

Redefining Specialty Occupation: How the Trump Administration is Limiting the Use of the H-1B Visa Program

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On April 18, 2017, President Donald Trump signed Executive Order No. 13,788, titled “Buy American and Hire American,” which listed among its priorities the reform of the H-1B visa program.¹ As background, the H-1B is a temporary visa for foreign workers who are employed in a “specialty occupation.” That term is defined under the Immigration and Nationality Act² (INA) 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.”³ Executive Order No. 13,788 states: “In order to promote the proper functioning of the H-1B visa program, the secretary of state, the attorney general, the secretary of labor, and the secretary of homeland security shall, as soon as practicable, suggest reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”⁴ This order, along with similar executive branch policies, is significantly affecting H-1B adjudications. Even though there have been no formal changes to the INA or to applicable federal regulations, immigration practitioners have seen noticeable changes in the U.S. Citizenship and Immigration Services’ (USCIS) adjudication of H-1B visas under the new administration.

Shortly after the issuance of Buy American Hire American, immigration practitioners reported a surge in both requests for additional evidence and straight-out denials of H-1B visa petitions by the USCIS. The number of requests for evidence on H-1B visa petitions more than doubled between the third and fourth quarters of fiscal year 2017.⁵ During that same period, H-1B denial rates increased by over 40 percent.⁶ While statistics for 2018 have not been made public, anecdotally, immigration practitioners report that they are now accustomed to seeing requests for evidence on the vast majority of H-1B petitions filed with USCIS. Denials of H-1B visa petitions are also becoming more

common, even for routine H-1B extensions where the petitioner’s role and employer are unchanged.

As stated above, there has been no change to existing law or regulations. Instead, USCIS has achieved Executive Order No. 13,788’s goal to restrict the H-1B program by modifying how the agency itself interprets the phrase “specialty occupation.” Federal regulations define “specialty occupation” as an “occupation which requires theoretical and practical application of a body of highly specialized knowledge in the 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 entry into the occupation in the United States.”⁷ Furthermore, in order for a position to qualify as a “specialty occupation,” one of the following four criteria must be met:

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 must 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 is so specialized and complex that knowledge required to perform the duties is typically associated with the attainment of a baccalaureate or higher degree.⁸

One of the main sources relied upon by USCIS to determine whether a position is a specialty occupation is the U.S. Department of Labor (DOL) Bureau of Labor Statistics’ *Occupational Outlook Handbook* (OOH).⁹ The OOH is a reference guide that outlines

typical job duties and general degree requirements for certain occupations. USCIS also relies upon the DOL Employment and Training Administration's O*NET, which provides detailed job descriptions, required skills, and standard vocational preparation required for various occupations.¹⁰ At issue is that the OOH often generalizes the requirements for specific occupations. For example, the OOH states: "Most computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree"¹¹ and "although some schools offer bachelor's and advanced degree programs in operations research, some [operations research] analysts have degrees in other technical or quantitative fields, such as engineering, computer science, analytics, or mathematics."¹² These generalizations are by no means unwarranted since every industry and employer may have their own unique hiring practices and educational requirements or preferences. Similarly, these same generalized statements are also found in the O*NET, such as "most of these occupations require a four-year bachelor's degree, but some do not."¹³

While USCIS has historically relied on the OOH in adjudicating H-1B petitions, the weight of the OOH as an adjudication tool changed drastically with the issuance of a new Policy Memorandum dated March 31, 2017.¹⁴ In that Policy Memorandum, USCIS rescinded its prior guidance recognizing the position of computer programmer as a specialty occupation. Reversing 17 years of precedent, the new Policy Memorandum states that it is improper to conclude that the USCIS would generally consider the position of computer programmer to qualify as a specialty occupation since the OOH indicates that individuals with only an associate's degree may enter the occupation.¹⁵ Therefore, an entry-level computer programmer position would generally not qualify as a specialty occupation since a specialty occupation requires at a minimum a bachelor's or higher degree in a specific specialty. Along those same lines, if the underlying Labor Condition Application (LCA) governing the salary of the H-1B worker indicates that the position is entry level, this also indicates that the position is not complex or specialized enough to require a bachelor's degree or higher for entry, thus qualifying as a specialty occupation.¹⁶ Finally, in a footnote, the Policy Memorandum states that the requirement of "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 visa."¹⁷

The result of the new Policy Memorandum was the emergence of requests for evidence that focused on whether a position, especially one classified as entry level on the corresponding LCA, qualified as a specialty occupation. More common, however, has been the general inquiry of whether a position truly requires a bachelor's degree at minimum in a specific field of study, especially where the OOH indicates that only "some" roles or only "many" roles require a bachelor's degree or possibly a bachelor's degree in more than one field of study.¹⁸ Finally, positions that require a bachelor's degree in business administration, or other "generalized" degrees such as an engineering degree where the specific engineering specialty is not identified, have been subject to heightened scrutiny.

