

USCIS H-1B Adjudications and RFEs Questioning Level I Wage Selection

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NAFSA’s International Student and Scholar Regulatory Practice Committee (ISSRP) and its Employment Based (EB) Subcommittee are aware of the evolving issue of H-1B Requests for Evidence (RFEs) related to the use of Wage Level I prevailing wage determinations (PWDs) and eligibility for H-1B classification.

Although most RFEs appear to have been issued in H-1B cap-subject cases, we understand that cap-exempt petitioners, including universities, have also received similar RFEs. This NAFSA resource provides some basic information on what is currently known, and a “back-to-basics” reminder of the legal framework surrounding the areas of concern.

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Background and Scope

Initial assessments link the motivation for these RFEs, at least in part, to the following policies and directives:

- The April 18, 2017 [Executive Order 13788](#), titled *Buy American Hire American*, which focused on reforming the H-1B category
- USCIS' April 3, 2017 announcement, [Putting American Workers First: USCIS Announces Further Measures to Detect H-1B Visa Fraud and Abuse](#)
- USCIS' April 3, 2017 announcement, [Combating and reporting H-1B fraud and program abuse](#)
- USCIS March 31, 2017 Policy Memorandum, [Guidance memo on H1B computer related positions](#)

Responding to RFEs

Preventing, anticipating, or responding to an RFE of this type requires a deep dive into the position. Is the position a traditional Professor, Researcher etc., or is it a staff position that may be questioned by USCIS even without this current trend, for example, a Residence Life, Coordinator or other staff position. Formulate a “back to the basics” response that specifically addresses the elements of the RFE, i.e.:

1. Restate the rule applicable to the issue brought up in the RFE (in plain language),
2. Cite the authorities for the rule (these are the underlying statutes, regulations, and policy statements that support the rule),
3. Apply the rule to the facts, and
4. Assert a logical conclusion

The American Immigration Lawyers Association (AILA) developed a detailed Practice Pointer for AILA attorneys to use when responding to RFEs of this type [AILA Doc. No. 17090132], and offers a recorded audio seminar on Responding to H-1B RFEs Raising ‘Level 1 Wage’ Issues, available from AILA at <https://agora.aila.org/product/detail/3429>. The AILA resources (and AILA attorneys) go into greater depth regarding each element of the RFEs.

There is little data regarding the success or failure of responses to these RFEs to date. This NAFSA advisory does not constitute legal advice. This NAFSA resource provides some basic information on what is currently known, and a “back-to-basics” reminder of the legal framework surrounding the areas of concern. Consider whether your institution needs legal assistance to make the best response.

NAFSA resources provide general information for educational purposes. They do not constitute legal advice, and are not a substitute for close and careful reading and application of relevant law and government policy. Individuals who need legal assistance should contact an experienced immigration lawyer.

RFE Types

AILA collected numerous RFE samples, and developed a detailed Practice Pointer for AILA attorneys to use when responding to RFEs of this type. The AILA Practice Pointer identifies three slightly different template versions of the RFE, which we summarize in this NAFSA advisory as follows:

- **Version one** requires the petitioner to demonstrate that a Level 1 PWD is appropriate for the specialty occupation. These RFEs imply that although the position may be specialized, the wage

level of the PWD used to support the LCA was inappropriate, and that the LCA should have been supported by a PWD above Level 1.

- **Version two** implies that a Level 1 PWD is never appropriate for a specialty occupation. These RFEs usually find fault with characterizing any “specialty occupation” as “entry level.” To make this argument, these RFEs cite the DOL general definition of Wage Level 1, and over-focus on phrases from that definition such as, “have only a basic understanding of the occupation... perform routine tasks that require limited, if any, exercise of judgment.” The RFE then asks the petitioner to demonstrate that the position is a specialty occupation.
- **Version three** combines both issues.

AILA’s analysis of 187 RFE examples show that “Level 1 RFEs for Job Zone 4 occupations tend to challenge whether the position is a specialty occupation or whether a Level 1 LCA is appropriate, while RFEs for Job Zone 5 occupations tend to challenge whether a Level 1 LCA is appropriate.”

