Interpretation of the Terms “Specialty Occupation” and “Body of Highly Specialized Knowledge” in H-1B Adjudications

April 4, 2012
MEMORANDUM

TO: Alejandro N. Mayorkas, Director
United States Citizenship & Immigration Services

FROM: American Immigration Lawyers Association

DATE: April 4, 2012

RE: Interpretation of the Terms “Specialty Occupation” and “Body of Highly Specialized Knowledge” in H-1B Adjudications

Dear Director Mayorkas:

The American Immigration Lawyers Association (AILA) appreciates the ongoing outreach to stakeholders conducted by USCIS. AILA is deeply concerned about the adjudication of petitions under INA § 101(a)(15)(H)(1)(b). AILA urges USCIS to review H-1B adjudications interpreting and defining the terms “specialty occupation” and “body of highly specialized knowledge.”

INTRODUCTION

Restrictive interpretations of the terms “specialty occupation” and “body of highly specialized knowledge” have evolved through non-binding AAO administrative decisions, applied in turn by the Service Centers. The restriction has been accomplished by reinterpreting the relationship between the regulation at 8 C.F.R. § 214.2(h)(4) and the regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A); by erroneously interpreting the terms “body of highly specialized knowledge” and “degree in the specific specialty” as they appear in INA § 214(i)(1); by failing to afford proper weight to evidence from the Department of Labor’s Occupational Outlook Handbook and other Labor Department resources routinely consulted by the AAO in determining whether a position qualifies as a “specialty occupation;” and, by failing to apply the preponderance of the evidence in evaluating evidence from DOL resources.
We offer the following Memorandum outlining our concerns and request that steps be promptly taken to bring AAO and service center adjudications in line with the statute and regulations.

I. Statute and Regulations

The Immigration Act of 1990 (IMM ACT 90)\(^1\) revised Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA), substituting the previous provision permitting the admission of nonimmigrant aliens “of distinguished merit and ability” with a nonimmigrant category permitting the admission of aliens seeking to enter the United States to perform services in a “specialty occupation.”\(^2\) Section 205(c)(2) of IMM ACT 90 introduced the current definition of the term “specialty occupation” in Section 214(i) into the INA:

(1) For purposes of section 101(a)(15)(H)(i)(b) and paragraph (2), the term “specialty occupation” means an occupation that requires--

(A) theoretical and practical application of a body of highly specialized knowledge, and

(B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Regulations at 8 C.F.R. § 214.2(h)(4)(ii) define “specialty occupation” as follows:

*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.

A petitioner is required to demonstrate that the position for which an alien’s services are sought is a “specialty occupation.” Regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A) provide four ways to do so:

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

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\(^2\) IMM ACT 90, Section 205(c).
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 is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

USCIS has previously appropriately interpreted the term “degree” in 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position.3

II. Relationship Between 8 C.F.R. § 214.2(h)(4)(ii) and 8 C.F.R. § 214.2(h)(4)(iii)(A)

The regulation at 8 C.F.R. § 214.2(h)(4)(iii)(A) describes the types of evidence that a petitioner must introduce in order to demonstrate that the position for which the alien’s services are sought is one that requires the “theoretical and practical application of a body of highly specialized knowledge” in a “field[] of human endeavor,” and 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.”

Consistent with the regulatory framework, the AAO historically properly treated 8 C.F.R. § 214.2(h)(4)(iii)(A) as listing types of evidence that a petitioner must present in order to demonstrate that a position is a “specialty occupation” within the meaning of INA §214(l) and the regulation at 8 C.F.R. § 214.2(h)(4)(ii). The AAO correctly treated 8 C.F.R. § 214.2(h)(4)(iii)(A) as listing evidence to show that the position in question qualified as a “specialty occupation,” not as a regulation that provided criteria a petitioner must meet in addition to showing that the position is a “specialty occupation” as defined in 8 C.F.R. § 214.2(h)(4)(ii).

