



Practice Pointer

H-1B Specialty Occupation RFE Toolbox

By AILA's USCIS HQ (Benefits Policy) Liaison Committee¹

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In the first quarter of FY2019, USCIS issued a Request for Evidence (RFE) in approximately 60% of H-1B petitions filed.² 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 2018.³ Indications are that this trend will continue for the foreseeable future. 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, case law, and government and non-government resources 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 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.

¹ Special thanks to AILA USCIS HQ (Benefits Policy) Liaison Committee members Dagmar Butte, Robin O’Donoghue, Bennett Savitz, and Suzanne Seltzer for their assistance in the preparation of this practice pointer.

² *H-1B Quarterly RFEs: FY2015-FY2019 Qi 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>.

³ *Understanding Requests for Evidence (RFEs): A Breakdown of Why RFEs Were Issued for H-1B Petitions in Fiscal Year 2018*, available at: <https://www.uscis.gov/tools/reports-studies/reports-and-studies>.

- *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 provide insight into how to build a winning argument when faced with an H-1B wage level challenge from USCIS.

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 AILA members in 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.⁴

Caselaw

- *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 to *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 all the relevant regulation, 8 C.F.R. 214.2(h)(2)(iii), required was simply to state that the training was unavailable outside of

⁴ *Disclaimer*, BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, <https://www.bls.gov/oooh/about/disclaimer.htm> (emphasis added).

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 a more detailed case summary provided as a Related Resource on the same AILA webpage as this practice pointer.

There are six relevant cases that cite to *Residential Finance*:

- *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 had 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*, noting 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*, noting 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 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.”

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, members can search for government positions with similar duties and requirements to positions subjected to 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/performancecmf>

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.

- DOL Labor Certification Registry - <https://lcr-pjr.doleta.gov/index.cfm?event=ehLCJRExternal.dspLCRLanding>

The Labor Certification Registry allows the public to search, analyze, and retrieve Labor Certification Application decisions. Data can be mined by location, employer, and job title, among others. Members can therefore search for specific job titles, SOC codes, and other information. Seeing what others have done with regard to LCAs for the same or similar positions could be helpful.

- 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

- ExploreHealthCareers - <https://explorehealthcareers.org>

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

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.”