CompeteAmerica

The Alliance for a Competitive Workforce

November 1, 2018

Kirstjen Nielsen
Secretary, U.S. Department of Homeland Security

George Fishman
Deputy General Counsel, U.S. Department of Homeland Security

L. Francis Cissna
Director, U.S. Citizenship and Immigration Services

Craig Symons
Chief Counsel, U.S. Citizenship and Immigration Services

Re: Legal issues regarding H-1B adjudications at U.S. Citizenship and Immigration Services

Dear Secretary Nielsen, Director Cissna, Deputy General Counsel Fishman, and Chief Counsel Symons,

We are writing to express our concerns about legal issues regarding the recent changes in adjudication standards for H-1B nonimmigrant visa petitions at U.S. Citizenship and Immigration Services under the Trump administration. The agency's current approach to H-1B adjudications cannot be anticipated by either the statutory or regulatory text, leaving employers with a disruptive lack of clarity about the agency's practices, procedures, and policies. This lack of certainty and consistency wreaks havoc among the nation's employers which are hiring high-skilled Americans and foreign-born professionals.

The Compete America coalition advocates for ensuring that the United States has the capacity to educate domestic sources of talent, and to obtain and retain the talent necessary for American employers to continue to innovate and create jobs in the United States. Our **coalition members** include higher education associations, industry associations, and employers. Coalition members collaborate to reflect the common interests of universities and colleges, research institutions, and corporations with regard to high-skilled employment-based immigration. For more than 20 years, Compete America has worked with successive administrations and Congress on issues critical to immigration compliance in the employment-based immigration system, as well as the global mobility of talent. We stand ready to meet with you to discuss any of the issues we are raising, and would welcome the opportunity to engage in a conversation with you about standards and consistency in H-1B adjudications.

Our coalition's members have reported dramatic increases in the issuance of Requests for Evidence (RFEs) and denials regarding H-1B petitions for the last 18 months, and more recently are experiencing a sharp increase in the issuance of Notices of Intent to Deny (NOIDs) and Notices of Intent to Revoke (NOIRs) concerning H-1B petitions. These reported shifts in agency action have been perplexing to our coalition's members, especially because the agency's changes in approach were unannounced and unexplained and are not previewed in the regulations governing a qualifying H-1B specialty occupation that have been in effect since 1991.

We have identified three legal issues concerning the agency's current approach to H-1B adjudications that best frame most of the obstacles experienced by our members. We have outlined these legal issues below.

LEGAL CONCERNS ABOUT H-1B ADJUDICATIONS UNDER THE TRUMP ADMINISTRATION

Congress has limited H-1B visa holders to, principally, those foreign professionals coming to the United States to provide services "in a specialty occupation." In the controlling statute, the Immigration and Nationality Act (INA), Congress delineated the definition of "specialty occupation" as an occupation that requires: (A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.[1]

In implementing these statutory requirements, legacy Immigration and Naturalization Service (hereafter "INS") promulgated regulations to which U.S. Citizenship and Immigration Services (hereafter "USCIS") is bound today. The regulations INS promulgated in 1991[2] at 8 CFR 214.2(h)(4)(ii)-(iii) to implement the statutory language have never been revised, and do not communicate the new interpretations adopted by the Trump administration.

The current rules essentially establish two principles about an offered job that control whether an employer can successfully petition for H-1B classification for that job to be filled by a foreign-born professional. First, the job offered must be in "an occupation which requires theoretical and practical application of ***a body*** of highly specialized knowledge."[3] Second, a four-year university degree or graduate or professional degree must be the "**usual, common, or typical**" requirement for the job.[4] Patterns in H-1B adjudications over the last 18 months suggest other standards are being applied.

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[1] INA Section 214(i)(1) – emphasis added
The term specialty occupation means an occupation that requires–
(A) theoretical and practical application of ***a body*** of highly specialized knowledge, and
(B) attainment of a bachelor's or higher degree in ***the specific*** specialty (or its equivalent) as a minimum for entry into the occupation in the United States.
Section 214(i)(1) of the Immigration and Nationality Act (INA) was added by the Immigration Act of 1990 (IMMACT90).

[2] Final rule at 8 CFR 214.2(h)(4)(ii)-(iii) published at 56 FR 61111, December 2, 1991 (see p. 61121). Proposed rule published at 56 FR 31553, July 11, 1991 (see p. 31559). The regulations defining specialty occupation have never been revised by either INS or USCIS.