As a consequence of the requests for evidence and denials stemming from the shift in the interpretation of the law, employers have found it increasingly difficult to keep their existing workforce of H-1B employees. In a Policy Memorandum dated Oct. 23, 2017, USCIS rescinded its long-standing policy of giving deference to prior

determinations of eligibility in the adjudication of extensions.¹⁹ The impact of this policy has been particularly burdensome for employers with workers who are Indian-born H-1B visa holders. Due to per country limitations for immigrant visas, the vast majority of Indian-born visa holders who have been sponsored for permanent residence by their employer hold H-1B status for eight or more years after being sponsored for permanent residence, waiting for their immigrant visa number to become available. With H-1B denial rates highest among Indian-born workers,²⁰ this means that employers are seeing disruptions in their workforce when H-1B workers who are in the pipeline for permanent residence suddenly have their H-1B visa extension denied because their role is no longer considered a specialty occupation. The denial of the H-1B petition often means that the employee, who now by virtue of the denial is unlawfully in the United States, must leave the country immediately or risk being placed in removal proceedings, courtesy of yet another USCIS Policy Memorandum issued in June 2018 enforcing the removal of individuals unlawfully present as a result of a denied petition.²¹ Most of these workers, if in the pipeline for permanent residence, have received certification from the DOL that there are no qualified or available U.S. workers who can perform the duties of their position, meaning their suddenly vacant job cannot be filled by a U.S. worker.

What is an employer to do in this scenario? Quickly hiring a new H-1B worker to fill the hard-to-fill void caused by the unexpected departure of the H-1B employee is no longer an option. Effective Sept. 11, 2018, USCIS announced that it is no longer offering expedited "premium processing" services for the majority of H-1B visa filings.²² While regulations allow certain H-1B visa holders to "port" to a new H-1B employer upon filing a change of employer petition with USCIS,²³ most employers and employees prefer to wait for an approval of their H-1B petition from USCIS before taking on the risk of starting a new job. For employees who do not qualify to port to new employment upon filing because they may be outside the United States at the time of filing or perhaps switched to another visa category due to a job loss or prior H-1B denial, waiting for an indefinite period of time outside the United States for a new H-1B visa is usually not a viable option. In this manner, the expanded suspension of premium processing has the consequence of further discouraging employers and employees from seeking H-1B classification.

What recourse do employers have now that they can't keep their H-1B employee, replace him or her with a U.S. worker, or hire a new H-1B employee in his or her stead? In light of the increased scrutiny, requests for evidence and H-1B denials, one must seriously consider other alternatives and contemplate all possible options in order to reduce disruptions for employees and employers alike. One key, yet often overlooked, provision is included in the U.S. Department of Homeland Security final rule entitled "Retention of EB-1, EB-2, and EB-3 Immigrant Workers and Program Improvements Affecting Highly-Skilled Nonimmigrant Workers."²⁴ This rule allows beneficiaries of an approved Immigrant Petition for Alien Workers to apply for a "compelling circumstances" employment authorization document (EAD) if their petition priority date is retrogressed due to the per country limitations, thereby preventing them from applying for adjustment of status.²⁵ Compelling circumstances is a high standard to meet but may include significant employer disruption, serious illness or disability, or other substantial harm to the foreign national. The beneficiary of an approved Immigrant Petition for Alien Workers is only eligible for a compelling circumstances EAD if the foreign

national is maintaining H-1B, H-1B1, L-1, O-1, or E-3 status at the time of EAD application; however, if granted, the foreign national must relinquish the underlying nonimmigration status for the EAD. This tradeoff is the main reason this provision is often overlooked or disregarded since using this EAD means that the foreign national loses their nonimmigrant status. However, in light of the increased scrutiny, requests for evidence, and H-1B denials, this seemingly contradictory tradeoff may be the only plausible alternative available to many beneficiaries who may have no other options. Desperate times call for creative measures. ☉

Endnotes

¹82 Fed. Reg. 18837 (Apr. 18, 2017).

