to an entry-level Computer Programmer position.

Issue Two, H-1B Adjudication Standards and Processes – The current USCIS, Adjudicators Field Manual provides adjudicators with the following guidance in deciding if proposed employment is a specialty occupation:

Although the definition of specialty occupation is included in the statute itself and the regulations are specific regarding the criteria for determining what qualifies as a specialty occupation, approval or denial often comes down to a judgment call by the adjudicating officer. There are numerous references available (such as the DOL's Occupational Outlook Handbook) to describe specific vocational preparation for various occupations. However, it is important to note that occupations are rapidly evolving and job titles themselves are often meaningless. In order to correctly adjudicate a case, it is necessary to consider all of the facts surrounding the petition: the beneficiary's education and work experience, the nature of the petitioner's business, industry practice, and salary (both offered to the beneficiary and typical for the industry). It is important not to be influenced by a single factor, such as the job title or salary, that other indicators are overlooked.⁶⁸

This guidance does not offer specific direction, as provided by the DOL in its 2009 policy guidance⁶⁹ for determining wage levels that directs the process of looking at the job duties of the position, selecting a SOC (Standard Occupational Classification),⁷⁰ assigning a wage level, and then deriving a wage determination.

One of the core questions relevant to entry-level computer programmers and other H-1B cases is how 8 C.F.R. §214.2(h)(4)(iii)(A) should be applied, which has been referred to as an

⁶⁸ USCIS, Adjudicator's Field Manual, Chapter 31.3(1), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> (accessed May 26, 2017).

⁶⁹ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, pg. 3, "The step-by-step process described in Section II. B. represents the approach for determining the appropriate prevailing wage. All prevailing wage determinations shall start with an entry level wage and progress to a wage that is commensurate with that of a qualified, experienced, or fully competent worker only after considering the experience, education, and skill requirements of an employer's job description (opportunity)."

⁷⁰ <https://www.bls.gov/soc/> (accessed May 31, 2017).

“amalgam of criteria” and “four overlapping bases.”⁷¹ Specifically, is the satisfaction of one of the four criteria of the regulation enough?

The Fifth Circuit Court of Appeals, without a resolution, discussed this regulation at length in *Defensor v. Meissner*, which involved a petitioner that hired nurses with Bachelor’s degrees for placement at third-party worksites in general nursing positions:

Section 214.2(h)(4)(iii)(A) appears to implement the statutory and regulatory definition of specialty occupation through a set of four different standards. However, this section might also be read as merely an additional requirement that a position must meet, in addition to the statutory and regulatory definition. The ambiguity stems from the regulation's use of the phrase "to qualify as." In common usage, this phrase suggests that whatever conditions follow are both necessary and sufficient conditions. Strictly speaking, however, the language logically entails only that whatever conditions follow are necessary conditions. In other words, if a regulation says "To qualify as a lawyer, one must have a law degree," then a law degree is a necessary but not necessarily sufficient condition for becoming a lawyer, as there may be other requirements. For example, the next regulation may say "To qualify as a lawyer, one must pass the bar exam."

If 214.2(h)(4)(iii)(A) is read to create a necessary and sufficient condition for being a specialty occupation, the regulation appears somewhat at odds with the statutory and regulatory definitions of "specialty occupation." For example, if an employer always required a bachelor's degree for a particular position (but for no good reason), then the position would qualify for a visa, but would probably not meet the statutory definition unless one assumes that any employer's requirements suffice to prove the U.S. minimum for the relevant occupation.

On the other hand, one might assume that 214.2(h)(4)(iii)(A) simply imposes a requirement that is related to the statutory and regulatory definitions, but which is not a complete substitute for them. Such a requirement would help confirm a finding that an occupation is a specialty occupation when the occupation's minimum requirements were not well defined in the United States. In such cases, requiring that the position meet one of the four 214.2(h)(4)(iii)(A) prongs would help ensure that the occupation was a specialty occupation. The problem with this interpretation is that a commonsense reading of 214.2(h)(4)(iii)(A) indicates an intention to fully implement the definition of "specialty occupation."⁷²

In 2012, the American Immigration Lawyers Association (“AILA”) provided a comprehensive review of ongoing issues related to “specialty occupation” determinations.⁷³ The

⁷¹ *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 141 and 145 (1st Cir. 2007).

