

“X” Marks the Spot: The Nexus between Requirements & Duties in H-1B Specialty Occupation Job Offers

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The general analysis of any H-1B case involves fulfillment of two distinct prongs under the Immigration and Nationality Act. First, is the position a specialty occupation and second, is the candidate a specialty occupation worker? This article discusses the first prong and includes the interplay between the requirements for the job offered and the job duties. The duties describe the functions that the worker will perform, and the requirements include education, experience, training and/or knowledge that are necessary in order to be competent to perform the duties.

The relationship between requirements and duties determines whether further H-1B analysis is warranted, or whether only other immigration options should be explored. Unless the employer has a position that requires the minimum of a specialized bachelor's degree to perform specialty occupation duties, then there is no H-1B and other immigration options should be explored.

If we begin with the proposition that an employer knows what it requires for a position to be performed (occasionally they don't), and we are advised by the employer that a minimum of a bachelors degree is required in a specialized course of study, this can be confirmed in one of four ways according to INS regulations at 8 CFR 214.2(h)(4)(iii)(A). A position meets the H-1 caliber standard of specialty occupation if:

1. A baccalaureate or higher degree 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.

The California Service Center of the INS opined on May 9, 2000 its litmus test for the above criteria. While there are similarities among them, each separately provides the clout needed to determine whether a position requires a minimum of a bachelor's degree. From a strategical perspective, the attorney who can use more than one basis for establishing the need for the degree is in a stronger position than the attorney who gambles to rely only on one basis.

A position would “normally” require a degree where it involves duties that would be laid out in a course of studies at the bachelors level. Examples of archetypal H-1s are professionals like teachers, architects, engineers, lawyers, and the like.

If utilizing the criteria that the requirement is common to the “industry” in “parallel” positions, INS should be informed with evidence of the definition of the industry, and mention of the size and locale of the employer are relevant.

Where the “employer normally requires a degree,” it is important to differentiate between similar positions at different levels, some of which may require a degree, while others would not. Further, it is important to show what the employer requires now of the position rather than at some point in the past. This recognizes that some positions are in transition from either becoming specialty occupations, or of no longer being specialty occupations. Finally, an employer’s preference for degreed individuals will not suffice to show it normally requires a degree. One area for special attention is in the field of design, particularly web and graphic design by computer. Unless INS is instructed clearly, the employer’s position may be construed for one performable by a high school student.

There is an unlimited list of other types of H-1B specialty occupation positions that don’t involve traditional professions. Some examples are specialized translators, foreign legal consultants, technical writers in entertainment, or any other special field, specialized managers, designers such as in interior design, graphics and fashion, research, whether academic or technical, and others only limited by the evolution of business. How a position is couched in terms of duties is critical to whether the INS will agree that it requires a specialized degree and is a specialty occupation.

To meet the specialty occupation standard of a position offered, it is critical that the job description include the sorts of functions that INS recognizes as requiring a minimum of a bachelor’s degree. The following is a list of core duties that are often found in many H-1B level jobs. Although the list is far from exhaustive, it includes the kinds of functions that INS generally agrees are specialized:

Analysis; Research; Consultation; Coordination; Recommendations to management; Writing or preparing reports; Teaching or training others; Solving problems; Planning; Designing; Representing clients; Developing; Formulation; Establishment; Review and evaluation; Devising methods and procedures.

These functions are taken from a number of positions in the Dictionary of Occupational Titles (DOT) and the Standard Occupational Classification (SOC) both of which are published by the U.S. Department of Labor and which are needed to properly analyze any proposed H-1B position. While DOL is replacing the DOT with the SOC, the DOT is not dead yet. It is this writer’s opinion, contrary to the INS, use of the DOT assists in categorizing specific positions at the beginning of the case. It permits more specific analysis of job duties than the SOC because there are many more such codes. However, just because a position has an SVP of 8 does not mean that INS will agree that the

position is a specialty occupation any more than if by using one of the functions in the listing above will guarantee a finding of specialty occupation. From the specific analysis under DOT a more generalized pigeon holing to the SOC is possible. Nevertheless, it is critical to convince the INS with customized language that the particular position in question is at the specialty occupation level far more than simply pointing to a DOT or SOC designation. Please note that the SOC has a crosswalk function from the DOT and can be found as part of the OES On-Line wage library at:
<http://flcdatacenter.com/owl.asp>.

A common area of caution involves general business functions that are not specialized enough. General positions that require a general business degree are not specialty occupations. Avoid H-1B for general business degrees unless the position requires a specialized function such as finance, accounting, management or marketing and the alien's transcript support the specialization. Staff management duties alone unless coupled with another specialty for example, agronomy, computer software operations or engineering are usually not specialty occupations at the bachelors level. The Masters level is more commonly accepted as H-1B caliber where various groups of people are managed. First line supervision is not management. Nor are activities involving sales, except perhaps at a higher management level. Where an employer routinely requires the general business bachelor's degree of all candidates, and there is good reason why they do, such as management trainee positions where the applicant is tracked to be involved in specialized business functions after exposure to a broader base of functions, then the H-1B is possible. I discuss the area of business studies to illustrate that the analysis of H-1B is not a black and white issue. These shades of gray exist in many other types of positions, which are not mentioned in this discussion. They go to show that a borderline case can win or lose depending upon how it is prepared.

If the requirement for the job is confirmed as requiring a minimum of a bachelor's degree, and we either use the employer's job description if such exists, or permit the employer to craft the job description using language like that listed above, or otherwise at the specialty level, then we meet the first prong of the H-1 test. We can then move on to analyze whether the applicant is specialized. Our next article in this series will discuss that analysis.