²Immigration and Nationality Act (INA), 8 U.S.C.A. §§ 1101 *et seq.* (1951) (as amended) (Westlaw 2018).

³INA § 214(i)(1).

⁴82 Fed. Reg. 18837, at 18839 (Apr. 18, 2017).

⁵NAT'L FOUND. FOR AM. POL'Y, NFAP POLICY BRIEF: H-1B DENIALS AND REQUESTS FOR EVIDENCE INCREASE UNDER THE TRUMP ADMINISTRATION (July 2018), <https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf>.

⁶*Id.* at 2.

⁷8 C.F.R. § 214.2(h)(4)(ii) (2018); *see also* INA § 214(i)(1) (defining "specialty occupation" under the INA).

⁸8 C.F.R. § 214.2(h)(4)(iii)(A).

⁹*Occupational Outlook Handbook*, BUREAU OF LAB. STAT., <https://www.bls.gov/ooh> (last modified Apr. 13, 2018) (last visited Nov. 27, 2018).

¹⁰O*NET ONLINE, <https://www.onetonline.org> (last visited Nov. 27, 2018).

¹¹*Computer Programmers*, BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/computer-and-information-technology/computer-programmers.htm> (last visited Nov. 27, 2018).

¹²*Operations Research Analysts*, BUREAU OF LAB. STAT., <https://www.bls.gov/ooh/math/operations-research-analysts.htm> (last visited Nov. 27, 2018).

¹³*Summary Report for: 15-1131.00—Computer Programmers*, O*NET ONLINE, <https://www.onetonline.org/link/summary/15-1131.00> (last visited Nov. 27, 2018).

¹⁴U.S.C.I.S. Pol'y Mem. PM-602-0142, Rescission of the December 22, 2000 "Guidance Memo on H1B Computer Related Positions" (Mar. 31, 2017), <https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRescission.pdf>.

¹⁵*Id.* at 2.

¹⁶*Id.* at 3.B *but see Next Generation Tech. v. Johnson*, 328 F. Supp. 3d 252, 267 (S.D.N.Y. Sept. 29, 2017) (While noting that "some employers hire workers with an associate's degree" for computer programmer positions, the *Occupational Outlook Handbook* goes on to state that "[m]ost computer programmers have a bachelor's degree in computer science or a related subject." *Supra* note 11, at *How to Become One* (tab 4). Thus, if the proposed position qualifies as a computer programmer position, then the *Occupational Outlook Handbook* arguably demonstrates that a bachelor's degree or higher in a specific specialty is "normal[ly]" the minimum requirement for entry into the position.").

¹⁷*Supra* note 14, at 4.

¹⁸*But see In re [Redacted]* (AAO Apr. 7, 2014) (While at least one non-precedent case before the Administrative Appeals Office has found that "in satisfying the specialty occupation requirements, both the act and the regulations require a bachelor's degree in a specific specialty or its equivalent, and that this language indicates that the degree does not have to be a degree in a single specific specialty. [P]rovided the specialties are closely related, e.g., chemistry and biochemistry, a minimum of a bachelor's or higher degree in more than one specialty is recognized as satisfying the 'degree in the specific specialty (or its equivalent)' requirement of § 214(i)(1)(B) of the act.") (non-precedent).

¹⁹U.S.C.I.S. Pol'y Mem. PM-602-0151, Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions for Extension of Nonimmigrant Status (Oct. 23, 2017), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf>.

²⁰*Supra* note 5.

²¹U.S.C.I.S. Pol'y Mem. PM-602-0050.1, *Updated Guidance for the Referral of Cases and Issuance of Notices to Appear (NTAs) in Cases Involving Inadmissible and Deportable Aliens* (June 28, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-28-PM-602-0050.1-Guidance-for-Referral-of-Cases-and-Issuance-of-NTA.pdf>.

²²*USCIS Extends and Expands Suspension of Premium Processing for H-1B Petitions to Reduce Delays*, U.S. CITIZENSHIP & IMMIGR. SERVS., <https://www.uscis.gov/news/uscis-extends-and-expands-suspension-premium-processing-h-1b-petitions-reduce-delays> (last updated Aug. 28, 2018) (last visited Nov. 27, 2018).

²³8 C.F.R. § 214.2(h)(2)(i)(H).

²⁴81 Fed. Reg. 82398 (Jan. 17, 2017).

²⁵8 C.F.R. 204.5(p).

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