For example, in an AAO decision from August 12, 2004, the AAO accurately quotes the regulation when it writes:

Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), 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

3 See, e.g., Matter of [name not provided], 30 Immig. Rptr. B2-35 (CSC) (AAO, Aug. 12, 2004); Matter of [name not provided], WAC 04 001 50530 (AAO, Sep. 30, 2005); Matter of [name not provided], WAC 04 259 50020 (AAO, Aug. 29, 2006); Matter of [name not provided], EAC 03 208 51938 (AAO, Sep. 7, 2007); Matter of [name not provided], EAC 10 127 51980 (AAO, Apr. 29, 2011).
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 is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.4

The review of a sampling of AAO decisions between 2005 and 2009 reveals identical, or substantially identical, passages.5 In each of its decisions addressing the interpretation of the term “specialty occupation” and the types of evidence that a petitioner must present to establish that the position is a “specialty occupation” under INA § 214(i)(1) and 8 C.F.R. § 214.2(h)(4)(ii), the AAO recognizes and properly applies the interpretation of the regulations in question that contemplate that a petitioner must provide evidence from one of the four criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A) to establish that the position is a “specialty occupation” as defined in INA § 214(i)(1) and the regulation at 8 C.F.R. § 214(h)(4)(ii).

In a subtle change, which was made without notice and comment, and which has had a dramatic impact on H-1B adjudications, the AAO altered its interpretation of the relationship between the two regulatory provisions in decisions beginning in early 2009. First, the AAO slipped the word “also” into a key passage that appears in subsequent AAO decisions. The new bridge passage that forms the transition from the discussion of 8 C.F.R. § 214.2(h)(4)(ii) to the discussion of 8 C.F.R. § 214.2(h)(4)(iii)(A) now reads: “Pursuant to 8 C.F.R. § 214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must also meet one of the following criteria…”6 [Italics added.]

The significance of the addition of “also” to that passage is that it completely alters the regulatory framework. Whereas, when read properly, documentary evidence from one or more of the criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A) proves that the position is a “specialty occupation” under 8 C.F.R. § 214.2(h)(4)(ii), under the AAO’s altered reading, the petitioner must present evidence from the list of criteria and also prove that the position is a “specialty occupation.” To require a petitioner to do so would be, to paraphrase the U.S. District Court in Buletini v. INS, to require a petitioner to prove that

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5 Matter of [name not provided], WAC 04 001 50530 (AAO, Sep. 30, 2005); Matter of [name not provided], WAC 04 259 50020 (AAO, Aug. 29, 2006); Matter of [name not provided], EAC 03 208 51938 (AAO, Sep. 7, 2007); Matter of [name not provided], WAC 06 160 52189 (AAO, Aug. 1, 2008); Matter of [name not provided], WAC 07 148 51006 (AAO, Jan. 2, 2009); Matter of [name not provided], WAC 07 148 54983 (AAO, Feb. 2, 2009).
6 Matter of [name not provided], WAC 07 145 50889 (AAO, Mar. 3, 2009); Matter of [name not provided], WAC 07 145 54181 (AAO, Mar. 3, 2009); Matter of [name not provided], WAC 08 148 53409 (AAO, Jan. 5, 2010); Matter of [name not provided], EAC 08 151 52400 (AAO, Mar. 2, 2011); Matter of [name not provided], WAC 10 008 50309 (AAO, Apr. 7, 2011); Matter of [name not provided], WAC 09 212 51131 (AAO, Feb. 7, 2012); Matter of [name not provided], WAC 09164 51575 (AAO, Feb. 12, 2012).
the position is a “specialty occupation” by requiring the petitioner to show that the position is a “specialty occupation.”

The AAO appears to rely on *Defensor v. Meissner* for the proposition that an H-1B petitioner must prove the existence of evidence from one of the criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A), and must separately prove that the position is a “specialty occupation” under INA § 214(i)(1) and 8 C.F.R. § 214.2(h)(4)(ii). In several AAO decisions from 2009 onward, in addition to the introduction of the word “also” discussed above, the following paragraph appears in text following the recitation of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A):

As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be read together with section 214(i)(1) of the Act, 8 U.S.C. § 1184(i)(1), and 8 C.F.R. § 214.2(h)(4)(ii). In other words, this regulatory language must be construed in harmony with the thrust of the related provisions and with the statute as a whole. See *K Mart Corp. v. Cartier Inc.*, 486 U.S. 281, 291 (1988) (holding that construction of language which takes into account the design of the statute as a whole is preferred); see also *COIT Independence Joint Venture v. Federal Sav. and Loan Ins. Corp.*, 489 U.S. 561 (1989); *Matter of W-F*, 21 I&N Dec. 503 (BIA 1996). As such, the criteria stated in 8 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not necessarily sufficient to meet the statutory and regulatory definition of specialty occupation. To otherwise interpret this section as stating the necessary and sufficient conditions for meeting the definition of specialty occupation would result in a particular position meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory or regulatory definition. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000). To avoid this illogical and absurd result, 8 C.F.R. § 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a position must meet, supplementing the statutory and regulatory definitions of specialty occupation. [*Italics in original.*]

