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DHS Docket ID No. USCIS-2023-0005

Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of Policy and Strategy
5900 Capital Gateway Dr.
Camp Springs, MD 20588-0009

Attn: Charles L. Nimick

Chief, Business and Foreign Workers Division

Re: Regulatory Proposal for Modernizing H–1B Requirements, Providing Flexibility in the F–1 Program, and Program Improvements Affecting Other Nonimmigrant Workers - *Comment on Proposed Changes to H-1B Registration Process at 8 CFR 214.2(h)(8)(iii)*

Dear Mr. Nimick:

Cyrus D Mehta & Partners PLLC ("CDMP") is a New York law firm that focuses its practice mainly in the area of US immigration law and represents many clients in H-1B visa matters. CDMP also advocates on behalf of its clients to achieve fairer and just immigration laws, and also posts articles on its widely read The Insightful Immigration Blog, https://blog.cyrusmehta.com, in furtherance of this objective. CDMP is accessible at www.cyrusmehta.com.

CDMP limits its comments to the proposed new definition of "specialty occupation" and the proposal that the USCIS will look to the end client's requirements to determine whether the position qualifies as a specialty occupation. These are the NPRM that are cause for concern.

The NPRM's New Definition of "Specialty Occupation" Contradicts the INA

We commend DHS for clarifying in the proposed regulation that in order for a particular bachelor's degree to be normally considered the minimum requirement, "normally does not mean always" and that the agency will not differentiate "normally" from the equivalent terms such as "mostly" or "typically" used in the DOL's Occupational Outlook Handbook ("OOH") and other sources of information describing the preparatory requirements for occupations. This is consistent with *Innova Sols., Inc v. Baran*, 983 F.3d 428 (9th Cir. 2020) where the court held that " … there is no daylight between typically needed, per OOH, and normally required, per regulatory criteria. 'Typically' and 'normally' are synonyms."

However, we are deeply concerned that the provision in the NPRM that requires specialized studies to be "directly related" to the position impermissibly exceeds the statutory requirements of the Immigration and Nationality Act ("INA"). The NPRM at 8 CFR 214.2(h)(4)(ii) states,

> A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, is sufficient to qualify for the position. A position may allow a range of degrees or apply multiple bodies of highly specialized knowledge, provided that each of those qualifying degree fields or each body of highly specialized knowledge is directly related to the position.

There is no requirement in the INA provision that the required specialized studies must be "directly related" to the position. Under § 214(i)(1) of the Immigration and Nationality Act ("INA") a "specialty occupation" is defined as an occupation that requires

- Theoretical and practical application of a body of highly specialized knowledge, and
- 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

Therefore, in contrast to the requirement in the NPRM that the degree must be "directly related" to the position, the statute at INA § 214(i)(1) clearly provides a substantially broader standard, stating that a requirement of a degree in the specialty or its equivalent can form the basis of a specialty occupation. A federal court explicitly stated that the statutory language defining a specialty occupation includes not only a required degree in the specialty but also other combinations of academic and experiential training that would qualify a beneficiary to perform the duties of the specialty occupation. In *Tapis International v INS*, the court held that a

> position may qualify as a specialty occupation if the employer requires a bachelor's degree *or its equivalent.* For the "equivalent" language to have any reasonable meaning, it must encompass … various combinations of academic and experience based training. It defies logic to read the bachelor's requirement of "specialty occupation" to include only those positions where a specific bachelor's degree is offered.

Tapis International v INS, 94 F. Supp. 2d 172 (D. Massachusetts 2000). The holding of *Tapis International* therefore specifically precludes the impermissible limitations that the agency seeks to impose in the NPRM by limiting employers to require only degrees that are "directly related."

The language in INA § 214(i)(1) that defines a specialty occupation by the requirement of either a bachelor's degree or higher in the specific specialty "or its equivalent" as a minimum for entry into the occupation is distinct from the statutory requirement of the qualifications that the H-1B beneficiary must possess to qualify for the specialty occupation. The statute sets forth distinct requirements at INA § 214(i)(2) for the beneficiary to establish his or her qualifications for the specialty occupation, such as completion of a bachelor's degree or experience in the specialty through progressively responsible positions relating to the specialty.