⁷² *Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000) (emphasis added).

⁷³ AILA Memorandum, *Interpretation of the Terms “Specialty Occupation” and “Body of Highly Specialized Knowledge” in H-1B Adjudications*, April 4, 2012 – AILA Doc. 12040451 & 15041361 (AAO decision discussing AILA Memo and federal court cases re: H-1B).

AILA Memo argued that the USCIS and Administrative Appeals Office⁷⁴ (“AAO”) have applied a more restrictive interpretation of the term “specialty occupation” and “body of highly specialized knowledge.” As of 2012, the AILA Memo asserted that the USCIS and AAO changed the standard, as evidenced by the cited statement:

“... the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation ... [and] must therefore be read as providing supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.”⁷⁵

Attorneys and employers should be aware that the USCIS could employ some form of “two-step” analysis beyond the satisfaction of one of the criteria in 8 C.F.R. §214.2(h)(4)(iii)(A).

Generally, the USCIS, AAO, and federal courts attempt to analyze the facts of the case sequentially through the four criteria of 8 C.F.R. §214.2(h)(4)(iii)(A). However, the analysis of the first criteria, if a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, typically centers on a discussion of the *Occupational Outlook Handbook* section covering the occupation.⁷⁶ In its 2014 Nurse Occupation Memo, the USCIS stated that it “recognizes the OOH as one authoritative source on the duties and educational requirements on the wide variety of occupations that it addresses, the OOH is not always determinative,” and “[o]ther authoritative and/or persuasive sources provided by the petitioner will also be considered.”⁷⁷ However, one should also be aware that the USCIS and AAO may utilize the OOH in a manner that does not seem to be in line with the plain text of the regulation’s standard of “normally” and instead places quixotic emphasis on the DOL’s statements that utilize the terms “some” or “many.”⁷⁸

Application of the Specialty Occupation Criteria (8 C.F.R. §214.2(h)(4)(iii)(A)) to Entry-Level Computer Programmer Positions – An employer seeking to sponsor an entry-level Computer Programmer must satisfy one of the four criteria to demonstrate the position is a “specialty occupation.” In the context of our hypothetical entry-level Computer Programmer position, there are three criteria that arguably could support the finding of specialty occupation.

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

⁷⁴ For information about the AAO, see: <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/administrative-appeals-office-ao> (accessed on May 27, 2017).

⁷⁵ AILA Memorandum, *Interpretation of the Terms “Specialty Occupation” and “Body of Highly Specialized Knowledge” in H-1B Adjudications*, April 4, 2012, pgs. 5-6.

⁷⁶ The relevant statute and regulations refer to the terms: *specialty occupation*, *specialty occupation position*, and *position*. Recent AAO cases indicate that the USCIS looks to the employer’s SOC selection on the Labor Condition Application for purposes of analysis. Note: In cases in which the SOC lacks a direct OOH description (see: <https://www.bls.gov/oooh/about/data-for-occupations-not-covered-in-detail.htm>), the petitioner should identify a relevant OOH description and discuss the nexus between the position and the OOH description.

⁷⁷ USCIS Memorandum, “Adjudication of H-1B Petitions for Nursing Occupations” (July 11, 2014), posted on AILA InfoNet at Doc. No. 14072241.

⁷⁸ *Matter of S- Inc.* (AAO Jan. 6, 2017) and *Matter of V-I-S-, Inc.* (AAO Jan. 12, 2017).

