



**Practice Pointer: Responding to H-1B Requests for Evidence (RFEs)
Raising Level 1 or Level 2 Wage Issues¹
(Updated 9/20/17)**

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I. Overview

In June 2017, AILA began receiving widespread reports of Requests for Evidence (RFEs) issued by U.S. Citizenship and Immigration Services (USCIS) for H-1B petitions raising questions regarding the use of a Level 1 wage. Specifically, the RFEs claim that: (1) a Level 1 wage is not appropriate given the complexity of the job duties; or (2) that the position is not a specialty occupation because the Level 1 wage indicates that the position is “entry-level.” More recently, AILA members report receiving RFEs where a Level 2 wage was designated on the Labor

¹ AILA extends a special thanks to the many AILA members who have contributed their time and expertise to this practice pointer, including Dagmar Butte, Robert Cohen, Lorna DeBono, Susan Im, Deborah Notkin, Turid Owren, Alan Perkins, Sarah Peterson, Linda Rose, Joseph J. Shepherd, Nicole Simon, Matthew Stump, David Wilks, Melissa Winkler, Stephen Yale-Loehr, and Lisa York, among others. AILA also thanks the American Immigration Council for its contributions and technical support to AILA members who are navigating this complex issue.

Condition Application (LCA). In these cases, USCIS questions whether the position is a specialty occupation, claiming that a Level 2 wage indicates that the employee will be performing only “moderately complex tasks that require limited judgment.”

II. Highlights and Trends from the H-1B Level 1 RFEs Submitted in Response to AILA’s Call for Examples

In response to these reports, AILA issued a [Call for Examples](#) to collect Level 1 and Level 2 RFEs, assess the scope of the trend, and identify patterns. To date, AILA has received more than 400 case examples. Although we are continuing to assess the scope of Level 2 and other trends, members of the AILA SCOPS Committee analyzed 187 RFE examples, and concluded that there are three main types of Level 1 RFEs:

- **Duties Beyond Level 1:** USCIS asserts that the duties indicate the position is beyond entry level, and therefore the petitioner has not established that the petition is supported by a certified LCA that corresponds to the position. The majority of these RFEs require the petitioner to demonstrate that the Level 1 wage is appropriate for the position. A few require the petitioner to demonstrate that the Level 1 wage is appropriate for the position or to submit a new LCA (if certified before filing). Approximately 65% of the RFEs reviewed fit this pattern. The VSC was more likely to issue this type of RFE than the CSC.
- **Level 1 is Not a Specialty Occupation:** USCIS asserts that the Level 1 wage indicates that the offered position is not a specialty occupation and therefore the petitioner must demonstrate that the position is a specialty occupation. Approximately 23% of the RFEs assessed fit this pattern. The CSC was more likely to issue this type of RFE than the VSC.
- **Duties Beyond Level 1 and Not Specialty Occupation:** This RFE is a hybrid of the first two. USCIS asserts that the duties are beyond entry level, that the Level 1 wage indicates the position is not a specialty occupation, and the petitioner must demonstrate that the Level 1 LCA is appropriate for the position. This RFE type accounted for 13% of the RFEs assessed.

Of the RFEs analyzed, the committee discerned several other patterns and observations:

- The RFEs were assessed predominantly for H-1B cap cases (83%).
- The RFEs were overwhelmingly issued by the VSC (77%) versus the CSC (21%). Only 2% of the RFEs were issued by the Nebraska Service Center (NSC).
- The RFEs are not limited to any particular O*Net code.
- Off-site, remote or third-party employment did not appear to be more likely to trigger a Level 1 RFE, although some RFEs noted that these employment situations indicated that the employer could not provide the high level of supervision required for a Level 1 position.

- Level 1 RFEs for Job Zone 4 occupations tend to challenge whether the position is a specialty occupation or whether a Level 1 LCA is appropriate, while RFEs for Job Zone 5 occupations tend to challenge whether a Level 1 LCA is appropriate.

For more information regarding the trends observed from the RFE case examples submitted to AILA, please see [Appendix A](#).

III. Background and Legal Framework

a. USCIS Computer Programmer Policy Memo

On March 31, 2017, USCIS issued a policy memorandum, “Rescission of the December 22, 2000 ‘Guidance memo on H-1B computer related positions’” (hereinafter “2017 Policy Memo”),² which superseded and rescinded a December 2000 memo issued to NSC employees.³ The 2000 memo directed NSC adjudicators to “generally consider the position of programmer to qualify as a specialty occupation” and acknowledged that other positions in the computer field, including programmer/analysts, software consultants, and computer consultants would also qualify for H-1B status. Reflecting a significant policy shift, the 2017 Policy Memo states that computer programmer positions should not generally be presumed to meet the requirements of an H-1B specialty occupation. The memo also directs adjudicators to consider the wage level on the LCA when evaluating whether the position qualifies as a specialty occupation. See [Appendix B](#) for a summary of the key policy pronouncements set forth in the 2017 Policy Memo.⁴

b. “Buy American and Hire American” Executive Order

On April 18, 2017, President Trump signed an Executive Order (EO), “Buy American and Hire American.”⁵ The stated purpose of the “Hire American” portion of the order is to create higher wages and employment rates for U.S. workers, and to protect their economic interests by rigorously enforcing and administering the laws governing entry into the United States of foreign workers. The EO highlights the H-1B program and directs federal agencies to suggest reforms to help ensure that H-1B visas are awarded to the most-skilled and highest-paid beneficiaries. USCIS has since reported that it is working on a combination of rulemaking, policy memoranda, and operational changes to implement the EO, with the stated objective of protecting the economic interests of U.S. workers and preventing fraud and abuse within the immigration

² USCIS Policy Memorandum, “Rescission of the December 22, 2000 ‘Guidance memo on H-1B computer related positions,’” PM-602-0142 (Mar. 31, 2017) [hereinafter “2017 Policy Memo”], published on www.AILA.org at [Doc. No. 17040300](#).

³ See Immigration and Naturalization Service, Nebraska Service Center, Memorandum for Center Adjudications Officers, “Guidance Memo on H-1B Computer Related Positions,” NSC 70/44.4 (Dec. 12, 2000), published on www.AILA.org at [Doc. No. 01040603](#).

⁴ AILA conducted a seminar on this topic, “The New USCIS Computer Programmer Memo and ‘Specialty Occupation,’” which can be purchased at <https://agora.aila.org/product/detail/3371?sel=description>.

⁵ Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 21, 2017), published on www.AILA.org at [Doc. No. 17041899](#); see also AILA’s Featured Issue page on the “Buy American and Hire American Executive Order,” available at <http://www.aila.org/advo-media/issues/immigration-2017-a-new-president-and-congress/executive-actions-on-h-1bs>.

system.⁶ Similarly, the Department of State (DOS) has made changes to its Foreign Affairs Manual (FAM), and the Department of Labor (DOL) and Department of Justice (DOJ) have stepped up monitoring and enforcement of H-1B employers.

c. Relevant Statutory Language

The Immigration and Nationality Act (INA) sets forth the definition of the H-1B nonimmigrant classification at section 101(a)(15). The definition of, and requirements for, a “specialty occupation” are set forth at INA §214(i). The LCA requirements and computation of the prevailing wage are governed by INA §212(n) and §212(p), respectively.

d. Relevant Regulations

Department of Homeland Security (DHS) regulations relating to the H-1B classification are found at 8 CFR §214.2(h). In particular, 8 CFR §214.2(h)(4) sets forth the definition of “specialty occupation,” the criteria for H-1B petitions, and petitioner requirements, among other things.

DOL regulations pertaining to the H-1B program are set forth at 20 CFR §655 Subparts H [**LCA requirements**] and I [**Enforcement of LCA**].

e. DOL Policy and Guidance

U.S. employers seeking to sponsor an H-1B worker must pay the higher of the actual wage paid to similarly employed workers, or the prevailing wage for the occupation.⁷ Employers must comply with these requirements to ensure that foreign workers are paid at a rate that is appropriate to the occupational requirements. For purposes of establishing the prevailing wage, Congress mandated that government wage surveys set forth at least four wage levels.⁸ This was an increase from the standard two levels that existed prior to 2005.⁹

The DOL Prevailing Wage Determination Policy Guidance (“Wage Guidance”) provides step-by-step procedures, worksheets, and resources to guide employers through the correct mathematical calculation to arrive at the appropriate wage level.¹⁰ Board of Alien Labor Certification Appeals (BALCA) case law confirms that this Wage Guidance is the exclusive and binding authority upon which DOL may base prevailing wage determinations, and that the

⁶ USCIS Update on Buy American, Hire American Executive Order, published on www.AILA.org at [Doc. No. 17080833](#) (July 28, 2017).