Therefore, the phrase in the statutory definition of specialty occupation at INA § 214(i)(1), which includes both a bachelor's degree or higher in the specific specialty and the alternative of "its equivalent" broadens the permissible requirement for a specialty occupation to "not only skill, knowledge, work experience, or training … but also various combinations of academic and experience based training." *See Tapis, supra*. Thus, under the statutory language, a position can qualify as specialty occupation not only on the basis of a specialized degree requirement, but also where the occupation requires a non-specialized degree combined with specialized experience, training or coursework as the equivalent of a specialized degree to serve as the minimum requirement for entry into the occupation. The rigid standard in the NPRM that the agency seeks to impose with its requirement that every permissible degree must be "directly related" contradicts the clear language of the statute and is therefore *ultra vires* and impermissible.

Another area of significant concern to our organization is the agency's misplaced and impermissible attempt to exclude positions requiring business degrees from the definition of specialty occupation. In its focus on excluding these positions from the definition of specialty occupation, USCIS appears to base its analysis on outdated notions that positions requiring a business degree are too generalized to qualify for H-1B classification. On the contrary, graduates of undergraduate and graduate business programs typically gain high-demand, sought-after skills in specialized STEM and business areas, including data analysis, technology management, accounting, financial forecasting and analysis, and many other disciplines. For many years the agency's practice has been to provide employers with the opportunity to establish that a

position's requirements and the beneficiary's qualifications were sufficient to qualify as a specialty occupation through *either* a business degree with a formal concentration *or*, alternatively, through a specific combination of coursework, *or* in some cases specialized professional experience. We urge the agency to recognize this important and long-established policy and practice and continue to allow employers to build a record to establish the specialized needs of sponsored positions to qualify as specialty occupations.

Similarly, we have significant concerns with the language in the preamble to the rule that would disqualify positions that require an engineering degree, without specialization, from qualifying as a specialty occupation. The NPRM states that "a petition with a requirement of any engineering degree in any field of engineering for a position of software developer would generally not satisfy the statutory requirement" as the petitioner may not be able to demonstrate that a range of fields of engineering would qualify the H-1B worker to perform the duties of a specialty occupation. This interpretation is impermissibly narrow and subverts the intent and the plain language of the statute. When a federal court recently overturned an agency denial of an H-1B petition based on the employer's requirement for a non-specialized engineering degree, the court explained that the statute does not require specialty occupations to be subspecialties. In its analysis, the court stated:

> Importantly, the INA defines professions — the basis of the H-1B Regulation's specialty occupation requirement — at the categorical level (e.g., "lawyers" and "teachers," 8 U.S.C. § 1101(a)(32), rather than "tax lawyer" or "college English professor," see id.) and specifically includes "engineers," id. In addition, the specialty occupation provision arose from a need "to meet labor shortages . . . in occupational fields, such as nursing, engineering, and computer science." 1988 Proposal, 53 FR 43217-01, at 43218 (emphasis added). Put simply, in contrast to a liberal arts degree, which the Service deemed "an [in]appropriate degree in a profession" because of its "broad[ness]," 1990 Rule, 55 FR 2606-01, at 2609, an engineering degree requirement meets the specialty occupation degree requirement.

InspectionXpert Corp. v. Cuccinelli, 1:19cv65, 58 (M.D.N.C. Mar. 5, 2020).

The decision in *InspectionXpert*, in addition to explaining that the statute disallows the requirement of specialized engineering degrees, aligns with the reality of the workplace and the skills gained in engineering degree programs. While there are many types of engineering disciplines, engineering degree programs provide a common core of advanced quantitative and technological skills that prepare the worker to perform the technical duties of a range of positions in specialty occupations such as Operations Research Analyst, Software Developer or Computer Systems Analyst. Again, we urge USCIS to recognize the long-established practice of allowing employers to build a record to establish the specialized needs of their positions to qualify as specialty occupations, including those where the employer believes that the requirements of a

particular position includes a number of engineering degrees or a non-specified engineering degree.

Moreover, the disfavoring of business management and engineering degrees in qualifying a position for H-1B classification flatly contradicts the Biden Administration's National Security guidance and strategy on "attracting and retaining the world's best talent" and the President's October 30, 2023, Executive Order on the "Safe, Secure and Trustworthy Development and Use of Artificial Intelligence." Executive Order ("EO") 14110. In studying the AI workforce, experts have found that primary degrees required for *core* AI job duties are business administration, computer science, engineering, mathematics, and statistics.[i] Yet, USCIS has chosen to provide an example in the preamble explanation of the NPRM cautioning employers about requiring the type of quantitative and problem-solving skills developed in an engineering degree as unlikely to be "directly related" to a qualifying H-1B position, and has proposed codifying in regulation that positions requiring business administration studies should *not* qualify for H-1B status. This creates unnecessary hurdles for employers engaging in on-campus recruitment in the U.S. where international students account for more than 50% of graduate engineering degrees [ii] and are among those completing a Master of Business Administration or Bachelor of Business Administration,[iii] and deprives our economy of the precise types of AI, technology and national security talent that the Biden Administration is making significant effort to attract and retain.