Reliance on *Defensor* is misplaced. While the court in *Defensor* did discuss the relationship between the two sections of the regulations, nothing in the *Defensor* decision would lead to the conclusion that the decision was based on such a reading of the regulations. Though there is discussion in the opinion of alternative readings of the regulations, in the end, the court reaches no conclusion and instead assumes for the sake

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7 *Buletini v. INS*, 860 F. Supp. 1222 (E.D. Mich. 1994), 1231. The District Court, discussing the INS application of 8 C.F.R. § 204.5(h)(3)(iv) and the imposition of an extra-regulatory requirement, said “...the Director's requirement would mean that plaintiff must prove he is a doctor of extraordinary ability in order to prove that he is a doctor of extraordinary ability.” The AAO repeats its mistake in the H-1B context.

8 *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000).

9 See cases cited at n6.

10 *Matter of [name not provided]*, WAC 07 145 50889 (AAO, Mar. 3, 2009); *Matter of [name not provided]*, WAC 08 148 53409 (AAO, Jan. 5, 2010); *Matter of [name not provided]*, EAC 08 151 52400 (AAO, Mar. 2, 2011); *Matter of [name not provided]*, WAC 10 008 50309 (AAO, Apr. 7, 2011); *Matter of [name not provided]*, WAC 09 212 51131 (AAO, Feb. 7, 2012); *Matter of [name not provided]*, WAC 09 164 51575 (AAO, Feb. 8, 2012).
of argument that 8 C.F.R. § 214.2(h)(4)(iii)(A) creates necessary and sufficient conditions for the category. The ultimate decision in *Defensor* focused on the question whether the plaintiff, Febe Defensor, and her business, Vintage Health Services, was the “employer” for H-1B purposes, and whether the work location – the hospital in which Vintage’s prospective H-1B employees were to be placed – had positions that were “specialty occupations” under 8 C.F.R. § 214.2(h)(4)(iii).11

The regulation at 8 C.F.R. 214.2(h)(4)(ii) is a definitional regulation, and the term “specialty occupation” is defined there, as are a number of other terms found in the regulations governing H-1B petitions. The regulation at 8 C.F.R § 214.2(h)(4)(iii)(A) sets out objective criteria by which to determine whether a specific job is a “specialty occupation” under 8 C.F.R. § 214.2(h)(4)(ii). Meeting one of the objective criteria suffices to prove that the position is a “specialty occupation.” The AAO’s alteration of the regulatory framework strips away this objectivity and leaves totally subjective what that broad definition means and how to meet it.

AILA calls upon USCIS to repudiate the line of cases and the reasoning adopted by the AAO that has imposed an extra-regulatory requirement to the regulations at 8 C.F.R. § 214.2(h)(4)(ii) and 8 C.F.R. § 214.2(h)(4)(iii)(A), and to restore to AAO administrative jurisprudence the correct reading of the regulations: 8 C.F.R. § 214.2(h)(4)(ii) and INA § 214(i)(1).

III. Erroneous Interpretation of the Terms “Body of Highly Specialized Knowledge” and “Degree in the Specific Specialty”

The AAO has also reinterpreted the phrases “body of highly specialized knowledge” and “degree in the specific specialty” such that the AAO will only find that the position is a “specialty occupation” in those rare occupations where a single specific degree in a discrete academic major is considered suitable for entry into the occupation. This is a distinct departure from prior AAO administrative jurisprudence, and is inconsistent with INA § 214(i)(1) and the regulations at 8 C.F.R. § 214.2(h)(4)(ii).