⁷ 20 CFR §655.731(a).

⁸ See INA §212(p)(4).

⁹ See Consolidated Appropriations Act of 2005, §423 (Pub. L. No. 108-447, Dec. 8, 2004). For background on the previous two level system and how DOL determined the wage level under that system, see Training and Employment Guidance Letter No. 5-02, “Clarification of Level I And Level II Skill Levels For The Purposes Of Prevailing Wage Determinations,” published on www.AILA.org at [Doc. No. 02081440](#).

¹⁰ See Employment and Training Administration, Prevailing Wage Determination Policy Guidance (rev. Nov. 2009) at 14-16, available at http://www.flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf, published on AILA InfoNet at [Doc. No. 10010468](#) [hereinafter Wage Guidance].

factors to be considered in making a determination are limited to experience, education, special skills, and supervisory duties, which are to be considered separately and independently.¹¹

IV. Strategies for Responding to RFEs and NOIDs

a. Responding to a USCIS Claim that a Level 1 Wage is Inappropriate Given the Complexity of the Job Duties

Citing the DOL Wage Guidance, USCIS states “Level 1 (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation,” and that these employees “perform routine tasks which require limited, if any, exercise of judgment.” Based on this, USCIS asserts that the Level 1 wage does not correspond with the complex duties described in the petition, or in other words, that the LCA does not correspond with the job offered. USCIS asks the petitioner to provide additional evidence that the petition is supported by a certified LCA that corresponds to the petition.

In crafting a response to this type of RFE, AILA members may wish to direct the adjudicator to the full context of the Wage Guidance, which explicitly provides that “[a]ll 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).”¹² In other words, the wage determination is primarily focused on the requirements (experience, education, and skills) for the position rather than the complexity of the duties.

AILA members should also consider walking the adjudicator through Steps 1 through 5 of Appendix A of the Wage Guidance, demonstrating through use of the “Appendix C: Worksheet for Use in Determining OES Wage Level” that the wage was appropriately classified at Level 1, and that the certified LCA corresponds to the position.¹³ For example, if the proffered position requires a bachelor’s degree, one year of experience, no special skills, and no supervisory duties, the Appendix C Worksheet should reveal a Level 1 for both O*Net Job Zone 4 and 5 occupations, irrespective of the complexity of the duties. Submitting the Appendix C Worksheet will help document this for the adjudicator.¹⁴

Another argument is that the “basic understanding” required for a Level 1 wage would be any education or experience necessary to enter the occupation. For most Job Zone 4 and all Job Zone 5 occupations, this would include a bachelor’s degree in a related field, or its equivalent. In other words, for many occupations, a “basic understanding” requires many years of study, or even experience, in a specific field. For example, an Actuary would need to have at least a basic

¹¹ *Matter of Reed Elsevier, Inc.*, 2008-PER-00201 (BALCA April 13, 2009), at 4.

¹² See Wage Guidance, *supra* note 10, at page 3. See also 8 CFR §656.40 (providing factors in determining a prevailing wage).

¹³ This analysis presupposes that the offered position falls within at least Job Zone 4 (SVP 7 to less than 8) as described on the O*NET Online Help page, available at <https://www.onetonline.org/help/online/zones>.

¹⁴ See *Quintanilla v. Myriad RBM Inc.* ARB No. 15-039, ALJ No. 2014-LCA-11 (ARB Apr. 30, 2015) (finding that the employer had properly completed the wage worksheet in the DOL Prevailing Wage Determination Policy Guidance, and thus, the Level 1 wage on the LCA was proper), available at https://www.oalj.dol.gov/PUBLIC/ARB/DECISIONS/ARB_DECISIONS/LCA/15_039.LCAP.PDF

understanding of how to perform complex actuarial pricing analysis and such knowledge would typically be gained from a bachelor's degree program in Actuarial Science (or a related field). The acquisition of "basic understanding" from an undergraduate degree program in a given field is what actually renders the offered position a specialty occupation, thereby meeting the statutory requirements for H-1B classification. Therefore, a Level 1 wage would be appropriate because the level of understanding required is that which is gained through a bachelor's degree program.

Petitions involving Job Zone 5 occupations should emphasize the extensive requirements for the position.¹⁵ According to O*NET, "[m]ost of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)."¹⁶ Moreover, "[e]xtensive skill, knowledge, and experience are needed for these occupations. Many require more than five years of experience. For example, surgeons must complete four years of college and an additional five to seven years of specialized medical training to be able to do their job."¹⁷ Because extensive education and experience is required for even entry-level positions in these occupations, explain that the position clearly qualifies as a specialty occupation and that a Level 1 wage is appropriate. For example, a Level 1 wage is appropriate for a dentist where the job requires a DDS or DMD, given that this is a Job Zone 5 occupational classification where at minimum a dental school degree is required.

Finally, note that under 8 CFR §214.2(h)(4)(i)(B)(2), USCIS is directed only to "determine if the [labor condition] application involves a specialty occupation as defined in [INA §214(i)(1)]" and to determine whether the alien qualifies to perform the services as described in the specialty occupation. Though USCIS may disregard the LCA when making this determination, its scope of review must nonetheless focus solely on a determination as to whether the occupation is a "specialty occupation." Nothing in 8 CFR §214.2(h)(4)(i)(B) authorizes USCIS to review the appropriateness of the wage level. Nor does the term "wage level" appear anywhere in 8 CFR §214.2(h). In addition, the "specialty occupation" criteria at 8 CFR §214.2(h)(4)(iii)(A) make no mention of a review of the LCA. As such, there is no regulatory basis for this request.

b. Responding to a USCIS Claim that the Position is Not a "Specialty Occupation" Because the Level 1 Wage Indicates it is an Entry-Level Position

The regulation at 8 CFR §214.2(h)(4)(ii) identifies several examples of specialty occupations, including, but not limited to "architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts." Each of these occupations requires a degree in a particular field of study, and every year, students graduate and enter these occupations at an entry level. Specialty occupations are of course not limited to these examples, and include any occupation in which a bachelor's degree (or its equivalent) in a specific field of study is required for entry into the occupation.

Nothing in the statute or regulations suggests that entry-level positions in these occupations change the character of the occupation itself. If the occupation is a specialty occupation because

¹⁵ A complete list of Job Zone 5 occupational classifications can be found on the O*NET Online webpage, available at <https://www.onetonline.org/find/zone?z=5&g=Go>.

¹⁶ See *supra* note 14.

¹⁷ *Id.*

the entry requirements are a baccalaureate education in a particular field, a person with that education, but no additional experience, would still be an entry level professional in the occupation. The DOL Wage Guidance provides that for a Job Zone 4 occupation, a Level 1 wage applies to a graduate with 0 to 2 years of experience. Assuming that most students graduate college at 21 years of age, enter into an occupation based upon their college education, and work until age 66, the average career would span approximately 45 years. Yet Congress mandated only four levels for prevailing wage determinations.

The suggestion that a position cannot be deemed a “specialty occupation” with a Level 1 wage is disingenuous. It assumes that specialty occupations must always require experience beyond the degree and that the attainment of the degree is insufficient to instill the knowledge necessary to perform the job duties. In several cases, the USCIS Administrative Appeals Office (AAO) has set forth the proposition that when an employer seeks to qualify a position as a specialty occupation under 8 CFR §214.2(h)(4)(iii)(A)(4), based upon the complexity or specialized nature of the job duties within the occupation, a Level 1 wage may suggest that it is not uniquely complex. However, some cases, such as *Matter of P-D-S-*, includes a footnote that states:

The issue here is that the Petitioner's designation of this position as a Level I position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions within the same occupation. **Nevertheless, it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation.** In certain occupations (doctors or lawyers, for example), such a position would still require a minimum of a bachelor's degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor's degree in a specific specialty or its equivalent. That is, a position's wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.¹⁸

See [Appendix C](#) for a sampling of cases that contain this footnote, or a variation of this footnote.

Neither the statute nor the regulations require experience to demonstrate that a position is a specialty occupation. The issue is whether a degree in a specific specialty or the identified body of knowledge is required. Had Congress intended H-1Bs to be available only to individuals with more than “X” years of experience, or had it intended to limit H-1Bs to positions with higher wage levels, it would have specifically provided for that in the INA. The wage level is only a means to determine the proper prevailing wage. It has nothing to do with a determination of whether the occupation is a specialty occupation.