[3] 8 CFR 214.2(h)(4)(ii) – emphasis added
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.

[4] 8 CFR 214.2(h)(4)(iii) – emphasis added
Criteria for H-1B petitions involving a specialty occupation.
(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:
(1) A baccalaureate or higher degree or its equivalent is ***normally*** the minimum requirement for entry into the particular position;
(2) The degree requirement is ***common*** to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
(3) The employer ***normally*** requires a degree or its equivalent for the position; or
(4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is ***usually*** associated with the attainment of a baccalaureate or higher degree.

❖ PATTERNS IN H-1B ADJUDICATIONS THAT REFLECT NEW AGENCY INTERPRETATIONS INSERTING SALARY REQUIREMENTS AS AN UNSTATED PREREQUISITE

USCIS has been denying H-1B petitions exclusively because an entry level wage is applicable for the specific position, even though the occupation itself is clearly a specialty occupation.

Nothing in the statute[5] or regulations[6] contemplates or suggests, much less states, that USCIS could ever take the position that it *per se* excludes or disfavors entry-level jobs in an occupation, or young professionals working in jobs in an occupation, as qualifying for H-1B specialty occupation approval.

Nevertheless, over the last 18 months USCIS has been issuing RFEs, denials, NOIDs, and NOIRs based on what must be an agency presumption of a disconnect between a comparatively entry-level job within an occupation and the employer's statements that a sophisticated body of knowledge is required for the job. The agency takes this position despite at least some non-precedent decisions by its Administrative Appeals Office saying otherwise.[7] These decisions have explained, correctly, that the law anticipates entry-level positions and associated wages as qualified for H-1B status: "There is no inherent inconsistency between an entry-level position and a specialty occupation. For some occupations, the "basic understanding" that warrants a Level I wage may require years of study, duly recognized upon the attainment of a bachelor's degree in a specific specialty. Most professionals start their careers in what are deemed entry-level positions. That doesn't preclude us from identifying a specialty occupation."[8]

❖ PATTERNS IN H-1B ADJUDICATIONS THAT REFLECT NEW AGENCY INTERPRETATIONS BEYOND THE STATUTE'S PREREQUISITES FOR A "SPECIFIC SPECIALTY" OF STUDY

Employers have reported repeated instances of USCIS denying an H-1B petition on the basis that the degree held by the sponsored foreign professional is not within a single field of acceptable study for an occupation.

Nothing in the statute allows for administrative discretion to restrict a qualifying specialty occupation to only those occupations where "***the*** specific ***specialty***" necessary for the job is only obtainable through completion of ***a single***, exclusive ***degree***. When the agency promulgated its regulations in 1991 implementing the statutory definition of "specialty occupation," the agency concluded that the statutory requirement for a degree in "***the*** specific specialty or its equivalent" related back to the immediately preceding statutory text requiring expertise in "***a body*** of highly specialized knowledge."[9] This conscious decision by the agency is reflected in the regulatory definition of specialty occupation.[10] In other words, the agency recognized in its final rule that "the" specific specialty for the qualifying degree in 214(i)(B) of the INA referred to the requirement in 214(i)(A) of the INA that a qualifying job must need the application of "a" body of highly specialized knowledge.

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[5] Supra Footnote 1.
[6] Supra Footnotes 3 and 4.
[7] See, e.g., Matter of B-C Inc. (decided January 25, 2018).
[8] Id.
[9] Supra Footnote 1.
[10] Supra Footnote 3.

There should be no presumption that alternative degree options as the minimum requirement for a job suggest, standing alone, that a specific body of knowledge is not required. Instead, the petitioning employer has the burden of proof to show what specific body of knowledge is required and how the alternative degree options each allow an individual to develop the required knowledge. It is common for many – if not most – arrays of professional job ***duties*** to be connected to ***a single body of required knowledge*** that can be attained through completion of alternative degrees.

This is especially the case in emerging fields of study. For example, top American universities offer degrees in bioinformatics under and through a number of different major fields of study. An individual might complete the courses to develop the "theoretical and practical application of ***a body*** of highly specialized knowledge" in bioinformatics by completing a bachelor's in Bioinformatics, Public Health, Biology, Genomics, or Computer Science. If an employer required, in the alternative, any one of these degrees for a bioinformatics job that should not detract in the least from whether the job requires a bachelor's or higher in the specific specialty of bioinformatics or its equivalent. Yet, current USCIS practices have led to regular RFEs, NOIDs, NOIRs, and denials in similar situations.