The AAO has long held that the requisite “degree in a specific specialty” related not to the specific academic major or area of academic concentration, or to the label affixed to the academic field of study, but rather, to the specialized nature of the body of knowledge that was acquired by an individual, as evidenced by the conferral of an academic degree. Thus, the AAO routinely determined that where suitable and sufficient knowledge to perform the duties of an occupation could be imparted through studies in a variety of academic areas, the position was a “specialty occupation” because it required “highly specialized knowledge” related to the occupation. The AAO raised no objections where that knowledge could be imparted through studies in more than one academic discipline.

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11 *Id.*, at 388.
In a 2004 case, when considering a petition for the position of document quality specialist (database administrator), the AAO referred to the Department of Labor’s *Occupational Outlook Handbook* (OOH), and found:

The *Handbook* states the following: “MIS programs usually are part of the business school or college and differ considerably from computer science programs, emphasizing business and management-oriented coursework and business computing courses.” A review of the beneficiary’s university coursework indicates a combination of business-oriented coursework along with business computing courses, such as database management, database programming, quantitative techniques in business, logic formulation & data structure, management information systems, computer business practicum, and systems analysis and design. The beneficiary’s university coursework while earning a bachelor of science degree in commerce does appear relevant to a degree in management information sciences. Thus, the beneficiary is qualified to perform the duties of the proffered position.\(^{12}\)

The AAO made a similar finding in a 2006 case involving the position of comptroller for a moving and storage company. In determining that the position was one that required at least a bachelor’s degree in a specific specialty, the AAO again referred to the OOH, and stated:

With respect to the educational requirements of financial managers, including finance officers, the Handbook states as follows:

A bachelor’s degree in finance, accounting, economics, or business administration is the minimum academic requirement for financial managers.

Based on the foregoing information, the AAO concludes that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(I).\(^ {13}\)

In another case from 2006, in finding the position of contract administrator to be a “specialty occupation,” the AAO stated:

The AAO finds that the beneficiary’s duties include those that the *Handbook* describes for a contract administrator, which is a sub-category listed under Administrative Services Managers in the *Handbook*. The *Handbook*, 2006-07 edition, gives the following information about the educational requirements for contract administration:


\(^{13}\) *Matter of [name not provided]*, WAC 04 259 50020 (AAO, Aug. 29, 2006), at 5.
Specific requirements vary by job responsibilities. Managers of highly complex services, such as contract administration, generally need at least a bachelor’s degree in business, human resources, or finance.

Based on the foregoing information, the AAO concludes that the proffered position qualifies as a specialty occupation under 8 C.F.R. § 214.2(h)(4)(iii)(A)(1).\(^{14}\)

The AAO has relied on evidence other than the OOH in finding that the “specific specialty” may be in one of several areas. In a 2007 case involving a strategic manager for an international advertising firm, the AAO relied on letters from experts to find that the “specific specialty” could include “business administration – advertising/marketing or psychology” or “management/marketing, psychology or advertising.”\(^{15}\)

In each of these cases, the AAO correctly focused on the substantive knowledge imparted through coursework—the “body of highly specialized knowledge”—and not the label affixed to the degree or academic major.

However, in more recent years, the AAO has equated the term “specific specialty” with a specific academic major, rather than a “body of highly specialized knowledge.” For example, in a 2009 case involving a petition for the position of budget analyst, the AAO held:

The Handbook fails to identify a specific degree requirement for employment as a budget analyst. Specifically, the Handbook indicates that:

A bachelor’s degree usually is the minimum educational requirement for budget analyst jobs, but some organizations prefer or require a master’s degree. Entry-level budget analysts usually begin with limited responsibilities but can be promoted to intermediate-level positions within 1 to 2 years, and to senior positions with additional experience.

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[A] bachelor’s degree in one of many areas, including accounting, finance, business, public administration, economics, statistics, political science, or sociology is a common requirement.

Based on the above discussion, the proffered position’s budget-related duties do not require the beneficiary to hold a baccalaureate degree in a directly related academic field, as required for classification as a specialty occupation. [Italics added.]\(^{16}\)

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\(^{14}\) Matter of [name not provided], WAC 04 172 53335 (AAO, Sep. 13, 2006), at 4.

\(^{15}\) Matter of [name not provided], LIN 05 179 53382 (AAO, Feb. 6, 2007), at 4.

\(^{16}\) Matter of [name not provided], WAC 07 145 50889 (AAO, Mar. 3, 2009), at 7-8.
Although the OOH language quoted was almost identical to that from pre-2009 cases, the AAO takes an entirely different view, concluding that the position is not a “specialty occupation” because a degree from more than one field of study meets the minimum educational requirement threshold.