¹⁸ *Matter of P-D-S-*, ID# 283927 (AAO July 31, 2017) at FN 10 (emphasis added); see also *Matter of A-I-Inc.*, ID# 16476 (AAO May 4, 2016), available at <https://www.uscis.gov/about-us/directorates-and-program-offices/administrative-appeals-office-ao/ao-non-precedent-decisions>.

c. Arguments that AILA Members Can Apply to Either Type of RFE

Some additional arguments AILA members can consider presenting when addressing both types of RFEs are provided below:

i. USCIS is Misapplying the Wage Level System

The four-tier wage system was intended to determine wage structures, not to serve as an indicator of specialty occupation. Accordingly, consider arguing that USCIS is misapplying the wage level system. By way of background, before the current four-tier system, the government would assign either a Level 1 or Level 2 wage to the occupation. For example, an engineering position might be assigned a prevailing wage of \$50,000 per year, without regard to the educational degree, years of experience, or complexity of the position. In 2005, a provision in the Consolidated Appropriations Act required the government to provide at least four levels of wages.¹⁹ In March 2005, DOL issued its Wage Guidance. This document was revised at least twice, and the latest version was issued in November 2009.²⁰

The four-tier system was created to conform to a government mandate that would allow for more accurate wage determinations by analyzing job requirements such as education and experience. These wage levels were never intended to, nor should they be construed to indicate whether the position is a specialty occupation. They simply provide an appropriate differentiation for the levels of any given occupation, whether it is a professional specialty occupation, a non-professional occupation, or an unskilled occupation. All occupations have a Level 1 wage, which is reserved for workers performing at the entry level. Medical doctors can garner a Level 1 wage, just as brick mason can. USCIS is misapplying the DOL wage level system when it uses the wage level to determine whether a position is a specialty occupation.

ii. Some Positions are Inherently Specialty Occupations Regardless of the Wage Level

Some occupational groupings are inherently specialty occupations. The INA identifies at least six occupations that are deemed “professional”: architects, engineers, lawyers, physicians, surgeons, and academic teachers.²¹ AILA members who receive RFEs for an engineer, medical doctor, lawyer, or other clearly professional position should argue that the position is inherently a specialty occupation regardless of the wage.

For example, all engineers in SOC 7-0000 (Architecture and Engineering Occupations) must possess at least a bachelor’s degree. There are no engineering occupations in that group that do not require a degree. Whether the engineer is working at the entry-level or at an advanced level, engineering is a specialty occupation as described in the regulations: a degree is normally required for the position and by the industry. AILA members can also argue the position is a specialty occupation based on the employer’s normal requirements and the complexity of the

¹⁹ See Consolidated Appropriations Act of 2005, §423 (Pub. L. No. 108-447, Dec. 8, 2004).

²⁰ See Wage Guidance, *supra* note 10.

²¹ INA §101(a)(32) (stating that the term “profession” shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries).

duties,²² but the very fact that a degree is required by the employer and the industry settles the fact that the occupation of “engineer” is a specialty occupation, regardless of the wage.

Moreover, 8 CFR §214.2(h)(4)(iii)(A)(1) notes that if a degree is required “for *entry* into the particular position,” then the first criterion is satisfied. Thus, an entry-level wage (Level 1) is not a factor that weighs against the specialty occupation determination; rather, it is, by USCIS’s own definition, *proof* that a position is a specialty occupation.

iii. The Wage Level Reflects the Worker’s Stature within the Employer’s Hierarchy, Not Whether the Position Falls Within the Regulatory Definition of Specialty Occupation

Employers use wage levels to create a necessary internal hierarchy. In other words, in any employment setting there are entry-level employees, mid-level employees, and senior-level employees. These divisions can fall within *all* occupations, including executives, engineers, administrative staff, and laborers. All occupations have different levels of workers – some entry-level, and some with more skills, knowledge, and seniority. The wage level does not reflect whether the position is a specialty occupation or professional occupation or non-professional occupation. It is simply a distinction reflecting knowledge, skills, and seniority within the company hierarchy.

iv. It is Outside the Scope of USCIS’s Adjudicatory Function to Make Wage Determinations

DOL determines wages, not USCIS. In the H-1B context, USCIS is charged only with determining whether the position is a “specialty occupation” and whether the beneficiary is qualified to carry out the duties of the position. As confirmed in the DOL regulations, “DHS determines whether the petition is supported by an LCA which corresponds with the petition, [and] whether the occupation named in the Labor certification application is a specialty occupation...”²³

As such, in the H-1B context, DOL has jurisdiction over the mathematical calculation employers use to accurately determine the wage rate for the H-1B petition. USCIS determines whether a certified LCA “corresponds” with the occupational classification and location listed on the LCA. As stated in *Matter of S- Inc.*, “a position’s wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.”²⁴ Attorneys must therefore comply with two separate sets of laws, created for two different purposes. When addressing USCIS questions about the effect of a wage classification on the approvability of an H-1B petition, AILA members should argue that USCIS is overstepping by suggesting that a mere mathematical calculation for wage leveling purposes is de facto evidence that a position is not a “specialty occupation,” and should ensure that the USCIS adjudicator is aware of DOL rules regarding the prevailing wage determination process.

²² See 8 CFR §214.2(h)(4)(iii)(A).

²³ 20 CFR §705(b).

²⁴ *Matter of S- Inc.*, ID# 32072 (AAO Jan. 6, 2017) at footnote 10, published on AILA InfoNet at [Doc. No. 17080932](#).

Members should be sure to include in their response a wage level analysis, excerpts of the 2009 Guidance, and the H-1B and PERM regulations addressing prevailing wages levels as evidence that the wage determination is a DOL function and not a USCIS function.

For additional support for the argument that USCIS is acting beyond the scope of its authority in examining the wage level, see discussion at [Appendix B](#).

v. Standard of Proof

The petitioner has the standard of proving eligibility by a “preponderance of the evidence,” meaning “the [petitioner] must prove it is more likely than not that each of the required elements has been met.”²⁵ In other words, the petitioner is required to show only that each essential element is more than 50 percent likely to be true. Thus, even if the adjudicator has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the adjudicator to believe that the claim is “probably true” or “more likely than not true,” the applicant or petitioner has satisfied the standard of proof.²⁶

vi. Miscellaneous Authorities and Source Material

Additional legal authorities and sources to support the argument that these RFEs are improper include:

- **Legislative History of IMMACT90.** The legislative history of the Immigration Act of 1990 (IMMACT90), Pub. L No. 101-649, 104 Stat. 4978 (Nov. 29, 1990) includes an explanatory statement of the intent of the H-1B program which reads: “The bill recognizes that certain *entry-level* workers with highly specialized knowledge are needed in the United States”²⁷
- **USCIS Adjudicator’s Field Manual (AFM).** The AFM states that a number of factors determine whether a position is a specialty occupation, including salary, but that “it is important not to be so influenced by a single factor, such as the job title or salary, that other indicators are overlooked.”²⁸
- **USCIS Policy Memo PM-602-0085.** States, “an RFE is not to be issued when the evidence already submitted establishes eligibility ... in all respects for the particular benefit or service. An unnecessary RFE can delay case completion and result in additional unnecessary costs to both the government and the [petitioner]”²⁹

²⁵ USCIS Policy Memorandum, “Requests for Evidence and Notices of Intent to Deny,” PM-602-0085, at 2 (June 3, 2013), published on www.AILA.org at [Doc. No. 13061247](#).

²⁶ See *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010); see also USCIS Adjudicator’s Field Manual (AFM) Chapter 11.1(c), available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>.

²⁷ House Report (Judiciary Committee), No. 101-723(I) at 67 (Sept. 19, 1990), reprinted in 1990 U.S.C.A.N. 6710, 6747. USCIS has previously accorded deference to legislative history in adjudicating employment-based immigration petitions. See, e.g., *Matter of [name not provided]*, WAC 07 277 53214, at 15-24 (AAO, July 22, 2008), published on www.AILA.org at [Doc. No. 08081964](#).

²⁸ AFM Chapter 31.3(1), available at <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1.html>

²⁹ See *supra* note 26; see also AFM Update AD12-04 (revising Chapter 10.5(a) of the AFM); 8 CFR §103.2(b)(8).

