

Position and Beneficiary Requirements for a Specialty Occupation Worker

H-1B Specialty Occupation Workers

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

- 1) theoretical and practical application of a body of highly specialized knowledge, and
- 2) 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.

H-1B Specialty Occupation Workers

8 C.F.R. § 214.2(h)(4)(ii) states the following:

Specialty occupation means an occupation which

[(1)] 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

[(2)] 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.

H-1B Specialty Occupation Workers

8 C.F.R. § 214.2(h)(4)(iii)(A) provides 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 positions; 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.

Specialty Occupation: Statutory and Regulatory Framework

The Act and the regulations must be read together.

8 C.F.R. § 214.2(h)(4)(iii)(A) provides supplemental criteria that must be met in accordance with, and not as alternatives to, the statutory and regulatory definitions of specialty occupation.

Position Requirements

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.

See Royal Siam Corp. v. Chertoff, 484 F.3d 139, 147 (1st Cir. 2007) (describing "a degree requirement in a specific specialty" as "one that relates directly to the duties and responsibilities of a particular position").

Criterion One

A baccalaureate or higher degree in a specific specialty, or its equivalent, is normally the minimum requirement for entry into the particular position.

- U.S. Department of Labor's Occupational Outlook Handbook (*Handbook*) – *The Handbook* is an authoritative source on the duties and educational requirements of the wide variety of occupations that it addresses.
- The petitioner may provide probative evidence (e.g., documentation from other objective, authoritative sources) that supports a finding that the particular position in question qualifies as a specialty occupation.
- Whenever more than one authoritative source exists, an adjudicator will consider and weigh all of the evidence presented to determine whether the particular position qualifies as a specialty occupation.

Criterion Two – 1st Prong

A bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner

Factors often considered by USCIS include:

- whether the *Handbook* reports a standard, entry requirement of a degree;
- whether the industry's professional association has made a degree a minimum entry requirement; and
- whether letters or affidavits from firms or individuals in the industry attest that such firms routinely employ and recruit only degreed individuals.

Criterion Two – 1st Prong

A bachelor's degree in a specific specialty, or its equivalent, is common to the petitioner's industry in positions that are both: (1) parallel to the proffered position; and (2) located in organizations that are similar to the petitioner

- For the petitioner to establish that an organization is similar, it must demonstrate that the petitioner and the organization share the same general characteristics.
- When determining whether the petitioner and the advertising organization share the same general characteristics, such factors may include information regarding the nature or type of organization and, when pertinent, the particular scope of operations, as well as the level of revenue and staffing (to list just a few elements that may be considered).
- North American Industry Classification System (NAICS) code
- Does the size of the petitioner's business operations impact the job duties?

Criterion Two – 2nd Prong

An employer may show that its particular position is so complex or unique that it can be performed only by an individual with a baccalaureate or higher degree in a specific specialty, or its equivalent

Examples of factors that may be considered:

- Did the petitioner explain which of the duties would be so complex or unique as to be distinguishable from those of similar but non-degreed or non-specialty degreed employment?
- Did the petitioner explain how the academic curriculum is necessary to perform the duties that are so complex and unique?

Also:

- It may be helpful to review the wage level designated on the Labor Condition Application.

Criterion Three

The employer normally requires a baccalaureate or higher degree in a specific specialty, or its equivalent, for the position

- USCIS is not limited to solely reviewing a petitioner's claimed self-imposed requirements.
- The requirement of a college degree for the sake of general education, or to obtain what a petitioner perceives to be a higher caliber employee will not establish eligibility. *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm'r 1988)

Criterion Four

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 in a specific specialty, or its equivalent

Examples of factors that may be considered:

- Has the petitioner sufficiently described the duties?
- Has specialization and complexity been sufficiently developed as aspects of the position?

Also:

- It may be helpful to review the wage level designated on the Labor Condition Application.

Related Issues

- General-purpose bachelor's degree
- Degree requirement in disparate / different / dissimilar fields

The petitioner must establish how each acceptable, specific field of study is directly related to the duties and responsibilities of the particular position.