Another example of this about-face was the AAO’s challenge of a service center director’s finding that the position of programmer-analyst is a specialty occupation. In a January 2010 case, the AAO stated “[T]he AAO disagrees with the director’s statement that ‘USCIS does not dispute that a bona fide position of Programmer Analyst requires a beneficiary to have a baccalaureate degree.’”

In that case, the AAO equates “specific specialty” with a single academic field, saying this:

Moreover, similar to the petitioner’s statement that the proffered position requires ‘a Bachelor’s degree in Computer Science, Engineering, Business, Math, Science, Technology, MIS, CIS, Finance, Economics, a related analytic or scientific discipline, or the equivalent thereof, as well as working experience in the field,’ the Handbook section on Computer Systems Analysts reads: ‘Despite the preference for technical degrees, however, people who have degrees in other majors may find employment as systems analysts if they also have technical

\footnote{Matter of [name not provided], WAC 08 148 53409 (AAO, Jan. 5, 2010), at 6. Contrast the AAO’s position with a December 22, 2000, memorandum on computer-related occupations prepared for Nebraska Service Center examiners by Terry E. Way, then Nebraska Service Center Director:

Past unpublished decisions of the Administrative Appeals Office have generally held that where the position of programmer involves providing clients with customized analysis and problem resolution to unique problems, the position’s complexity would require a person with at least a baccalaureate degree in computer science. The position would therefore merit eligibility as a specialty occupation.

In accordance with the above guidelines [e.g., 8 C.F.R. § 214.2(h)(4)(iii)(A)] and in light of the fact that in 1998, 60% of the programmers had a bachelor’s degree or higher, we will generally consider the position of programmer to qualify as a specialty occupation. This will be especially true if the position involves providing clients with programming analysis, custom designs, modification, and/or problem-solving software.

Regarding other positions in the computer field, since we will now recognize most programmers as specialty occupations, it would follow that the higher level positions, such as programmer/analyst, software consultants, and computer consultants would also qualify for specialty occupation status. Therefore, if the duties described in the petition primarily constitute analysis/design/modification of software or hardware, that fact should be sufficient to establish eligibility. We no longer require a petitioner to establish that the analysis duties will constitute a majority of the proposed duties in order for the position to qualify. The higher level of programming duties described previously will also qualify as analysis.}

Reprinted at AILA InfoNet Doc. No. 01040603 (Posted 04/06/01); see also 78 Interpreter Releases 725 (April 23, 2001).
skills.’ Therefore, the Handbook does not indicate that programmer analyst positions normally require at least a bachelor’s degree in a specific specialty.\textsuperscript{18}

In an April 2011 decision, the AAO denied a petition for an emergency medical services manager. Holding that the position was similar to that of a medical and health services manager in the OOH, the AAO found that the position of medical and health services manager was not a specialty occupation, stating:

While the Handbook states that a master’s degree is the standard requirement for a generalist position, it also states that a degree “in one of a number of fields” is acceptable. As discussed previously in this decision, USCIS consistently interprets the term “degree” in the criteria at 8 C.F.R. § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a specific specialty that is directly related to the proffered position. According to the Handbook, degrees in a wide variety of fields, such as health services administration, long-term care administration, health sciences, public health, public administration, or business administration [are acceptable].\textsuperscript{19}

In February of 2012, the AAO declined to find that the position of “bioinformatics programmer at a government research center” was a specialty occupation, saying this in a footnote:

Similarly, in the chapter entitled Computer Software Engineers and Computer Programmers, the Handbook states the following:

Many programmers require a bachelor’s degree, but a 2-year degree or certificate may be adequate for some positions. Some computer programmers hold a college degree in computer science, mathematics, or information systems, whereas others have taken special courses in computer programming to supplement their degree in a field such as accounting, finance, or another area of business.