- **June 8, 1995 INS Policy Memo on Ability to Pay Prevailing Wage in H-1B Cases.** States that officers involved in the adjudication of H-1B petitions should not question the information provided on the LCA or question the ability of the petitioner to pay the prevailing wage.³⁰
- **April 12, 1994 INS Legal Opinion on Debarment Procedure.** Confirms that all investigatory and adjudicatory authority under INA §212(n) is assigned to DOL, and states that consequently, INS has no authority to review or challenge a DOL finding that an employer be debarred for one year.³¹
- ***Quintanilla v. Myriad RBM (2/10/95)*.** In a complaint involving back wages and return transportation costs, the ALJ held that the employer satisfied all requirements for a bona fide termination and that the H-1B employee was properly categorized as a Level 1 Research Associate.³²
- **November 13, 1995 INA Memo on Supporting Documentation for H-1B Petitions.** States “Wage determinations and enforcement of their payment with respect to the H-1B classification are the sole responsibility of the Department of Labor (DOL).³³
- **DOL Notice of Intent to Issue Declaratory Order (12/17/14).** DOL notice of its intent to issue a declaratory order confirming that it has exclusive authority to make legal and policy determinations based on its authority to administer and enforce the H-2B program, including prevailing wage determinations.³⁴
- **USCIS VSC H-1B Standard Operating Procedures (1/13/14).** VSC Standard Operating Procedures (SOP) for processing I-129 H-1B petitions released by USCIS in response to a FOIA request. Special thanks to David Gluckman.³⁵
- **DOL ETA/OFLC Prevailing Wage Standard Operating Procedures.** DOL Standard Operating Procedures (SOP) on prevailing wage requests, obtained in response to a FOIA request. Special thanks to Jonathan Moore.³⁶

³⁰ INS Memorandum, “Ability to Pay the Prevailing Wage in H-1B Cases,” HQ 214h-C (June 8, 1995), published on www.AILA.org at Doc. No. [17090860](#).

³¹ INS Legal Opinion, “INS Procedure for Processing Debarment of Employer,” (Apr. 12, 1994), published on www.AILA.org at Doc. No. [17090861](#).

³² *Quintanilla v. Myriad RBM*, 2014-LCA-11 (ALJ 2/10/95), published on www.AILA.org at Doc. No. [17090830](#).

³³ INS Memorandum from Louis Crocetti Jr., Associate Commissioner, INS Office of Examinations, (11/13/95), published on www.AILA.org at Doc. No. [95111390](#).

³⁴ DOL Notice of Intent to Issue Declaratory Order, 79 Fed. Reg 75179 (12/17/14), published on www.AILA.org at Doc. No. [14121606](#).

³⁵ Vermont Service Center Standard Operating Procedures, H-1Bs (1/13/14), published on www.AILA.org at Doc. No. [15120706](#).

³⁶ DOL ETA/OFLC Prevailing Wage Standard Operating Procedures, published on www.AILA.org at Doc. No. [16062004](#).

d. Suggested Research and Documentation for Case-Specific Issues

AILA members may consider conducting the following research and/or providing the following types of documentation, depending on the case-specific issues raised in the RFE.

i. Establishing that the Degree Requirement is Normally the Minimum Requirement for Entry into the Particular Position

- Review the Occupational Outlook Handbook (OOH) code listed on the LCA submitted and identify the appropriate sub-occupation, if applicable, to determine educational requirements. Considerations include Job Zone and the O*Net Online summary report, which may provide additional information about the position from an industry-specific perspective, percentage of respondents with positions in the same classification requiring a bachelor's degree, etc.
- Consider obtaining letters in support of the degree requirement from:
 - **Petitioner:** Focus on the position duty requirements, including analyses required to perform the job duties, such as strategies, measuring effectiveness, and industry specific requirements as may be applicable.
 - **Professor in the Academic Field:** Focus on course work that contributes to the theoretical application of knowledge to prescribed job duties of the proffered position, including knowledge gained from particularly relevant classes.
 - **Comparable Company in the Industry:** Focus is same as noted above for petitioner letter.
- Provide examples of work product created by current and/or prior employees in similar positions, including, for example, reports, presentations, or designs.
 - **Caution:** Ensure that work product does not disclose proprietary information. Additionally, including work product with the RFE response could provide added support for USCIS to deny the petition (i.e. USCIS deems the work product not sufficiently sophisticated to require a specialty occupation).
- Provide an example of a typical day or week in the proffered position, including percentage breakdown of position duties.

See [Appendix D](#) for a sample response, [Appendix E](#) for a sample of a typical day or week in the proffered position, and [Appendix F](#) for a percentage breakdown of daily tasks.

ii. Establishing that the Degree Requirement is Common to the Industry

- Ask the petitioner for names of comparable companies in the industry. Check the companies' career pages for similar job postings with similar requirements.

- Search the Internet for comparable companies in the industry with a view to company size and job postings similar to the proffered position. (Note that it may be difficult to determine a comparable company’s level of revenue.)
- Obtain letters from industry-related professional associations confirming that a bachelor’s degree or higher in a specific specialty is a requirement for entry into the field.
- Obtain letters or affidavits from individuals (i.e. Human Resources) at comparable companies in the industry confirming degree requirements for same/similar positions. These letters or affidavits should meet the requirements set forth in the RFE, if applicable, and include, for example, a statement of the author’s qualifications as an expert, how the conclusions were reached, and the basis for the conclusions supported by copies or citations of any materials used.
- Practice Tips:
 - Review the degree requirements in job postings carefully to ensure they closely match the petitioner’s position requirements
 - Avoid postings that have numerous degree fields listed, particularly if they are not directly relevant.
 - Do not use postings that include language regarding degree “preferred” instead of an actual degree requirement.
 - Do not use postings that have a bachelor’s degree requirement but do not list any degree fields.

See [Appendix G](#) for sample language that can be used to establish that the degree requirement is common to the industry.

iii. Establishing that the Employer Normally Requires a Degree or Equivalent for the Position

Confer with the petitioner to determine what documentation is readily available to demonstrate that the employer normally requires a degree or its equivalent for the position. Ensure that the petitioner’s past postings for the proffered position have very similar requirements to those provided in the petition. If they are not the same, explain any discrepancies.

In addition, as evidence of Petitioner’s hiring practices, consider submitting the following documentation:

- Petitioner’s organizational chart showing its hierarchy and staffing levels.
- Copies of present and past job postings for the proffered position showing that petitioner requires its applicants to have a minimum of a bachelor’s degree or higher in a specific specialty or its equivalent.

- Copies of degrees/transcripts to verify the level of education of persons previously hired for the position.
 - **Note:** Providing copies of degrees/transcripts of the petitioner’s employees raises privacy issues and it is unlikely that companies have copies of their employees’ degrees and/or transcripts on file and may not wish to obtain them from employees.

See [Appendix H](#) for a sample response establishing that the petitioner normally requires a degree or its equivalent for the position.

iv. Establishing that the Nature of the Specific Duties is So Specialized and Complex that Knowledge Required to Perform the Duties is Usually Associated with Attainment of a Baccalaureate or Higher Degree

AILA members are cautioned about arguing the fourth evidentiary prong to prove a position is a specialty occupation. The risk of arguing that the level of complexity of the position requires a bachelor's degree is that USCIS (including the AAO) could find the position duties inconsistent with a Level 1 wage. Please see the discussion below under [V. Strategies for Avoiding RFEs and NOIDs in the Future, b. Strategy for Establishing a Specialty Occupation](#), in this Practice Pointer.

V. Strategies for Avoiding RFEs and Notices of Intent to Deny (NOIDs) in the Future

AILA members may wish to consider the following strategies to avoid RFEs and NOIDs in the future.

a. “Leveling Up”³⁷

In this new environment, AILA members should always give extra scrutiny to a job involving an entry-level wage, but this is especially true for H-1B extension of status petitions. “Leveling up” can be part of the equation if the employer indicates there is a planned wage review soon or if a wage review is possible. But see “[Other Considerations](#)” discussion, *infra*. See also, “[Alternative Wage Surveys](#),” *infra*.

b. Strategy for Establishing a Specialty Occupation

Based on a review of recent AAO H-1B decisions, it is apparent that many attorneys argue that the position qualifies as a specialty occupation based on all four criteria at 8 CFR §214.2(h)(4)(ii). However, it is important to remember that only *one* of the four prongs must be satisfied, and for entry-level positions, it may be counterproductive to argue for the level of complexity required in (4) or in the second prong of (2). Instead, providing strong evidence of (1) and (2) may be a better alternative.

c. Using Strong Third Party Evidence

³⁷ The term “leveling up” is utilized in this practice pointer to mean the act of selecting a higher wage level on the LCA than an attorney may normally select.

