Buy American and Hire American - BAHA

Sec. 5. Ensuring the Integrity of the Immigration System in Order to “Hire American.”

(a) . . . propose new rules and issue new guidance, to supersede or revise previous rules and guidance if appropriate, to protect the interests of United States workers in the administration of our immigration system, including through the prevention of fraud or abuse . . .

(b) 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.

AILA Doc. 17041899
BAHA Resources

- AILA Member Talking Points on “Buy American, Hire American” Executive Order. AILA Doc. 17041851
- Executive Action: Buy American and Hire American resources - AILA Doc. No. 17052537

BAHA -Announcements

- USCIS Announce Additional Measures to Detect H-1B Visa Fraud and Abuse - April 3, 2017. AILA Doc. 17040332
- USCIS provides E-mail Address for Reporting Suspected H-1B Fraud or Abuse - April 3, 2017 AILA Doc. 17040333
- DOJ Cautions Employers Seeking H-1B Visas Not to Discriminate Against U.S. Workers - April 3, 2017 AILA Doc. 17040331
- DOL Announces Plans to Protect American Workers from H-1B Program Discrimination. April 4, 2017. AILA Doc. 17040568
Buy American, Hire American: Putting American Workers First | USCIS - August 8, 2017

- **H-1B**: [ReportH1BAbuse@uscis.dhs.gov](mailto:ReportH1BAbuse@uscis.dhs.gov)
- Encouraged people to report fraud and abuse to Department of Labor’s Wage and Hour Division.
- **H-1B Datasets** - provide information about the hiring practices of employers who petition for foreign national workers.
  - Characteristics of Specialty Occupation Workers (H-1B): Fiscal Year 2016
  - H-1B Trends: 2007 to 2017
  - Approved H-1B Petitions by Employer, FY2015
  - Approved H-1B Petitions by Employer, FY2016

AILA Doc. 17080833

Executive Branch’s Regulatory Priorities - Fall 2017

- **Registration Requirement for Petitioners Seeking To File H-1B Petitions on Behalf of Aliens Subject to Numerical Limitations** - missed Target of February 2018
- DHS proposes to establish an electronic registration program for petitions subject to numerical limitations for the H-1B nonimmigrant classification.
- Intent is to allow USCIS to more efficiently manage the intake and lottery process for these H-1B petitions.
- The proposal may include a modified selection process, as outlined in section 5(b) of Executive Order 13788, Buy American and Hire American.

AILA Doc. 17121930
Regulatory Priorities - continued

Strengthening the H-1B Nonimmigrant Visa Classification Program

DHS proposes to:

- revise the definition of *specialty occupation* to increase focus on obtaining the best and the brightest foreign nationals via the H-1B program.
- revise the definition of employment and employer-employee relationship to better protect U.S. workers and wages.
- propose additional requirements designed to ensure employers pay appropriate wages to H-1B visa holders.

Target - October 2018

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Regulatory Priorities - continued

Removing H-4 Dependent Spouses from the Class of Aliens Eligible for Employment Authorization

- DHS is proposing to remove from its regulations certain H-4 spouses of H-1B nonimmigrants as eligible for employment authorization.

- NPRM Targeted: February 2018
Regulatory Priorities continued

- Practical Training Reform
  ICE to propose comprehensive reform of practical training options to reduce fraud and abuse.
  The purpose is to improve protections of workers who may be negatively impacted by employment of nonimmigrant students on F and M visas.
- Target 2018

Policy Brief - National Foundation for American Policy: International Students and STEM OPT - October 2017

USCIS Will No Longer Provide Deference to Prior Adjudications for Nonimmigrant Petitions - October 23, 2017

- Updated guidance is both more consistent with the agency’s current priorities and also advances policies that protect the interests of U.S. workers.
- In adjudicating petitions for immigration benefits, including nonimmigrant petition extensions, adjudicators must, in all cases, thoroughly review the petition and supporting evidence to determine eligibility for the benefit sought. The burden of proof in establishing eligibility is, at all times, on the petitioner.
- The fundamental issue with the April 23, 2004 memorandum is that it appeared to place the burden on USCIS to obtain and review a separate record of proceeding to assess whether the underlying facts in the current proceeding have, in fact, remained the same. Not only did this improperly shift the burden of proof to the agency contrary to INA § 291, but it was also impractical and costly to properly implement, especially when adjudicating premium processing requests.
- What are people seeing?
AILA Doc. 17102461
RFE Trends