That chapter does not indicate that computer programmers require a bachelor’s degree and does not indicate that, for those programmer positions that do require a bachelor’s degree, the degree must be in any specific specialty.\textsuperscript{20}

The requirement that the degree must be in a specific academic major or have a specific title has recently been explicitly rejected by a United States District Court. The California Service Center denied an H-1B petition for a Market Research Analyst, finding that the OOH “…does not indicate that the degrees held by such workers must be in a specific specialty that is directly related to market research…”\textsuperscript{21} In reversing the CSC and directing approval of the petition, the court said this:

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Matter of [name not provided], WAC 10 008 50309 (AAO, Apr. 7, 2011), at 8.
\item \textsuperscript{20} Matter of [name not provided], WAC 09 121 51131 (AAO, Feb. 7, 2012), at note 1.
\item \textsuperscript{21} In Re: Residential Finance Corporation, WAC 11 215 55179 (CSC, Nov. 11, 2011).
\end{itemize}
\end{footnotesize}
Defendant argues that Plaintiff is attempting to read out of the statutory and regulation requirements the “specific specialty” component. But Defendant’s approach is too narrow. ...Defendant’s implicit premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge. See Tapis Int’l v. I.N.S., 94 F. Supp. 2d 172, 175-76 (D. Mass. 2000) (rejecting agency interpretation because it would preclude any position from satisfying the “specialty occupation” requirements where a specific degree is not available in that field). 22

The “body of highly specialized knowledge” which must be applied theoretically and practically in the performance of the duties of the occupation must by necessity be directly related to the duties of the occupation, that is, “the specific specialty.” The source of that knowledge, however, may originate in different fields or disciplines, or a combination of fields or disciplines. Whatever the field named in the degree, the inquiry must go to the substance of the knowledge learned, the attainment of which is usually memorialized by the conferral of a degree.

AILA calls on USCIS to repudiate the line of cases and reasoning of the AAO that equates “specific specialty” with a single, specific, academic major or field, and to restore prior AAO jurisprudence that recognizes that “highly specialized knowledge” can be gained in related academic disciplines without regard to the name of the major or field, and that a qualifying degree, or its equivalent, can be from one of several related bodies of knowledge appropriate to the field of human endeavor, without regard to the label affixed to the degree or to the body of highly specialized knowledge.

IV. Probative Value of Labor Department Resources

The AAO treatment of vocational and occupational preparation resources developed by the Department of Labor diminishes, or totally disregards, their probative value in establishing that an occupation is a “specialty occupation” or that a particular beneficiary possesses knowledge that constitutes “highly specialized knowledge” for H-1B purposes.

Principal DOL resources include the Occupational Outlook Handbook, 23 the Occupational Information Network (O*NET), 24 the Educational and Training Codes for Professional Occupations (ETCPO), 25 and Specific Vocational Preparation (SVP)
Each of these resources provides, in varying degrees, evidence that can, alone or in combination with other evidence, establish that an occupation is a “specialty occupation,” as well establish that an individual has gained a body of “highly specialized knowledge” in a particular field of specialization.

As described by the DOL’s O*NET Resource Center, O*NET is “the nation’s primary source of occupational information.” According to the O*NET Toolkit for Business, O*NET is a “power tool for employers and human resource professionals ... that provides detailed information on over 900 occupations.” The O*NET database provides occupation-specific information and worker requirements, including skills, knowledge, and education required for each position. This information is routinely used by employers and human resource managers in developing accurate job descriptions and defining recruitment goals.

In assessing whether a position qualifies as a specialty occupation, the AAO regularly rejects evidence of a degree requirement from the Department of Labor’s O*NET system. For example, in a case involving a Market Research Analyst/Marketing Manager, the AAO refused to accord any weight at all to O*NET information provided by the petitioner. The AAO stated:

\[O*NET\] is not a persuasive source of information regarding whether a particular job requires the attainment of a baccalaureate or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation. Its assessment (the JobZone classification) does not specify the particular type of degree, if any, that a particular position would require.

O*NET assigns a Job Zone 4 for Market Research Analysts and Marketing Specialists. Occupations that fall within Job Zone 4 require “considerable preparation” and “most” of these occupations require a bachelor’s degree. According to the O*NET data, 71% of the respondents surveyed required a bachelor’s degree as a minimum for entry into the occupation, 24% required a Master’s degree, and 4% required a doctoral degree. Though the O*NET description for this occupation does not specify the field or fields from which the degree must be awarded, evidence of the percentage of employers who require a degree should not be dismissed outright. Rather, the O*NET information is highly relevant to defining a base requirement of a bachelor’s degree, which, when considered in conjunction with evidence that identifies the specific “body of highly specialized knowledge” that an individual has attained and the award of a degree symbolizes, should be more than sufficient to establish that a position is a specialty occupation by a preponderance of the evidence.