If the OOH does not provide solid evidence that all or most positions require a specific type of bachelor's degree, strong third party evidence from the industry, other employers, etc. may be helpful, as well as evidence of how many other employees an employer has that have the same or a similar degree (especially if it is 100%). Overall, it is important to provide a thoughtful analysis of which qualifying criteria under the regulations relate to an employer's petition and focus on those. Sometimes, less is better.

d. Alternative Wage Surveys

If the position is not covered by a collective bargaining agreement, an alternative wage survey can be used. A wage survey uses an alternate source of wage data to determine the prevailing wage. These surveys often provide greater flexibility in meeting any real-world wage issues.

The November 2009 DOL Wage Guidance sets forth the criteria for employer-provided surveys.³⁸ As stated above, if the job opportunity is in an occupation not covered by a collective bargaining agreement, DOL will also consider wage data that has been furnished by the employer (i.e., wage data contained in a published wage survey that has been provided by the employer, or wage data contained in a survey that has been conducted or funded by the employer). The employer can also elect to use a current wage determination in the area of intended employment under the Davis-Bacon or McNamara O'Hara Service Contract Acts. An employer survey can be submitted either initially or after DOL issues a prevailing wage determination. If the employer provides a wage survey after DOL makes a prevailing wage determination, the new wage data from the employer-provided survey shall be considered a new prevailing wage request.

In each case where the employer submits wage data or a survey for consideration, it will be incumbent upon the employer to provide DOL with enough information about the survey methodology (e.g., sample size and source, sample selection procedures, survey job descriptions) to allow DOL to make a determination with regard to the adequacy of the data provided and the validity of the statistical methodology used in conducting the survey.

See [Appendix I](#) for more information regarding the required criteria for employer-provided wage surveys.³⁹

e. Other Considerations

When representing clients in a single matter before two different government agencies, each with different missions and purposes, attorneys must consider the potential conflicts that may arise during the course of their representation; what may be beneficial to the client before one agency

³⁸ See Wage Guidance, *supra* note 10.

³⁹ See also AILA [Doc. No. 15121608](#), DOL Practice Pointer: LCA Wage Survey Naming Conventions for the Form ETA 9035, explaining how to complete Question G.11 on the LCA to avoid denials due to abbreviation in the survey title; AILA [Doc. No. 15080502](#), which refers to DOL FAQ on prevailing wages, including entering the standard default prevailing wage when OFLC Online Wage Library displays "N/A" for leveled wage, identifying prevailing wage surveys, entering untitled custom surveys on the LCA, and acceptable prevailing wage source surveys for Section G.

may not be beneficial before the other. As this issue has so aptly demonstrated, a prevailing wage deemed correct and sufficient by DOL for Wage and Hour Division (WHD) purposes may be used by USCIS as evidence that the position is not a specialty occupation. But if we flip this, and start crafting petitions with a wage level aimed at satisfying USCIS, will we then find ourselves confronted with questions from WHD? To ensure effective representation, attorneys must consider how the drafting of an application will be viewed by all government agencies involved.

As attorneys, we have an ethical duty to competently represent our clients.⁴⁰ According to the preamble to the ABA Modern Rules of Professional Conduct, “[a]s advisor, a lawyer provides a client with an informed understanding of the client’s legal rights and obligations and explains their practical implications.” Therefore, it is critical, when advising employers with regard to this new trend in H-1B adjudications, we carefully review the facts of each individual case with the employer, explain all of the possible options for satisfying both DOL and USCIS standards, and ensure that the employer’s consent is fully informed.⁴¹ And if we agree that the process for determining the proper wage level is a purely mathematical, non-discretionary exercise that falls exclusively within the jurisdiction of DOL, one point of view is that we must exercise appropriate caution when counseling an employer on the pros and cons of “leveling up.” Toward this end, we must also bear in mind our obligations to ensure that the LCA does not contain any materially misrepresented facts,⁴² and that the employer does not fail to accurately convey the wage rate and working conditions under which the H-1B nonimmigrant will be employed on the LCA.⁴³ An employer who is found to have engaged in prohibited conduct following an investigation may be subject to penalties.⁴⁴

On the other hand, WHD should have no objection if an employer genuinely pays a wage higher than Level 1. It is readily acknowledged that there are variances in wages in a free market system. For example, lawyers in large firms are paid significantly more than lawyers in small firms. Aside from years of experience, there are many variables that can result in wage variances – such as quality of research and writing skills, reputation of the university or college from which the applicant graduated, grade point average, etc. Moreover, under INA §212(n)(1)(A)(i), the employer is obligated to pay the higher of the actual wage or the prevailing wage. If the actual wage paid to a similarly situated worker is higher than the Level 1 prevailing wage, the prevailing wage is viewed as a “floor” and the employer must pay the higher actual wage. Therefore, assuming the employer intends to pay the higher salary, “leveling up” should not be viewed as a material misrepresentation by WHD.

As noted above, attorneys have an obligation to be competent and to communicate all possible options and outcomes to the client. If an employer is concerned that a Level 1 wage for a computer programmer will be denied in light of the April 1, 2017 guidance, and is willing to offer a Level 2 wage, the employer could opt to “level up” so that it can make a better argument that the position qualifies as a specialty occupation.

⁴⁰ ABA Model Rules of Professional Conduct 1.1.

⁴¹ ABA Model Rules of Professional Conduct 1.0(e): "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

⁴² 20 CFR §655.805(a)(1).

⁴³ 20 CFR §655.805(a)(6).

⁴⁴ 20 CFR §655.810(b)(3).

Beyond this, we must also consider the philosophical implications of this new trend and the impact of our collective response to USCIS. For example, though lawyers owe a duty to zealously represent their clients and an interest in obtaining an approved petition, we must also consider the potential impact on our clients in the future. For example, if collectively there is a large scale effort to “level up” in response to this new trend, a number of negative consequences could result, such as skewed wages and an immigration system that functionally no longer recognizes the legitimacy of an entry-level specialty occupation. Moreover, when the employer is ready to extend the H-1B petition, will USCIS expect the position to move from Level 2 to Level 3? Given that we are already seeing Level 2 RFEs, where does the slippery slope end? Will we, as attorneys, fight to put an end to this calculated, ill-informed policy or will we simply shift our approach to adjust to this “new normal?” In navigating this thorny issue, it is important to not lose sight of the long-term picture while we fight to meet the short-term needs of our clients.

**Appendix A:
Highlights and Trends from AILA’s H-1B Level 1 Call for Examples**

The following trends were observed among the Level 1 RFEs assessed by AILA’s SCOPS Liaison Committee:

- *RFE Type*
 - 65% of the RFEs assessed questioned the issue of “Duties beyond Level 1”
 - This type of RFE accounted for:
 - 21% of the total RFEs issued by the CSC
 - 76% of the total RFEs issued by the VSC
 - 23% of the RFEs assessed questioned the issue of “Level 1 not a specialty occupation”
 - This type of RFE accounted for:
 - 74% of the total RFEs issued by CSC
 - 9% of the total RFEs issued by VSC
 - 13% of the RFEs assessed questioned both types of issues outlined above (i.e. “Duties beyond Level 1” and “Level 1 not a specialty occupation”)
 - This type of RFE accounted for:
 - 5% of the total RFEs issued by CSC
 - 15% of the total RFEs issued by VSC
- *Case Type*
 - 83% of the RFEs assessed were H-1B cap cases
 - 11% of the RFEs assessed were H-1B amendment/extension of stay cases
 - 6% of the RFEs assessed were H-1B change of employer cases
- *Service Center*
 - 77% of the RFEs assessed were issued by VSC
 - 21% of the RFEs assessed were issued by CSC
 - 2% of the RFEs assessed were issued by NSC
- *Prevailing Wage Source*
 - All but one of the RFE examples assessed indicated OFLC Online Data Center as the prevailing wage source on the LCA
 - Only one RFE example assessed indicated a different wage source and it was a prevailing wage determination (PWD) issued by the DOL
- *O*Net Code*
 - The RFEs assessed were not limited to any particular O*Net code or occupation, however, “Software Developers, Applications” was the highest reported occupation and “Computer Systems Analysts” was the second highest reported occupation
- *Job Zone*
 - The RFEs assessed reported occupations in Job Zones 4, 5, and Not Available (NA)
 - Job Zone 4 comprised 75% of the total number of RFEs