- More RFEs
- Multiple RFEs
- Longer processing times
- New Issues
  - Level One Wages
  - Focus on IT companies and jobs
  - CPT/OPT fact pattern

Popular Flavors of RFEs

- Specialty Occupation
- Computer Programmer
- Level One Wage
- Employer/Employee Relationship
- Degree Equivalency
- OPT Followed by CPT
Specialty Occupation

- Targeting based on SOC Code from LCA and corresponding OOH entry
  - Computer Systems Analysts
  - Computer Occupations, All Other
  - Software Developers, Accountants & Engineers not Immune
- Degree in a “Specific Specialty”
- Job Duties Not Specific Enough

USCIS Computer Programmer Memo

- The OOH indicates that an individual with an associate’s degree may enter the occupation of computer programmer.
- An entry-level computer programmer position would not generally qualify as a position in a specialty occupation because the regulatory definition of “specialty occupation” requires that the proffered position have a minimum entry requirement of a U.S. bachelor’s degree or higher degree in the specific specialty, or its equivalent.
- USCIS officers should also consider the wage level on the LCA when evaluating whether the position qualifies as a specialty occupation.

AILA Doc. 1704030
Computer Programmer - Almost one year later

- Computer programmer positions should not generally be presumed to meet the requirements of an H-1B specialty occupation.

- Practice Pointer: Responding to H-1B Requests for Evidence (RFEs) Raising Level 1 or Level 2 Wage Issues (Updated 9/20/17) AILA Doc. 17090132.
  
  Appendix B: Background & Legal Framework
  
  I. USCIS Computer Programmer Policy Memo

Where are people seeing?

Level One Wages

- 2018 Cap Cases Targeted - Easing up?
- 2 Flavors of RFE:
  - The Job is Too Specialized: LCA does not “correspond” to petition: Job is Not a “Level 1” job because duties are too sophisticated
  - The Job is Not Specialized Enough: Use of Level 1 wage shows that job is not complex or sophisticated enough to be a “specialty occupation”
- Multiple RFEs: Specialty Occupation Followed by Level 1
- AWESOME Practice Pointer: AILA Doc. No. 17090132
- Sample Denials: AILA Doc. No. 17092006
Level One Wage - Immigration Act of 1990 (IMMACT 90)


Employer-Employee Relationship

- IT Consulting Companies
- Third Party Placement (or not)/ “Sufficient Specialty Occupation Work”
- Statements of Work or “Detailed Contractual Documents” from the End-Client
  - Signed as of date of I-129 submission
  - Must include beneficiary name and duties, location, and timeframe
New USCIS Memo - H-1B Petitions Involving Third-Party Worksites - effective 2/28/2018

► What is the same?
► What is new?
► What is unknown?

AILA Doc. 18022334

Degree Equivalency - Recognition of Expertise

► 8 CFR 214.2(h)(4)(iii)(C)(4): If no degree, foreign equivalent degree or license, must show: “Education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and have recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.”

Degree Equivalency (cont.)

Denial: “The [experience verification] letters provided are insufficient in detail to determine that: the work experience included the theoretical and practical application of specialized knowledge required by the proffered position; the beneficiary’s experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and that the beneficiary has recognition of expertise in the specialty.” [8 CFR 21.2(h)(4)(iii)(D)(5)]

OPT Followed by CPT

Practice Pointer: AILA Doc. No. 18020939

Second master’s degree at an institution that authorizes immediate CPT. Foreign national, upon completion of his or her OPT, continues working for the OPT employer by enrolling in an institution that will immediately authorize CPT to do so.

Detailed Enrollment Evidence

Prepare Client for Possible Consular Processing
Fighting the Good Fight: Elements of a Successful RFE Response

What is “Normal”???

- Is a Bachelor’s degree “Normally” the minimum requirement?
- OOH Entries:
  - A bachelor’s degree is “usually” required for graphic designers, software developers, and computer network architects
  - Earning a professional degree in architecture is “typically” the first step to becoming an architect
  - “Most” computer systems analysts and accountants have a bachelor's degree
- Dictionary Definition: Usual, Typical, Expected, Not Strange
New Hope for “Normal”- Litigation!