In conclusion, the proposal to redefine "specialty occupation" will not only contravene the statutory provisions defining the H-1B criteria, but it will make it unnecessarily restrictive and run counter to the Administration efforts to boost our competitive advantage and our economy. See Stuart Anderson's Biden Immigration Rule Copies Some Trump Plans to Restrict H-B Visas, Forbes (October 23, 2023), which provides examples of emerging occupations vital to U.S. economic growth and competitiveness that may not qualify under the proposed definition of specialty occupation. The views of the undersigned are also reflected in this article.

Therefore, CDMP proposes that USCIS delete the language in proposed 8 CFR § 214.2(h)(4)(ii) stating that "[t]he required specialized studies must be directly related to the position" and "A position is not a specialty occupation if attainment of a general degree, such as business administration or liberal arts, without further specialization, if sufficient to qualify for the position."

We request that the regulatory language remains consistent with the definition of "specialty occupation" under INA § 214(i)(1) that requires "[a]ttainment 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."

Also, the proposed regulation should allow for a specific body of knowledge required to perform the job duties of the position to properly interpret "or its equivalent" in INA § 214(i)(1). For

instance, if the position of management analyst requires a bachelor's degree and specialized experience or training, it ought to be considered a "specialty occupation" for H-1B classification if the beneficiary possesses a bachelor's degree in a liberal arts field and also has experience or training in marketing. Similarly, the position ought to also qualify as a specialty occupation if the candidate possesses a bachelor's degree in liberal arts but has significant course work in quantitative fields such as statistics and data analytics that would allow the beneficiary to perform the duties of the position of marketing analyst.

The End Client's Requirements Should Not Determine the Degree Requirement

Under the NPRM, for a worker who will be "staffed" to a third-party client site, the client rather than the employer would need to establish that it would normally require a U.S. bachelor's degree in a directly related specific specialty. We believe that this requirement is unduly burdensome in the normal course of business as it would be difficult for the sponsoring employer to obtain such documentation from a client.

The agency's reliance in the NPRM on the 5th Circuit's holding in *Defensor v Meissner*, 201 F. 3d 384 (5th Cir. 2000) is misplaced. In *Defensor*, the Court treated the client as a co-employer. In contrast, the H-1B regulations contemplate only the petitioner as the employer. The client does not supervise the H-1B worker or evaluate their job performance. The clients of the petitioner would certainly not want to be viewed as a co-employer and incur potential liability from a claim by the H-1B worker.

Under the NPRM, it is important to note that the educational requirements of the third party would only be taken into account and would only apply if the H-1B worker is contracted in a "staff augmentation" arrangement to the third party as opposed to providing services to the third party. *Defensor v. Meissner* involved a staffing agency for nurses that filed the H-1B petitions and contracted the nurses to hospitals. There is a critical distinction between the nurse in *Defensor v. Meissner* and a software engineer who is providing services to the client rather than being staffed to the client. The absence of clear guidance on this key distinction is likely to result in a proliferation of RFEs resulting in burdens for the employer and inefficient use of government resources.

For these reasons, CDMP proposes that the phrase "or third party if the beneficiary will be staffed to that third party" in 8 CFR 214.2(h)(4)(iii) be deleted.

Yours sincerely,

Cyrus D. Mehta
Managing Partner

[i] Autumn Toney and Melissa Flagg, U.S. Demand for AI-Related Talent Part II: Degree Majors and Skill Assessment (September 2020), Center for Security and Emerging Technology, p. 3.

[ii] See e.g., National Science Foundation, Science & Engineering Indicators 2022, "International S&E Higher Education and Student Mobility," which reported that students on temporary visas earned 50% of engineering Master's degrees in the United States and over half of U.S. doctoral degrees in engineering (State of U.S. Science & Engineering 2022, National Science Board).

[iii] Higher-ed institutions commonly offer four different types of Business degrees: Bachelor of Arts or Bachelor of Science degrees in Business, which have different distribution requirements and different options for "specialization" as compared to a Bachelor in Business Administration and a Master in Business Administration. The proposed regulatory text would permit an adjudicator to start with a presumption that a Bachelors or Masters in Business Administration cannot be qualifying, based on the label of the degree, and by default ignore a completed minor or concentration, for example, as not being a "specialization," without obligating the adjudicator in all cases to review and give weight to the transcript.