- When the RFE involved a Job Zone 4 occupation, all three types of RFEs were issued and were fairly evenly distributed among the categories
- When the RFE involved a Job Zone 5 occupation, the RFEs were mostly the first RFE type (“Duties beyond Level 1”) and were much less likely to be the second RFE category (“Not specialty occupation”)
- *Education & Training Code (ETC)*
 - RFEs assessed reported RFEs for all ETC codes, but the largest proportion of RFEs assessed was comprised of ETC Code No Level Set (58%)
 - When ETC Code 4, 5 or No Level Set, all three types of RFEs were observed and relatively evenly distributed among the categories
 - When ETC Code 1, 2 or 3, RFEs were almost exclusively the first type of RFE, “Duties beyond Level 1”
- *Consulting company, multiple worksites, or off-site employment*
 - 79% of RFEs assessed reported no to all of the above
 - 15% of RFEs assessed reported yes to one of the above
 - 6% of RFEs did not answer this question
 - Some of the first category of RFEs (“Duties beyond Level 1”) specifically cited to off-site, third-party placement or remote employment as facts indicating the employer cannot provide the level of supervision required for a Level 1 position
- *Other issues on RFEs not related to Level 1 LCA*
 - 66% of RFEs assessed did not include any other issues on the RFE, *i.e.*, the sole issue was Level 1
 - The remaining 34% of RFEs assessed contained additional requests, which were spread across a multitude of other issues

Appendix B: Background & Legal Framework

I. USCIS Computer Programmer Policy Memo

The USCIS Computer Programmer Policy Memo issued on March 31, 2017⁴⁵ (hereinafter “2017 Policy Memo”), introduces the following contentions into the existing body of sub-regulatory USCIS policy guidance concerning H-1B adjudications:

- “[A]bsent additional evidence to the contrary, the [*Occupational Outlook Handbook* (“*OOH*”)] indicates that an individual with an associate’s degree may enter the occupation of computer programmer. As such . . . an entry-level computer programmer position would not generally qualify as a position in a specialty occupation”⁴⁶
- “Officers are reminded that ‘USCIS must determine whether the attestations and content of [an LCA] correspond to and support the H-1B visa petition’”⁴⁷
- **Note:** In *Simeio Solutions*, the AAO cited to DOL regulations at 20 CFR §655.705(b) to support its contention about USCIS’ responsibilities, as quoted above.⁴⁸ The regulations do not support this claim, as DOL states only that DHS’s responsibilities are to determine “whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation. . . and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification.”⁴⁹ The AAO in *Simeio Solutions* also includes a “*see also*” reference to one of its own DHS regulations, at 8 CFR §214.2(h)(4)(i)(B). However the DHS regulation does not support the AAO’s contention either. Rather, the regulation recognizes that USCIS has limited jurisdiction; that it “shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. [USCIS] shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.”⁵⁰ Therefore, USCIS’s contention in note 6 of the 2017 Policy Memo, which in turn relies on *Simeio Solutions*, represents an improper, unilaterally imposed, novel substantive or evidentiary requirement beyond those set forth in the applicable regulations.⁵¹

⁴⁵ USCIS Policy Memorandum “Rescission of the December 22, 2000 “Guidance memo on H1B computer related positions,” PM-602-0142 (March 31, 2017) [hereinafter 2017 Policy Memo], published on AILA InfoNet at [Doc. No. 17040300](#).

⁴⁶ *Id.* at 3.

⁴⁷ *Id.* at 3, n.6 (quoting *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 (AAO 2015)).

⁴⁸ *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 546 (AAO 2015).

⁴⁹ 20 CFR §655.705(b).

⁵⁰ 8 CFR §214.2(h)(4)(i)(B)(2).

⁵¹ See *Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (citing *Love Korean Church v. Chertoff*, 549 F.3d 749, 758 (9th Cir. 2008) (stating that “neither USCIS nor [the] AAO may unilaterally impose novel substantive or evidentiary requirements beyond those set forth [in 8 CFR]”)).

- “Accordingly, USCIS officers must also review the LCA to ensure the wage level designated by the petitioner corresponds to the proffered position.”⁵²
- “If a petitioner designates a position as a Level I, entry-level position, for example, such an assertion will likely contradict a claim that the proffered position is particularly complex, specialized, or unique compared to other positions within the same occupation.”⁵³
 - **Note:** AILA is aware of non-precedent AAO decisions as early as 2013 where the AAO affirmed denials of H-1B petitions at least in part on the contended basis that the petitioner’s designation of a Level I or Level II wage in the LCA undermined the credibility of the petitioner’s statements regarding the specialized, complex and/or unique nature of the position/duties;⁵⁴ and precluded approval since the H-1B petition was not accompanied by an LCA that was certified for a wage-level that corresponded to the levels of responsibility, judgment, and occupational knowledge that the petitioners claimed that the positions required.⁵⁵
- “In general, a petitioner must distinguish its proffered position from others within the same occupation through the proper wage level designation to indicate factors such as the complexity of the job duties, the level of judgment, the amount and level of supervision, and the level of understanding required to perform the job duties [citation omitted]. Through the wage level, the petitioner reflects the job requirements, experience, education, special skills/other requirements, and supervisory duties”⁵⁶
- “USCIS officers may not approve a petition based on inconclusive statements from the *Handbook* about the entry-level requirements for a given occupation. Rather, the petitioner bears the burden to submit probative evidence from objective and authoritative sources that the proffered position qualifies as an H-1B specialty occupation.”⁵⁷
- “[A] petitioner may not rely solely on the *Handbook* to meet its burden when seeking to sponsor a beneficiary for a computer programmer position. Instead, a petitioner must provide other evidence to establish that the particular position is one in a specialty

⁵² *Supra* note 1, at page 3, n.6.

⁵³ *Id.*

⁵⁴ *Matter of [name not provided]*, (AAO April 30, 2013); *Matter of [name not provided]*, (AAO May 3, 2013).

⁵⁵ *See Matter of [name not provided]*, (AAO April 30, 2013) (school system/lead teacher); *Matter of [name not provided]*, (AAO May 1, 2013) (distributor and manufacturer of welding and industrial supplies/business development manager (exports)); and *Matter of [name not provided]*, (AAO May 1, 2013) (Mongolian BBQ buffet restaurant/marketing analyst); *see also CareMax Inc. v. Eric Holder*, No. C-13-02412 CRB, (N.D. Cal. April 2014).

⁵⁶ *Supra* note 1, at page 3, Footnote 6 (citing Employment and Training Administration, Prevailing Wage Determination Policy Guidance (revised November 2009)).

⁵⁷ *Supra* note 1, at page 3, n.7.

occupation as defined by 8 CFR 214.2(h)(4)(ii) that also meets one of the criteria at 8 CFR 214.2(h)(4)(iii).”⁵⁸

II. Sampling of Relevant Law and Regulations

i. Relevant Statutory Language

The definition of the H-1B nonimmigrant classification is set forth at INA §101(a)(15):

INA §101(a)(15)(H)(i)(b) [an alien] subject to section 212(j)(2), who is coming temporarily to the United States to perform services ... in a specialty occupation described in section 214(i)(1) ... who meets the requirements for the occupation specified in section 214(i)(2) ... 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).

The definition of, and requirements for, a "specialty occupation" is set forth at INA §214(i):

INA §214(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--

INA §214(i)(1)(A) theoretical and practical application of a body of highly specialized knowledge, and

INA §214(i)(1)(B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

INA §214(i)(2) For purposes of section 101(a)(15)(H)(i)(b), the requirements of this paragraph, with respect to a specialty occupation, are--

INA §214(i)(2)(A) full state licensure to practice in the occupation, if such licensure is required to practice in the occupation,

INA §214(i)(2)(B) completion of the degree described in paragraph (1)(B) for the occupation, or

INA §214(i)(2)(C)

INA §214(i)(2)(C)(i) experience in the specialty equivalent to the completion of such degree, and

INA §214(i)(2)(C)(ii) recognition of expertise in the specialty through progressively responsible positions relating to the specialty.

The requirements for the LCA and computation of the prevailing wage level are set forth at INA §§212(n) and (p):

INA §212(n) Labor condition application.--

⁵⁸ *Supra* note 1, at pages 3 - 4 (citing to INA §214(i)(1) and also citing to *Royal Siam Corp. v. Chertoff*, 484 F.3d 139, 147 (1st Cir. 2007) (requiring “a general-purpose bachelor’s degree, such as a business administration degree... without more, will not justify the granting of a petition for an H-1B specialty occupation”).

INA §212(n)(1) No alien may be admitted or provided status as an H-1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

INA §212(n)(1)(A) The employer--

INA §212(n)(1)(A)(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H-1B nonimmigrant wages that are at least—

INA §212(n)(1)(A)(i)(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

INA §212(n)(1)(A)(i)(II) the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available as of the time of filing the application, and

INA §212(n)(1)(A)(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

...