- (2) The degree requirement is common to the industry in parallel positions among similar organizations; or
- (3) The employer normally requires a degree or its equivalent for the position.⁷⁹

Normal Requirement – As stated in the USCIS’s Adjudicator’s Field Manual, there are numerous references available (such as the DOL’s Occupational Outlook Handbook) to describe specific vocational preparation for various occupations.⁸⁰

Starting with the Occupational Outlook Handbook (“OOH”), the DOL has identified ten (10) occupational classifications for *Computer and Information Technology Occupations*, along with associated entry-level education requirement.⁸¹ The DOL forecasts that employment of computer and information technology occupations is projected to grow 12 percent from 2014 to 2024, and grow from about 3.9 million jobs to about 4.4 million jobs from 2014 to 2024, in part due to a greater emphasis on cloud computing, the collection and storage of big data, more everyday items becoming connected to the Internet in what is commonly referred to as the “Internet of things,” and the continued demand for mobile computing.⁸²

In its description of the Computer Programmer occupation, the DOL states the following regarding the normal requirements for the occupation:

How to Become a Computer Programmer

Most programmers have a degree in computer science or a related field.

Most computer programmers have a bachelor’s degree in computer science or a related subject; however, some employers hire workers with an associate’s degree. Most programmers specialize in a few programming languages.

Education

Most computer programmers have a bachelor’s degree; however, some employers hire workers who have an associate’s degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Most programmers learn a few computer languages while in school. However, a computer science degree gives students the skills needed to learn new computer

⁷⁹ 8 C.F.R. §214.2(h)(4)(iii)(A). The balance of the alternative criteria, that particular position is so complex or unique that it can be performed only by an individual with a degree, or the nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree, would likely not result in a Level I wage pursuant to the DOL’s 2009 policy guidance’s worksheet calculation.

⁸⁰ USCIS, Adjudicator’s Field Manual, Chapter 31.3(1), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>.

⁸¹ <https://www.bls.gov/ooh/computer-and-information-technology/home.htm> (accessed on May 27, 2017).

⁸² *Id.*

languages easily. During their classes, students receive hands-on experience writing code, testing programs, fixing errors, and doing many other tasks that they will perform on the job.

To keep up with changing technology, computer programmers may take continuing education and professional development seminars to learn new programming languages or about upgrades to programming languages they already know.⁸³

The statement that “most computer programmers have a bachelor’s degree” is evidenced by the DOL’s O*Net description for the occupation, which provides the following data:

Education - Percentage of Respondents, Education Level Required

Bachelor's degree – 78%

Post-secondary certificate – 11%

High school diploma or equivalent – 6%

The OOH Computer Programmer occupational description explicitly states that: *Most computer programmers have a bachelor’s degree in computer science or a related subject.* The OOH description also states that: *Most computer programmers have a bachelor’s degree; and Most programmers get a degree in computer science or a related subject.* At minimum, based upon the statistics in the DOL’s O*Net description, 78% of surveyed employers of Computer Programmers report a minimum requirement of at least a Bachelor’s degree. If “most” programmers get a degree in computer science or a related subject, then at least 39% of Computer Programmers have a Bachelor’s degree in computer science or a related subject, making it the most common and “normal” requirement. The DOL provides additional evidence that a Bachelor’s degree is the minimum requirement for the occupation on its website⁸⁴ and in its 2009 prevailing wage policy guidance.⁸⁵

Therefore, the DOL provides multiple sources of data that support a finding that, by at least a preponderance of the evidence, a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the Computer Programmer occupation.⁸⁶

⁸³ See: <https://www.bls.gov/ooh/computer-and-information-technology/print/computer-programmers.htm> (accessed on May 27, 2017) (emphasis added).

⁸⁴ <https://www.bls.gov/ooh/computer-and-information-technology/home.htm> (accessed on May 27, 2017). Note: The occupation Computer Programmers is associated with a minimum degree requirement of a Bachelor’s level.

⁸⁵ Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009, Appendix D: Professional Occupations Education and Training Categories, pgs. 3-5.

⁸⁶ Note re: requirement for *degree in a specific specialty* - The proposed regulations for IMMACT covering the revised H-1B category included a discussion of the “cross-over” of definitions and standards relating to a “specialty occupation.” (56 Fed. Reg. 31553, 31554 (July 11, 1991)). Specifically, the Immigration and Nationality Service (“INS”) stated: “The definition and standards for an alien in a specialty occupation mirror the Service’s current requirements for aliens who are members of the professions;” and “This proposed rule amends regulations at 8 CFR 214.2(h)(4)(iii) to change all references to “profession” to “specialty occupation” and to specify the same standards for qualifying as an alien in a specialty occupation that were indicated for an alien who is a member of the professions under existing regulations.” (*Id.*) This interpretation of the “cross-over” of definitions was discussed in

Common Degree Requirement – Employers may also show that the degree requirement is common to the industry in parallel positions among similar organizations. Neither the regulation nor the AFM specifies any further guidance on how an employer must document this criteria.