❖ PATTERNS IN H-1B ADJUDICATIONS THAT REFLECT NEW AGENCY INTERPRETATIONS BEYOND THE STATUTE'S PREREQUISITES FOR A "USUAL REQUIREMENT" OF A DEGREE

Employers are also reporting repeated instances of USCIS denying H-1B petitions for occupations that may have some limited instances of jobs where a bachelor's degree or higher is not required, even when those occupations normally do require that level of education for the majority of roles, as contemplated by the statute.

Nothing in the statute suggests Congress intended that the requirement of a "theoretical and practical application of a body of highly specialized knowledge" necessitate documentation that a bachelor's degree or higher is required in every single manifestation of an occupation. Indeed, when the agency promulgated its regulations in 1991 implementing the new statutory definition of "specialty occupation," the agency well-understood that its determination of whether the minimum requirements for entry into an occupation job was in a specialty occupation had nothing to do with whether one specific degree was required for all jobs in the occupation all the time across the economy for all employers. Instead, INS recognized that its identification of specialty occupations focused on job duties ***usually*** requiring a degree, a degree requirement being ***common***, a degree ***normally*** being a minimum requirement, or the sponsoring employer ***normally*** requiring a degree.[11]

In explaining the regulation still on the books today, the agency made clear both that the list codified in the regulations was not exhaustive and that the agency did anticipate that the identified fields were indeed expected to be specialty occupations.[12] The codified list confirms that INS regarded the Department of Labor's Occupational Outlook Handbook (or OOH) references to degrees as "typical" or "usual" requirements as ***sufficient*** to establish a qualifying specialty occupation except when the agency publicly announced policy guidance based on specific information about an occupation. For example, accounting and architecture are identified by regulation as a specialty occupation, in the definitions

[11] Supra Footnote 4.
[12] See 56 FR 61111, at 61112 (December 2, 1991): "[T]he list of fields of endeavor **are included in the regulation as examples**. That list is by no means exhaustive." (Emphasis added.) See supra Footnote 3.

section at 8 CFR 214.2(h)(4)(ii), but the Department of Labor's Occupational Outlook Handbook reports that accounting jobs "usually" but not "always" require a degree and that earning a bachelor's is "typically" the first step in becoming an architect. The agency has never published a policy memorandum suggesting that the accounting or architecture occupations have changed such that they should not be qualifying specialty occupations. The practical result is that the agency's regulations list certain occupations as qualifying as specialty occupation, even though a university degree is not always (100% of the time) required. Thus, for over 25 years INS and USCIS have consistently approved H-1B petitions when the particular job duties identified by the sponsoring H-1B employer are in an occupation the OOH says normally, typically, or usually requires a degree. Yet, of late, USCIS has regularly been issuing RFEs, NOIDs, NOIRs, and denials for H-1B petitions in occupations the OOH says commonly require a degree.

CONCLUSION

We have observed three changes in H-1B adjudication practices under the current administration that seem to permeate most of the increased H-1B adjudication inconsistencies experienced by employers. The agency appears to be acting outside of its own regulations and the controlling statute by requiring petitioners to comply with the agency's current view that:

- a comparatively entry-level job, and corresponding wage level, cannot be in a specialty occupation,
- the specific field of study requirement for a specialty occupation means the job must necessitate completion of a *single* major or qualifying degree, and
- the requirement for an occupation to *usually* carry a degree prerequisite means a degree must *always* be needed.

The agency has the option to evaluate, consistent with the statute, the viability of a new regulatory definition of specialty occupation and we are aware that the Trump administration's Unified Agenda states the intent to engage in a formal rulemaking on this subject. We certainly welcome the opportunity to share our thoughts in any public notice and comment rulemaking in this important area. In the meantime, it remains unclear that the above-listed, three H-1B adjudication practices are appropriate under the statute or regulations. At a minimum, the revisions to *employer* practices and procedures that are necessary to accommodate the new USCIS approach to H-1B adjudications require the agency to provide significantly more detail about its change in interpretation and policies.

The Compete America coalition asks that both DHS and USCIS legal officers review the agency's current H-1B adjudications and practices, and provide any clarification needed either internally or with the regulated community prior to the agency's receipt of FY2020 H-1B cases. Thank you for your attention to this matter.

Respectfully submitted,

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