INA §212(n)(1)(G)(ii) . . . The Secretary of Labor shall review such an application only for completeness and obvious inaccuracies. Unless the Secretary finds that the application is incomplete or obviously inaccurate, the Secretary shall provide the certification described in section 101(a)(15)(H)(i)(b) within 7 days of the date of the filing of the application. ...

INA §212(p) Computation of prevailing wage level.

[. . .]

INA §212(p)(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.

INA §212(p)(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.

ii. Sampling of Relevant Regulations

Department of Homeland Security regulations relating to the H-1B nonimmigrant classification are set forth at 8 CFR §214.2(h) and include the following:

8 CFR §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 a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.

8 CFR §214.2(h)(4)(iii) Criteria for H-1B petitions involving a specialty occupation.

8 CFR §214.2(h)(4)(iii)(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:

8 CFR §214.2(h)(4)(iii)(A)(1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

8 CFR §214.2(h)(4)(iii)(A)(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;

8 CFR §214.2(h)(4)(iii)(A)(3) The employer normally requires a degree or its equivalent for the position; or

8 CFR §214.2(h)(4)(iii)(A)(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 CFR §214.2(h)(4)(iii)(B) Petitioner requirements. The petitioner shall submit the following with an H-1B petition involving a specialty occupation:

8 CFR §214.2(h)(4)(iii)(B)(1) A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary,

8 CFR §214.2(h)(4)(iii)(B)(2) A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay,

8 CFR §214.2(h)(4)(iii)(B)(3) Evidence that the alien qualifies to perform services in the specialty occupation as described in paragraph (h)(4)(iii)(A) of this section

8 CFR §214.2(h)(4)(i)(B) General requirements for petitions involving a specialty occupation.

8 CFR §214.2(h)(4)(i)(B)(1) Before filing a petition for H-1B classification in a specialty occupation, the petitioner shall obtain a certification from the Department of Labor that it has filed a labor condition application in the occupational specialty in which the alien(s) will be employed.

8 CFR §214.2(h)(4)(i)(B)(2) Certification by the Department of Labor of a labor condition application in an occupational classification does not constitute a determination by that agency that the occupation in question is a specialty occupation. The director shall determine if the application involves a specialty occupation as defined in section 214(i)(1) of the Act. The director shall also determine whether the particular alien for whom H-1B classification is sought qualifies to perform services in the specialty occupation as prescribed in section 214(i)(2) of the Act.

The regulations pertaining to the Department of Labor and its role in the H-1B program are set forth in 20 CFR § 655, Subparts H and I and include the following:

20 CFR §655.700(b)(2) After obtaining DOL certification of an LCA, the employer may submit a nonimmigrant visa petition (DHS Form I-129), together with the certified LCA, to DHS, requesting H-1B classification for the foreign worker. The requirements concerning the submission of a petition to, and its processing by, DHS are set forth in DHS regulations. The DHS petition (Form I-129) may be obtained from an DHS district or area office.

20 CFR §655.705(b) ... For H-1B visas, the following agencies are involved: DHS accepts the employer's petition (DHS Form I-129) with the DOL-certified LCA attached. In doing so, the DHS determines whether the petition is supported by an LCA which corresponds with the petition, whether the occupation named in the labor condition application is a specialty occupation or whether the individual is a fashion model of distinguished merit and ability, and whether the qualifications of the nonimmigrant meet the statutory requirements for H-1B visa classification. ...

20 CFR §655.740(a) . . . DHS shall determine whether each occupational classification named in the certified labor condition application is a specialty occupation or is a fashion model of distinguished merit and ability.

Appendix C:
Sampling of AAO Cases Containing a Footnote Addressing the Question of Level 1 Wages

Matter Name (Westlaw)	Footnote Number	AAO Citation
Matter of A-I- Inc. Appeal of Vermont Service Center Decision [2016WL3035019 (DHS)]	7	Matter of A-I- Inc, ID# 16476 (AAO May 4, 2016)
Matter of NYS-M- Inc. Appeal of Vermont Service Center Decision [2017WL1471246 (DHS)]	9	Matter of NYS-M-, Inc., ID# 315962 (AAO Apr. 3, 2017)
Matter of N-, Inc. Appeal of California Service Center Decision [2016WL3361527 (DHS)]	10	Matter of N-, Inc., ID# 16819 (AAO May 31, 2016)
Matter of T-G-Inc. Appeal of California Service Center Decision [2016WL7191066 (DHS)]	5	Matter of T-G- Inc., ID# 10411 (AAO Nov. 9, 2016)
Matter of K-T-, Inc. Appeal of California Service Center Decision [2017WL2180998 (DHS)]	12	Matter of K-T-, Inc., ID# 287108 (AAO Apr. 27, 2017)
Matter of I-S-F-, Inc. Appeal of Vermont Service Center Decision [2015WL9426440 (DHS)]	5	Matter of I-S-F-, Inc., ID# 15014 (AAO Dec. 14, 2015)
Matter of M-H-S-, Inc. Appeal of Vermont Service Center Decision [2016WL4259103(DHS)]	7	Matter of M-H-S-, Inc., ID# 15973 (AAO July 19, 2016)
Matter of RJH- LLC Appeal of Vermont Service Center Decision [2017WL1133235 (DHS)]	11	Matter of RJH- LLC, ID# 242116 (AAO Mar. 1, 2017)
Matter of I-P-, LLC Appeal of Vermont Service Center Decision [2015WL5984359 (DHS)]	8	Matter of I-P-, LLC, ID# 13704 (AAO Sept. 17, 2015)
Matter of S-W-U- Appeal of California Service Center Decision [2015WL6957367 (DHS)]	4	Matter of S-W-U-, ID# 14213 (AAO Oct. 27, 2015)
Matter of T-Inc. Appeal of Vermont Service Center Decision [2016WL3361500 (DHS)]	15	Matter of T-. Inc., ID# 16718 (AAO June 1, 2016)
Matter of E-Corp. Appeal of Vermont Service Center Decision [2016WL8316426 (DHS)]	7	Matter of E- Corp, ID# 109185 (AAO Dec. 29, 2016)
Matter of N-, Inc. Appeal of California Service Center Decision [2016WL3361533 (DHS)]	8	Matter of N-, Inc., ID# 16767 (AAO May 31, 2016)
Matter of T-L-E-, Inc. Appeal of California Service Center Decision [2016WL8316270 (DHS)]	6	Matter of T-L-E-, Inc., ID# 252422 (AAO Dec. 20,2016)
Matter of M-G-, Inc. Appeal of Vermont Service Center Decision [2016WL4536668 (DHS)]	5	Matter of M-G-, Inc., ID# 17288 (AAO Aug. 8, 2016)
Matter of N-Inc. Appeal of California Service Center Decision [2016WL3361531 (DHS)]	9	Matter of N-, Inc., ID# 16792 (AAO May 31, 2016)
Matter of U-P-, Inc. Appeal of Vermont Service Center Decision [2016WL6277687 (DHS)]	8	Matter of U-P-, Inc., ID# 124801 (AAO Oct. 3, 2016)
Matter of G-H-P-, Inc. Appeal of California Service Center Decision [2016WL8316296 (DHS)]	8	Matter of G-H-P-, Inc., ID# 152392 (AAO Dec. 21, 2016)
Matter of A-, LLC Appeal of Vermont Service Center Decision [2016WL3039013 (DHS)]	7	Matter of A-, LLC, ID# 16406 (AAO May 11, 2016)
Matter of T-T- Co. Appeal of California Service Center Decision [2016WL3361540 (DHS)]	3	Matter of T-T- Co., ID# 17101 (AAO June 1, 2016)

**Appendix D:
Sample Response to Demonstrate that the Degree is Normally a Minimum Requirement
for Entry into a Particular Position**

The position offered to the Beneficiary falls within the occupational classification “_____.” The U.S. Department of Labor’s 2016-2017 Occupational Outlook Handbook (OOH) indicates that most of the occupations under this classification require a four-year Bachelor’s degree [**Include if applicable**]. In reviewing how to become a _____, the OOH indicates the following educational requirements:

“_____”

The O*Net Online summary report indicates that _____ positions are in Job Zone __, with an SVP range of ____, which corresponds to attainment of _____. Please see O*Net Online summary report, including the description of Job Zone __ at _____.