A recent AAO decision provided the following statement regarding this criteria:

In determining whether there is such a common degree requirement, factors often considered by USCIS include: whether the *Handbook* reports that the industry requires a degree; 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 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)).⁸⁷

On its face, the cited cases seem to provide a solid basis, but there are a few appreciable issues with the use of this authority.

Hird/Blaker Corp. v. Sava, involved an architectural woodworking manufacturing seeking to employ an individual in H-1B status for the position of Architectural Cost Estimator, arguing that the position required an engineering degree.⁸⁸ The employer’s arguments included one asserting that the degree requirement was an industry standard in parallel positions among similar firms and institutions.⁸⁹ The court found the INS’s standards wanting, by stating, “... these vague formulations offer a court little guidance for reviewing the INS’s decisions.”⁹⁰ Furthermore, the court refused to evaluate the issue, remanded the case, and directed the INS to articulate a test for assessing the industry standard.⁹¹ In the absence of an INS standard, the court conducted a survey of INS rulings in the area and identified particular considerations when in scrutinizes the industry standard and stated:

For example, the INS has considered an occupation a profession where the Occupational Outlook Handbook said the position required a degree, see, e.g., *Matter of Michael Hertz Assocs.*, Interim Decision 3046, at 4 (Comm.1988); *Matter of Panganiban*, 13 I & N Dec. 581, 582 (Dep.Assoc.Comm. 1970), where

post-IMMACT litigation. In *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1164 (D. Minn. 1999), the INS treated precedent developed under the “profession” standard as relevant to the post-IMMACT interpretation of the “specialty occupation.” The court found that this standard was not clearly erroneous nor inconsistent with the regulations. This is critical to the definition of the words: “degree in a specific specialty.” In discussing the meaning of a professional position, a pre-IMMACT decision, *Matter of Caron International, Inc.*, I&N Dec. 791 (Comm. 1988) stated the following: “The clearest common denominator for professional standing is at least a baccalaureate degree awarded for academic study in a specific discipline or a narrow range of disciplines.” Therefore, the USCIS should, at minimum, consider the narrow range of disciplines as being associated with the specific specialty.

⁸⁷ *Matter of S- Inc.* (AAO Jan. 6, 2017), at pg. 6.

⁸⁸ *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1097 (S.D.N.Y. 1989).

⁸⁹ *Id.* at pgs. 1101-1102. Note: This case is based upon the pre-IMMACT standard, but as detailed in footnote 28, the application of this case is consistent with the current regulations.

⁹⁰ *Id.* at pg. 1102.

⁹¹ *Id.*

the industry's professional association made a degree a minimum entry requirement, see, e.g., *Matter of Michael Hertz Assocs.*, Interim Decision 3046, at 4 (Comm.1980); *Matter of Villanueva*, 13 I & N Dec. 733, 735 (Dep.Assoc.Comm.1971); *Matter of Panganiban*, 13 I & N Dec. 581, 582 (Dep.Assoc.Comm.1970), or where letters or affidavits from firms or individuals in the industry said that firms routinely employ and recruit only degreed individuals. See *Matter of Michael Hertz Assocs.*, Interim Decisions 3046, at 4 (Comm.1988).⁹²

Shanti, Inc. v. Reno, involved an Indian restaurant seeking to employ an individual in H-1B status for the position of Restaurant Manager, arguing that the position required a Bachelor's degree in Business Administration.⁹³ The court in this case cited *Hird/Blaker Corp. v. Sava*, but did not accurately quote the case. As discussed above, the *Hird/Blaker Corp.* court criticized the INS and then conducted its own survey. The key portion of that decision did not start with the language, "Factors often considered," but instead began with, "For example, the INS has considered."⁹⁴ The full quotation in *Shanti, Inc.* is as follows:

Factors often considered by the INS when determining industry standard include: whether the *Occupational Outlook Handbook* reports that the industry requires a degree, whether the industry's professional association has made a degree a minimum entry requirement, and letters or affidavits from firms or individuals in the industry testifying that such firms "routinely employ and recruit only degreed individuals." *Hird/Blaker*, 712 F. Supp. at 1102 (citations omitted).⁹⁵

Two cases provide examples of what has not satisfied the criteria that the degree requirement is common to the industry in parallel positions among similar organizations:

- *Six vacancy announcements placed by other companies advertising positions entitled Computer Programmer, Computer Programmer I, Junior Programmer, Java Programmer (Entry Level), and Programmer Automated Systems*. Rejected for the following reasons: a) most required an experience requirement, b) some contained a requirement for a considerable amount of very specific programming experience, c) one advertisement did not state a bachelor's degree requirement in a specific specialty, d) the record did not establish the advertisements were placed by employers within the same or similar industry, and e) even if all of the advertisements met the regulation's requirement, the number of advertisements did not demonstrate what statistically valid inferences could be drawn from them.⁹⁶

⁹² *Id.* (emphasis added).

⁹³ *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1156 (D. Minn. 1999).

⁹⁴ Compare *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999) and *Hird/Blaker Corp. v. Sava*, 712 F. Supp. 1095, 1102 (S.D.N.Y. 1989).

⁹⁵ *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999).

⁹⁶ *Matter of S- Inc.* (AAO Jan. 6, 2017), at pg. 7.

- *Excerpts from the OOH and copies of two similar prior visa petitions approved by the INS.* Rejected because the OOH explicitly did not require a degree (listed as a preference by some employers) and the prior H-1B petitions were, in retrospect, approved in error.⁹⁷

Based upon the discussion in the recent case, *Matter of S- Inc.*, the AAO applied the cited case law rigidly and appears to have utilized standards that are neither explicitly stated nor arguably supported by the plain text of the regulation regarding “parallel positions” among “similar organizations.”⁹⁸ The word “parallel” is defined as “similar” or “analogous.”⁹⁹ The AAO’s position that a “Petitioner would be required to show that other wage Level I computer programmer positions, which are entry-level positions, require a minimum of a bachelor’s degree in a specific specialty or its equivalent” is not consistent with the definition of the word “parallel.”¹⁰⁰ Additionally, the USCIS has not issued any policy guidance that informs the public that a “statistically valid” number of advertisements for parallel positions are required to satisfy the regulation.¹⁰¹ In fact, neither the USCIS’s AFM nor the preponderance of evidence purport or support a requirement of statistical validity in making an adjudication.¹⁰²

Employers can attempt to prove that the degree requirement is common to the industry in parallel positions among similar organizations through the means stated in *Hird/Blaker*, or by any other means, to include job advertisements. However, employers should be aware that any job descriptions submitted for this criteria will be closely scrutinized and they should include substantive discussion of the relevant law and how the evidence meets the criteria.

Employer’s Normal Degree Requirement – Employers may also show that it normally requires a degree or its equivalent for the position. The recent AAO decision provides an outline of their current view:

The Petitioner asserted that it requires a bachelor’s degree in engineering or a related field for the proffered position. While a petitioner may believe or otherwise assert that a proffered position requires a degree in a specific specialty. Were USCIS limited solely to reviewing a petitioner’s self-imposed requirements, then any individual with a bachelor’s degree could be brought into the United States to perform the occupation as long as the employer artificially created a token degree requirement, whereby all individuals employed in a particular position possessed a baccalaureate or higher degree in the specific specialty or its equivalent. *See Defensor v. Meissner*, 201 F.3d at 387. In other words, if a petitioner’s degree requirement is only symbolic and the proffered position does not in fact require such a specialty degree or its equivalent to perform its duties, the occupation would not meet the statutory or regulatory definition of a specialty

⁹⁷ *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999).

⁹⁸ *Matter of S- Inc.* (AAO Jan. 6, 2017), at pg. 7.

⁹⁹ Merriam-Webster, Online Dictionary, <https://www.merriam-webster.com/dictionary/parallel> (accessed May 27, 2017).