- Next Generation Technologies v. Johnson (SDNY 2017);
  AILA Doc. No. 17100334
- OOH: “Most computer programmers have a bachelor’s degree; however, some employers hire workers with an associate’s degree.”
- “Even affording appropriate deference to the Government’s interpretation of the statutory and regulatory requirements, this Court is at a loss to see a ‘rational connection’ between the evidence indicating that ‘most computer programmers have a bachelor’s degree’ and USCIS’s determination that ‘computer programmers are not normally required to have a bachelor’s degree.’”

Using DOL References to show “Normal”

- O*NET - Job Zone 4: “Most” require a Bachelor’s “but some do not”
- MOST = NORMAL (91% of Mechatronics Engineers require a BS Degree)
- Reference “Education” Section of O*NET
- “Appendix D” Professional Occupations Education and Training Categories
Using the “All Other” Codes on LCA

- Possible RFE Trigger
- OOH’s A to Z Index

Dealing With “Specific Specialty”

- Software Developer Denial: “A Job Zone 4 indicates that a position requires considerable preparation. It does not, however, demonstrate that a bachelor’s degree in any specific specialty is required, and does not, therefore, demonstrate that a position so designated is a specialty occupation.”

- Raj & Company v. USCIS, Case No. C14-123RSM (W.D. WA 2015)
  - Market Research Analyst
  - OOH: “typically need a bachelor’s degree in market research or a related field. Many have degrees in fields such as statistics, math, or computer science. Others have a background in business administration, one of the social sciences, or communications ...”
  - USCIS: NOT a specialty occupation because does not require a specific field of study
  - Judge Martinez: The regulations “do[] not restrict qualifying occupations to those for which there exists a single, specifically tailored and titled degree program.”
Tightening Up Job Postings

<table>
<thead>
<tr>
<th>Employer</th>
<th>Similar to Petitioning Entity</th>
<th>Job Title</th>
<th>Degree Requirement</th>
</tr>
</thead>
<tbody>
<tr>
<td>XYZ Corp.</td>
<td>“Cannot determine whether similar to petitioning entity”</td>
<td>Software Engineer III</td>
<td>- NO specified field (“Specific Specialty”)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- Too many fields listed (“allow for a wide variety of backgrounds”)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>- “Equivalent Combination of Education/Training/Experience”</td>
</tr>
</tbody>
</table>

Expert Opinion & Advisory Letters

- Detailed Discussion of Expert Qualifications
- Traditional “Professor” Letters
- Industry Expert Letters
- Competitor Letters
- Client Letters
- Recruiter Letters
- Professional Association Letters
- Industry Publications
Do Letters Make a Difference?

- Straightforward Software Engineer Case - Letters submitted:
  - Industry Expert and advisor to high tech companies
  - CEO of Recruiting Agency for high tech companies
  - CEO of Advisor to small high tech companies similar to petitioner
  - 2 Professor Letters
- Denial: “[T]hese letters were found to have little or no substantive value. . . . USCIS maintains discretion to use as advisory opinions statements submitted as expert testimony.”
- 2 Similar Computer Systems Analyst cases

Employer Normally Requires a Degree

- Employer Declarations, Charts Showing Other Employees in Job, Current and Prior Employer Job Postings
  - Be As Detailed as Possible - Proof of Employment & Educational Records
  - USCIS rejects acceptance of experience and education equivalence
- Software Engineer Denial: “Your creation of a position with obligatory bachelor's degree requirement will not conceal the fact that the position is not a specialty occupation. . . . If USCIS was limited to reviewing a petitioner's self-imposed employment requirements, then any alien with a bachelor’s degree could be brought into the United States to perform a menial, non-professional, or an otherwise non-specialty occupation, so long as the employer required all such employers to have bachelor's degrees.”
Nature of the Duties

<table>
<thead>
<tr>
<th>Job Duty with % of Time Spent on Duty</th>
<th>Skill Required to Perform Job Duty</th>
<th>Course(s) in Which Skill is Typically Gained</th>
</tr>
</thead>
</table>

- Employer/Products uniquely complex or sophisticated: Size of company, complexity of products, clients, safety issues at stake (SEC Form 10K), etc.
- Professor/Expert Letters discussing duties and nature of employer: “While the OOH and O*NET statements regarding the entry level education for a Computer Systems Analyst appear to leave the possibility open for a minority of positions to require less than a bachelor’s degree, the position in this case would clearly be among the majority job positions which would absolutely require bachelor’s-level preparation in a computer-related field at a minimum.”
- Samples of Work Product Showing Complexity
- Wage Level One Problem - “does not show that the position is more complex or specialized than other positions within the occupation”
- Be as Detailed as Possible!