- Include quotes/references to letters obtained that support a Bachelor’s degree as a minimum requirement for entry into the particular position.
- Provide examples of work product that do not include proprietary information, if you choose to include work product.
- Provide example of typical day or week in proffered positions—see **Appendix E**.

**Appendix E:
Example of Typical Day or Week in the Proffered Position**

Example of a day as a _____ at [Petitioner's Name]

[Include with the response a copy of Beneficiary's transcripts highlighting courses referenced below.]

9:00 -10:00 am / [List task:_____.]

- This task corresponds to "***Position duty***" referenced in the Petitioner's response letter at _____.
- Further, Beneficiary's coursework in _____, _____, _____, _____ and _____ helped prepare Beneficiary for these duties because _____.

10:00 – 11:00 am / [List task:_____.]

- This task corresponds to "***Position duty***" referenced in the Petitioner's response letter at _____.
- Further, Beneficiary's coursework in _____, _____, _____, _____ and _____ helped prepare Beneficiary for these duties because _____.

11:00 am – 12:30 pm / [List task:_____.]

- This task corresponds to "***Position duty***" referenced in the Petitioner's response letter at _____.
- Further, Beneficiary's coursework in _____, _____, _____, _____ and _____ helped prepare Beneficiary for these duties because _____.

12:30 – 1:30 pm / Break

1:30 – 3:00 pm / [List task:_____.]

- This task corresponds to "***Position duty***" referenced in the Petitioner's response letter at _____.
- Further, Beneficiary's coursework in _____, _____, _____, _____ and _____ helped prepare Beneficiary for these duties because _____.

3:00 – 5:00 pm / [List task:_____.]

- This task corresponds to "***Position duty***" referenced in the Petitioner's response letter at _____.

- Further, Beneficiary's coursework in _____, _____, _____, _____ and _____ helped prepare Beneficiary for these duties because _____.

5:00 – 6:00 pm / [List task: _____.]

- This task corresponds to "***Position duty***" referenced in the Petitioner's response letter at _____.
- Further, Beneficiary's coursework in _____, _____, _____, _____ and _____ helped prepare Beneficiary for these duties because _____.

**Appendix F:
Tasks Percentage Breakdown**

Percentage of Time (should add up to 100%)	Description of the Tasks Performed
%	
%	
%	
%	
%	
%	

Appendix G:
Sample Response to Demonstrate that the Degree Requirement is Common to Industry

The requirement of at least a Bachelor's degree in _____, _____, _____ or a related field or the equivalent is common to positions like the Petitioner's _____ position, both within the _____ industry in which Petitioner operates, and within other, similar companies operating in the _____ industry. Examples of current job listings for _____ positions, and positions with substantively similar job duties, are enclosed with this response at _____.

Specifically:

- _____ position with _____ [company], which has _____ employees in _____ [geographic location]. Company is a _____ company that _____ [identify product/service provided], with annual revenues of \$_____. Its _____ position requires a "Bachelor's degree in _____.
- [Continue list of posted positions]

The enclosed examples of _____ and related positions are representative of companies with _____ (provide approximate number of employees) in the _____ industry, with annual revenues of an estimated \$_____. Each posted position evidences that a minimum of a Bachelor's degree in a _____-related field is common to the industry.

Additionally, Petitioner provides the following letters from industry-related professional associations and individuals in the industry that confirm the degree requirement for _____ positions.

Specifically:

- Please see letter from _____, a professional association in the _____ industry, indicating that a Bachelor's degree in _____ is a requirement for entry into the field.
- Please see letter from _____ [name and title] with the _____ [company], confirming _____ position in the _____ industry requires a minimum of a Bachelor's degree for entry into the position. Mr./Ms. _____ is qualified because _____, and based this opinion on _____, as supported by [_____] materials attached.

**Appendix H:
Sample Response to Demonstrate the Employer Normally Requires a Degree or Equivalent
for the Position**

Petitioner confirms that it normally requires a degree or its equivalent for the position in _____ [insert major field].

Petitioner has a past and current practice of hiring persons with a Bachelor’s degree in _____, _____, _____ or related field, or equivalent, to perform the duties of the proffered position. This practice is affirmed in Petitioner’s initial letter in support of its H-1B petition and in the Declaration of _____ (Petitioner representative), enclosed at _____, as well as in Petitioner’s job postings for the position (past and present), enclosed at _____.

Currently there are _____ [insert number] individuals employed by Petitioner in the same or very similar positions whose names and educational or equivalent experience qualifications are provided in the chart below:

Name of Employees	Job Title	Degree/Years of Related Experience

Petitioner’s past and current hiring practice for its _____ position has consistently required that the applicant have a minimum of a Bachelor’s degree in _____, _____, _____ or related field, or the equivalent experience. This hiring practice is further evidenced by the following documents [include as available, but note the caveat below]:

- Petitioner’s line-and-block organizational chart showing its hierarchy and staffing levels.
- Copies of Petitioner’s present and past job postings for the proffered position showing that Petitioner requires its applicants to have a minimum of a Bachelor’s degree or higher in a specific specialty or its equivalent.
- Copies of degrees/transcripts to verify the level of education of persons previously hired for the position.
 - **Note:** Providing copies of degrees/transcripts of Petitioner’s employees in the position may be considered an invasion of the employees’ privacy; moreover, it is possible that companies may not have copies of their employees’ degrees and/or transcripts on file and/or may not wish to obtain them from employees.

Appendix I: Criteria for Employer-Provided Surveys

As set forth in the Department of Labor's Employment and Training Administration's Prevailing Wage Determination Policy Guidance⁵⁹, employer-provided wage surveys must meet the following criteria:

1. The survey must be recent.

If the employer submits a published survey, that survey must:

- Have been published within 24 months of the date of submission of the prevailing wage request;
- Be the most current edition of the survey; and
- Be based on data collected within 24 months of the date of the publication of the survey.

If the employer submits a survey conducted by the employer, the survey must be based on data collected within 24 months of the date of submission of the prevailing wage request.

2. The wage data submitted by the employer must reflect the area of intended employment.

Area of intended employment means the area within normal commuting distance of the place (address) of intended employment.

- If the place of intended employment is within a Metropolitan Statistical Area (MSA) or Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within the normal commuting distance of the place of intended employment.
- All locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distances for prevailing wage purposes.
- The borders of PMSAs, MSAs, or CMSAs are not controlling in the identification of the normal commuting area; an employer location just outside of the PMSA, MSA, or CMSA boundary may still be considered within normal commuting distance.

The terminology CMSAs and PMSAs are being replaced by the Office of Management and Budget (OMB); However, ETA will continue to recognize the use of these area concepts as well as their replacements.

3. The job description applicable to wage data submitted by the employer must be adequate to determine that the data represents workers who are similarly employed. *Similarly employed* means jobs requiring substantially similar levels of skills.

⁵⁹ Employment and Training Administration, Prevailing Wage Determination Policy Guidance (revised November 2009) at pages 14-16, *available at* http://www.flcdatcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf, published on AILA InfoNet at Doc. No. 10010468.

4. The wage data must have been collected across industries that employ workers in the occupation.
5. The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment. If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.
6. In all cases where an employer provides the NPWHC with wage data for which it seeks acceptance, the employer must include the methodology used for the survey to show that it is reasonable and consistent with recognized statistical standards and principles in producing a prevailing wage (e.g., contains a representative sample), including its adherence to these standards for the acceptability of employer provided wage data. It is important to note that a prevailing wage determination based upon the acceptance of employer provided wage data for the specific job opportunity at issue does not supersede the OES wage rate for subsequent requests for prevailing wage data in that occupation.

Information from employers that consists merely of speculation, subjective impressions, or pleas that it cannot afford to pay the prevailing wage rate determined by the NPWHC will not be taken into consideration in making a wage determination. If the NPWHC does not find the employer provided wage survey acceptable, the NPWHC must notify the employer in writing and include the reasons the survey was not found to be acceptable. Upon receiving this determination, the employer may provide supplemental information, file a new request, or appeal the determination.

In issuing wage determinations, the NPWHC may be required to convert an hourly rate to a weekly, monthly, or annual rate, or to convert a weekly, monthly, or annual rate to an hourly rate. As a matter of policy, such conversions shall be based on 2,080 hours of work in a year.

Factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, do not bear in a significant way on the skills and knowledge levels required and, therefore, are not relevant to determining the prevailing wage for an occupation under the regulations at 20 CFR §655.10 and 20 CFR §656.40. As noted above, the relevant factors are the job, the geographic locality of the job, and the level of skill required to perform independently on the job.