¹⁰⁰ *Matter of S- Inc.* (AAO Jan. 6, 2017), at pg. 7.

¹⁰¹ *Id.*

¹⁰² *See*: USCIS, Adjudicator’s Field Manual, Chapter 31.3(1), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html> (accessed May 26, 2017), and the discussion above detailing the preponderance of evidence standard at pgs. 7-8.

occupation. *See* section 214(i)(1) of the Act; 8 C.F.R. §214.2(h)(4)(ii) (defining the term “specialty occupation.”)¹⁰³

The AAO determined that the petitioner’s evidence, documentation that two individuals hired as computer programmers had relevant degrees, was insufficient.¹⁰⁴ Additionally, the AAO found that the evidence did not demonstrate that these two individuals held Level I positions.¹⁰⁵ The AAO concluded that the educational requirement of their positions has not been shown to be directly related relevant to the educational requirement of the proffered position in that case.¹⁰⁶

In order for an employer to meet this criteria, the amount and type of evidence it presents with the petition is critical. The plain text of the regulation, 8 C.F.R. §214.2(h)(4)(iii)(A)(3) requires that the employer “normally” requires a degree or its equivalent, so some exceptions to the hiring requirement should be permissible. However, the text of the regulation also states the hiring standard must apply to “the position,” meaning that the USCIS could interpret this narrowly. In *Shanti, Inc.*, the court suggests that, in lieu of fulfilling the industry standard requirement, that the following INS-enumerated documentation may document the employer’s normal requirements: job advertisements, job descriptions, and other documentation to show that individuals with bachelor’s or higher degrees in the specialized area have been employed in the past.¹⁰⁷ The *Royal Siam Corp.* court stated that an employer should also provide a compelling connection to the responsibilities of the position support a finding of a specialty occupation under this criteria.¹⁰⁸

Larger employers that engage in recruiting activities, like on-campus recruiting, for entry-level computer programmer positions are likely able to document their satisfaction of this criteria. Smaller employers may find that satisfaction of this criteria may be more difficult, but not necessarily impossible if they are diligent and compile solid, supportive documentation.

Conclusion

So, does the law support approval of an H-1B petition for entry-level Computer Programmers? It depends. The USCIS, through its Computer Programmer Memo, has staked out a legally aggressive position, yet one that includes abbreviated analyses without offering significant clarification of the issues raised therein. Employers should be on notice that entry-level computer programmer positions, as well as other IT-related positions, may be challenged

¹⁰³ *Matter of S- Inc.* (AAO Jan. 6, 2017), at pg. 9. Note: the cited case, *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) involved a petitioner that hired nurses with Bachelor’s degrees for placement at third-party worksites in general nursing positions (current OOH requirement: “Generally, licensed graduates of any of the three types of education programs (bachelor’s, associate’s, or diploma) qualify for entry-level positions as a staff nurse. However, employers—particularly those in hospitals—may require a bachelor’s degree.” <https://www.bls.gov/ooh/healthcare/print/registered-nurses.htm> (accessed May 27, 2017). The court in *Defensor v. Meissner* concluded that it was not an abuse of discretion to interpret the statute and regulations to require the petitioner to adduce evidence that the third-party worksites actually employing the nurses to have degrees (at pg. 388).

¹⁰⁴ *Matter of S- Inc.* (AAO Jan. 6, 2017), at pg. 9.

¹⁰⁵ *Id.* at pgs. 9-10.

¹⁰⁶ *Id.* at pg. 10.

¹⁰⁷ *Shanti, Inc. v. Reno*, 36 F. Supp. 2d 1151, 1165 (D. Minn. 1999).

¹⁰⁸ *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007).

by the USCIS utilizing the arguments presented in the AAO decision, *Matter of S- Inc.* (AAO Jan. 6, 2017). Additionally, there is a high probability of site inspections associated with these types of petitions, so the employer, employee, and others interacting with the employee should be aware of the nature of the sponsored position. There is a broad range of legal authority that supports entry-level Computer Programmer cases. One should be familiar with it and employ it accordingly.

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