Level 1 is Appropriate for the Job

- Organizational Chart
- Support Letter emphasizing
  - Entry-level nature of job (internal leveling/intern to FTE?)
  - “Routine” duties
  - Level of Supervision
  - Training provided
- Expert Letter(s)
- Compare job duties to O*Net duties: “Detailed Work Activities”
- DOL 5-Step Worksheet
DOL’s Prevailing Wage Disclosure Data

- [www.foreignlaborcert.doleta.gov/performancedata.cfm](http://www.foreignlaborcert.doleta.gov/performancedata.cfm)

- Graphic Designer
  - 63% of PWDs issued used Level 1
  - 88% Required Bachelor’s degree
  - Half of Level 1 PWDs require work experience in addition to degree
  - Job Titles and Supervisor Titles for Level 1 PWDs indicate not always entry-level
  - Conclusion: DOL issues Level 1 wages to Graphic Designers, even for jobs requiring extensive education and experience
Agency Guidance - DOL has sole authority over LCAs

► 1995 INS Memo on Ability to Pay for H-1B: “The only responsibility which the Service has in this area is to ensure that the petitioner has obtained a certified LCA and that the Service has no statutory authority to question the veracity of the information furnished on the LCA.”  
AILA Doc. No. 17090860

► 1995 INS Memo on Supporting Documentation for H-1Bs: “Wage determinations and enforcement of their payment with respect to the H-1B classification are the sole responsibility of DOL.”  
AILA Doc. No. 95111390

Showing Specialty Occupation in Spite of Level 1 Wage

► Correlation between use of Level 1 Wage and Specialty Occupation RFEs

► Entry Level can be Specialty:
  ► AAO: “There is no inherent inconsistency between an entry-level position and a specialty occupation... Most professionals start their careers in what are deemed entry-level positions. That doesn’t preclude us from identifying a specialty occupation.”  
  Matter of B-C-, Inc., ID# 1139516  
  (AAO Jan. 25, 2018)
New Hope: Litigation for Level 1!

  - Geotechnical Engineer
  - Industry Association Letter confirming Entry Level nature of position
  - The Director determined the Level I wage was inappropriate by comparing the Petitioner-indicated duties directly with DOL's generic definition of a Level I wage. According to DOL guidance, that is not the correct comparison. The proper comparison is between the Petitioner-indicated job attributes and requirements and those associated with the appropriate O*NET occupation.

  - Investment Banking Analyst
  - Level I not appropriate because of Master's degree (Bachelor's is "normal")
  - Both Decisions followed DOL's 5-step Prevailing Wage Guidance

Strategies for Anticipating/Avoiding RFEs

- Discuss risks/costs with client upfront
- “Level Up” on the Wage?
- Private Wage Surveys?
- Obtain Prevailing Wage Determination?
- Choose O*Net SOC Code Carefully and Reference O*Net Duties
  - Avoid “All Other” and Computer Systems Analyst
- Minimalist Approach to Initial Submission?
- Charging for RFEs: AILA Doc. No. 17100663
USCIS H-1B Fraud Visits

- Funded by $500 “Fraud” fees - 25,000 visits
- Often Unannounced
- Employer
  - When was company incorporated?
  - How many employees?
  - H-1B worker’s job title, duties, salary, location
  - Who paid legal and filing fees?
- Employee
  - Job title, duties, location
  - Who supervises your work, and how?
  - Salary, how often are you paid
  - Who paid legal and filing fees?

Best Practices for Unannounced Visit

- Obtain copies of identification, warrant/subpoena
- Escort agents to conference room
- Ask for information about nature/ scope of investigation (get copies)
- Speak with Counsel before answering questions or turning over documents
- Do not consent to any search beyond what is authorized
- Do not leave agents unattended
- Document the Visit - Take Notes