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27 [http://www.onetcenter.org/overview.html](http://www.onetcenter.org/overview.html) (Last accessed 03/26/12.)
29 Matter of [name not provided], WAC 06 160 52 189 (AAO, Aug. 1, 2008).
30 Id.
Moreover, it should be noted that for some positions, O*NET does indicate a specific educational background. For Environmental Engineers, for example, O*NET states that in addition to a bachelor’s or master’s degree, the occupation may require an educational background in environmental engineering or environmental science. Therefore, where specific disciplines are indicated, USCIS should accord just as much weight to O*NET as is given to the OOH.

The Foreign Labor Certification Data Center Online Wage Library similarly assigns Education and Training Codes for Professional Occupations (ETCPO) for purposes of calculating prevailing wage determinations. In a matter involving an H-1B for a public relations specialist, the AAO dismissed evidence submitted by the employer that the position of public relations specialist is assigned an ETCPO level five, “Bachelor’s Degree,” which states, “Completion of the degree program generally requires at least 4 years but not more than 5 years of full-time equivalent academic work.” The AAO stated:

The code does not specify the particular type of degree that a job would normally require; does not indicate [sic] whether a baccalaureate or higher degree in a specific specialty is a minimum for entry into the type of position proffered here; and does not rebut the Handbook’s information that such positions do not normally require a degree in a specific specialty for entry into the occupation.

Similar to O*NET, evidence that an occupation is assigned an ETCPO level five, when considered in conjunction with other evidence that a degree is normally required or is common to the industry, and when accompanied by evidence identifying the “body of highly specialized knowledge,” is relevant, and should be accorded appropriate weight when evaluating whether the position qualifies as a specialty occupation based on the totality of the evidence.

Finally, even the Specific Vocational Preparation (SVP) schedule provides probative evidence. According to the DOL, “Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation.” The SVP scales vocational preparation in nine “levels,” the lowest of which, SVP 1, indicates that “average performance” in a particular job can be achieved with a “short demonstration only,” and SVP 9, which indicates that average performance can only be achieved with over 10 years of vocational preparation, that is, education “organized around a specific vocational objective,” training, and/or experience in the field. Rather than according no weight to information regarding the SVP, the SVP level, when accompanied by evidence identifying “the body of highly specialized knowledge” necessary to perform the duties of the occupation, and evidence of the

32 Matter of [name not provided], EAC 07 133 52477 (AAO, Apr. 1, 2010).
33 Supra, n.26.
34 Supra, n.32.
specific education, training, and experience required, should likewise be accorded appropriate weight.

AILA urges USCIS to review the treatment of DOL resource materials by the AAO and affirm the probative value of DOL resources in determining whether a particular position is a “specialty occupation,” when coupled with evidence identifying the “body of highly specialized knowledge” required to perform the duties of the “specialty occupation.”

V. Interpretation of Labor Department Resources

The AAO fails to properly apply the preponderance of the evidence standard in evaluating information on occupations found in various DOL resources. In evaluating evidence from DOL resources proffered to demonstrate that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position in satisfaction of the criterion at 8 C.F.R. §214.2(h)(4)(iii)(A)(1), the service centers and the AAO routinely ignore the preponderance standard and take an extremely narrow approach to interpreting information contained in the DOL Occupational Outlook Handbook (OOH).

For example, in a case involving an H-1B for an accountant, the AAO referenced the OOH, which states, “[m]ost accountants and auditors need at least a bachelor’s degree in business, accounting, or a related field.” Based on this, the AAO concluded, “‘Most’ is not indicative that a particular position within the wide spectrum of accountant jobs normally requires at least a bachelor’s degree or its equivalent in a specific specialty.”

Similarly, in a computer systems analyst case, the AAO first quoted the OOH: “When hiring computer systems analysts, employers usually prefer applicants who have at least a bachelor’s degree.” However, it then went on to say “...the usual preference for applicants with a bachelor’s degree indicat[es] ... that, while usually preferred, a bachelor’s degree is not normally required.”