Addressing USCIS’s argument that Wage Level 1 is not appropriate for a specialty occupation

To address USCIS’s assertions that a Level I PWD is never appropriate for a specialty occupation, one argument to make is that some occupations that require a high level of expertise can also be “entry level.” An example of this is a postdoc, which requires a doctoral degree as a minimum educational credential for an entry-level position. Consider citing this DOL OFLC Prevailing Wage FAQ, which clearly indicates that a postdoc is usually an “entry level” position where a Wage Level 1 wage is appropriate:

<https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#q!499>:

4. Are all Postdoctoral Fellow positions considered entry level?

No. The NPWC considers a Postdoctoral Fellow position as entry level unless the position requires significant experience. If the employer requires significant experience and/or training for a Postdoctoral Fellow position, the NPWC may issue a wage higher than a level one. Additionally, if the position requires supervising other postdoctoral fellows or has other significant special requirements or duties, the wage issued may be higher than a level one.
March 15, 2011

Along these same lines, you might also argue that every occupation, including specialty occupations, has an entry level, and that Wage Level 1 appropriately reflects the entry level wages for the job in your petition.

You may also wish to explain the role of DOL in setting prevailing wage determination policy, and USCIS’s role in checking for factual accuracy. It may also be helpful to walk them through the “mathematical calculation” that DOL requires you use to determine the wage level. “Plain language” descriptions of DOL’s 4-level taxonomy in cases like *Matter of Reed Elsevier, Inc.*, [2008-PER-00201](#) (BALCA April 13, 2009) might help illustrate the process. For example, BALCA explains in the *Reed Elsevier* case that the DOL tabular worksheet “includes separate categories for each requirement: education, experience, special skills, and supervisory duties,” and that,

“Every occupation begins at wage level 1, and wage level may increase, depending on whether or not each of the position’s requirements exceed those described on O*Net.”

This will be a good time for you to refresh your knowledge of DOL's November 2009 [Prevailing Wage Determination Policy Guidance](#), which is the source of the "mathematical calculation" that DOL requires you use to determine the wage level based on education, experience, special skills, and supervisory duties.

- Appendix A contains detailed instructions for the NPWC on how to use the check sheet and worksheet
- [Appendix B](#) of the DOL guidance provides a "check sheet"
- [Appendix C](#) provides a "worksheet"
- [Appendix D](#) is a list of "professional" occupations wherein the corresponding "education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations." O*NET-SOC Codes not on Appendix D use the education description in the occupation's "job zone" as a point of departure.

Some potentially helpful observations:

- On page 13 of the guidance document, DOL instructs the NPWC that, "[t]he process described above should not be implemented in an automated fashion. The NPWC must exercise judgment when making prevailing wage determinations. **The wage level should be commensurate with the complexity of tasks, independent judgment required, and amount of close supervision received as described in the employer's job opportunity.**"
- Non-precedent cases such as Matter of Quintanilla v. Myriad RBM, Inc.; D/B/A Rules Based Medicine ([2014-LCA-00011](#), BALCA) clarify that, "Complainant argued that his position was not a Level I position because it required extensive training and he was extremely qualified to perform the tasks of his job. He used the definition of a Level I position to show that unlike the definition, his position required more than a basic understanding of the occupation, he was not under close supervision, and he was not an intern, research fellow, or worker in training. However, what Complainant fails to understand is that even if certain aspects of his position are above Level I, that does not automatically place him at Level II. **Further, the purpose of using OES is to go through the checklist and use the definitions of each Level as a guiding, but not controlling, factor.**" (p. 13, note 44)

For quick reference, here are the DOL descriptions of the four Wage Levels established by DOL's November 2009 [Prevailing Wage Determination Policy Guidance](#):

Wage Level I. Level I (entry) wage rates are assigned to job offers for beginning level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgment. The tasks provide experience and familiarization with the employer's methods, practices, and programs. The employees may perform higher level work for training and developmental purposes. These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training, or an internship are indicators that a Level I wage should be considered.

Wage Level II. Level II (qualified) wage rates are assigned to job offers for qualified employees that have attained, either through education or experience, a good understanding of the occupation. They perform moderately complex tasks that require limited judgment. An indicator that the job request warrants a wage determination at Level II would be a requirement for years

of education and/or experience that are generally required as described in the O*NET Job Zones.

Wage Level III. Level III (experienced) wage rates are assigned to job offers for experienced employees that have a sound understanding of the occupation and have attained, either through education or experience, special skills or knowledge. They perform tasks that require exercising judgment and may coordinate the activities of other staff. They may have supervisory authority over those staff. A requirement for years of experience or educational degrees that are at the higher ranges indicated in the O*NET Job Zones would be indicators that a Level III wage should be considered.

Frequently, key words in the job title can be used as indicators that an employer's job offer is for an experienced worker. Words such as 'lead' (lead analyst) or 'senior' (senior programmer) or 'head' (head nurse) or 'chief' (crew chief) or 'journeyman' (journeyman plumber) would be indicators that a Level III wage should be considered.