Related Issues

- **Duties of the proffered position are insufficiently described**
 - Duties copied from O*NET, DOT, the *Handbook*, or other internet source
 - Duties are so vague you cannot ascertain what the beneficiary will actually do on a day-to-day basis
 - Petitioner has indicated that the proffered position pertains to more than one occupational category without sufficient explanation

Related Issues

- **Inconsistencies in the file call into question the credibility of the entire petition**
 - Inconsistencies in the petitioner's statements
 - Evidence provided doesn't match petitioner's statement
 - Scope of petitioner's business operations doesn't match duties of proffered position
 - Not apparent how beneficiary will be relieved of non-qualifying duties (small company with few employees)
- **NAICS mismatch**

Related Issues

- **LCA wage level does not match the petitioner's description of the proffered position**
 - Level I wage, but the position requires substantial independent judgment, experience, and/or expertise, or requires an advanced degree beyond what is normally required for the occupational category
- **Petitioner has not established that it will pay a sufficient wage**
 - LCA Level I but position requires special skills (e.g., foreign language skills)
 - Prevailing wage listed on LCA appears to be wrong (too low)
 - Inconsistent information about the position as represented to DOL and USCIS

Beneficiary Qualifications

USCIS is required to follow long-standing legal standards and determine:

- First, whether the proffered position qualifies as a specialty occupation, and
- Second, whether a beneficiary was qualified for the position at the time the nonimmigrant visa petition was filed.

Cf. Matter of Michael Hertz Assoc., 19 I&N Dec. 558, 560 (Comm'r 1988) ("The facts of a beneficiary's background only come at issue after it is found that the position in which the petitioner intends to employ him falls within [a specialty occupation].").

Beneficiary Qualifications

The petitioner must show that the beneficiary meets one of the following four criteria:

- 1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- 2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

Beneficiary Qualifications (cont'd)

- 3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment;
- 4) The beneficiary has 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 has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

Licensing Requirements

If the occupation (not the duties) requires a state or local license the beneficiary must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for a permanent license, except for administrative reasons, e.g. need Social Security # or DHS permission to be employed to receive licensure.

Identifying Licenses

- Temporary or provisional licenses normally are titled as such and may have requirements stated on the license that need to be completed before a permanent license can be issued.
- However, a few permanent licenses may also list requirements to be completed for an extension of the license and they normally do not have the word “permanent” in the title.

Equating Credentials (cont'd)

- (3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;
- (4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;
- (5) A determination by the Service that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty and that the beneficiary has achieved recognition of expertise in the specialty occupation as a result of such training and experience. . . ., not training and/or work experience.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the beneficiary is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.
- If otherwise approvable, the petition may be granted for one year or for the period that the temporary license is valid, whichever is longer.

Beneficiary Qualifications

- Common Issues

- No evaluation of foreign education
- Equivalency based on work experience and evaluation done by a commercial service, or the evaluator does not have authority to grant college credit
- Beneficiary does not appear to qualify under the petitioner's stated qualifications

Labor Condition Application (LCA)

Labor Condition Application (LCA)- General Requirements

- DOL Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA.*
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.
- The LCA does not constitute a determination that the occupation is a specialty occupation.

*(Except H-1B2 petitions for DOD research project workers)

Labor Condition Application (LCA)-

Contents

- Employer information
- Rate of pay
- Period of employment and occupation information
- Information related to work location
- Employer labor condition statements
- Public disclosure information
- Declaration of employer (signed)
- Contact information
- Number of workers sought

Labor Condition Application (LCA)- Purpose

The employer attests on the LCA that:

- it will pay the H-1B employee the greater of the prevailing or actual wage;
- the working conditions for the H-1B employee will be similar to the working conditions for similar U.S. workers;
- there is not a strike or lockout occurring at the place of employment; and
- it has provided notice of filing of an LCA at the H-1B employee's worksite.