The CSC drew a similar conclusion in denying a case for a property manager. There, relying on the OOH, the CSC stated, “…most employers prefer to hire college graduates for property management positions, particularly for offsite positions dealing with a property’s finances and contract management and for most commercial properties. A bachelor’s or master’s degree in business administration, accounting, finance, real estate, or public administration is preferred for these positions.” However, despite this, the CSC went on to conclude, “There is no clear standard for how one prepares for a career as a [property] manager and no requirement for a degree in a specific specialty.”

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35 Matter of [name not provided], WAC 09 140 50401 (AAO, Apr. 22, 2011).
36 Id.
37 Matter of [name not provided], WAC 09 142 51714 (AAO, Apr. 29, 2011).
38 WAC 11 055 50051 (CSC, Jul. 26, 2011).
39 Id. Note that in the decision, the word “operations” appears before “manager,” rather than the word “property.”
In concluding that these positions do not *normally* require a baccalaureate or higher degree or its equivalent for entry into the particular position, USCIS is imposing a standard of proof far greater than a preponderance, which simply requires a showing of a more than 50 percent chance that an employer would require a bachelor’s degree or higher. In other words, a statement in the OOH that says “‘most’ employers require/prefer” or “employers ‘usually’ require/prefer,” should be deemed the equivalent of “the employer more likely than not requires,” which satisfies the preponderance standard. USCIS’s overly narrow reading of these provisions is flawed and is resulting in denials that are not grounded in law.

Moreover, for other positions, the OOH states that where a degree is required by “many” employers, or that an employer “typically” requires a bachelor’s degree, that is insufficient. For example, in a case involving a human resources specialist, the AAO has held that where the OOH stated that “‘many’ employers seek college graduates who have majored in human resources, personnel administration, or industrial and labor relations,” the evidence did not support the petitioner’s assertion that a bachelor’s degree is not normally required for the position.40 The AAO went on to reject evidence submitted by the employer to refute the OOH, and/or to establish that a degree is common to the industry under 8 CFR §214.2(h)(4)(iii)(A)(2).

Where the OOH states that “many” employers require a degree, and the petitioner submits evidence of its own degree requirement or industry standard for similar employers, this should also be found to meet the preponderance standard, that it is “more likely than not” that a bachelor’s degree or the equivalent is required for the position.

AILA urges USCIS to adjudicate H-1B petitions in a manner consistent with the statutory and regulatory language, and in accordance with the “preponderance of the evidence” standard of proof. The AAO’s rationale should be rejected, and evidence from DOL resource materials indicating that “most” employers require a degree in one of several fields qualifying as a “body of highly specialized knowledge” should be recognized as sufficient evidence that a position is a “specialty occupation” in satisfaction of 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). Moreover, where DOL resource materials provide evidence that “many” employers require a degree in a “body of highly specialized knowledge,” the evidence that “many” employers require a degree, when coupled with evidence of complexity of duties or evidence of employer preference, is competent and probative evidence relevant to satisfaction of the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A)(2), (3), or (4).

VI. Conclusion

The H-1B nonimmigrant category provides U.S. employers access to highly-skilled workers from abroad. The adjudication of H-1B petitions in recent years has been marked by increasingly restrictive interpretations of key elements of the law, compounded by the impermissible introduction of factors into the adjudication of H-1B petitions that are supported by neither the statute nor the regulations. In addition, the

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40 Matter of [name not provided], WAC 04 010 54346 (AAO, Apr. 1, 2005).
AAO has adopted an interpretation of the terms “specialty occupation” and “body of highly specialized knowledge” that is not supported by the statute, prior AAO administrative jurisprudence, or case law. Additionally, adjudication of H-1B petitions has been restricted by the application of an impermissibly narrow interpretation of the preponderance of the evidence burden of persuasion, and the rejection of probative and competent evidence drawn from resources of the Department of Labor.

AILA calls upon USCIS to conduct a review of H-1B adjudications at the Administrative Appeals Office and at service centers for the purpose of restoring the proper interpretation of the regulations and burden of proof. AILA also requests that USCIS conduct a stakeholder engagement on H-1B adjudications, the proper interpretation of the terms “specialty occupation” and “body of highly specialized knowledge,” and the regulations at 8 C.F.R. § 214.2(h)(4) and at 8 C.F.R. § 214.2(h)(4)(iii)(A).

We look forward to working with USCIS on this matter of great importance.