Wage Level IV. Level IV (fully competent) wage rates are assigned to job offers for competent employees who have sufficient experience in the occupation to plan and conduct work requiring judgment and the independent evaluation, selection, modification and application of standard procedures and techniques. Such employees use advanced skills and diversified knowledge to solve unusual and complex problems. These employees receive only technical guidance and their work is reviewed only for application of sound judgment and effectiveness in meeting the establishment's procedures and expectations. They generally have management and/or supervisory responsibilities.

The NPWC will use a "point system" to determine the appropriate wage level for a position. Points are awarded based on a comparison of the employer's job offer to the requirements in the SOC/O*NET description for similar occupations.

Remember, according to DOL's November 2009 [Prevailing Wage Determination Policy Guidance](#), for O*NET-SOC codes on Appendix D, use Appendix D's Education and Training Categories as the point of departure for the baseline required degree on the Education section of the DOL wage level determination worksheet, and for all other occupations, use the O*NET job zone for that occupation as the baseline.

Only education requirements that exceed the degree level listed in the "usually requires" description of the Appendix D Education and Training Category, or that exceed the degree level listed in the "most occupations require" or "usually require" description of the O*NET Job Zone for that occupation, will require a point to be added to the wage level worksheet.

For an explanation of DOL's O*NET job zones, see <https://www.onetonline.org/help/online/zones>.

Two of the five O*NET job zones are relevant to H-1B cases:

- [Job Zone 4](#) – "Most of these occupations require a four-year bachelor's degree, but some do not."
- [Job Zone 5](#) – "Most of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree)."

Remember the basics of what constitutes a specialty occupation

The analysis in these RFEs may also lead USCIS to ask the petitioner to prove that the position qualifies as a specialty occupation, and that the beneficiary possesses the educational background to fill the position.

Remember that INA 214(i) defines a "specialty occupation" for H-1B purposes 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.

It is not sufficient to argue that entry into the occupation requires "any" bachelor's or higher degree. The petitioner must establish that the job is in an occupation where "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." And it must also be shown that the beneficiary possesses such a degree or its equivalent.

You can improve your chances of avoiding an RFE by explaining in a letter in support of the petition exactly how the duties of the position relate to the educational requirement and how they correlate to the wage level of the PWD on the LCA supporting the petition.

Degree level

8 CFR 214.2(h)(4)(iii)(A) is the regulatory authority for establishing a job is in a specialty occupation. A petitioner must show that the job fits within one of the following alternative 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 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 best place to begin for establishing that a bachelor's degree is normally the minimum requirement (alternative (1) above) is the Bureau of Labor Statistics' Occupational Outlook Handbook (OOH), at <https://www.bls.gov/ooh/>. Ideally, the OOH entry for your occupation would indicate both the degree level as well as the degree specialty. Some OOH entries do, many do not. For those that do not, you will have to prepare extra documentation to establish the specialty. Compare these two OOH entries, found under the "How to Become One" tab:

Mechanical Engineers	Human Resources Manager
<p>“Mechanical engineers typically need a bachelor’s degree in mechanical engineering or mechanical engineering technology.”</p>	<p>“Human resources managers usually need a bachelor’s degree. Candidates may earn a bachelor’s degree in human resources or in another field, such as finance, business management, education, or information technology. Courses in subjects such as conflict management or industrial psychology may be helpful.”</p>

The OOH entry for Mechanical Engineers references both degree level and a narrow range of degree specialization, whereas the entry for Human Resource Manager, although it references a degree level, presents a range of degree specializations that USCIS will likely view as too broad to satisfy the “specialty occupation” definition without additional documentation and corroboration from the petitioner.

The O*NET description of the position can also be useful in demonstrating that at least a bachelor’s degree is the minimum level of education required for entry into the occupation. For occupations not listed as “professional occupations” in Appendix D (see Appendix D of DOL’s prevailing wage guidance, on page 10), the O*NET description will include information about the standard type of preparation needed for the occupation. For example, the O*NET occupation “25-1124.00 - Foreign Language and Literature Teachers, Postsecondary” is assigned to “[Job Zone Five](#),” where education is described as: “Most of these occupations require graduate school. For example, they may require a master's degree, and some require a Ph.D., M.D., or J.D. (law degree).” It is also assigned a [Specific Vocational Preparation](#) (SVP) Range of “8.0 and above,” which translates to a combined education, experience, and training minimum of “Over 4 years up to and including 10 years.” There is only one more SVP range above 8, SVP 9, which includes occupations that require “Over 10 years” of combined education, experience, and training.

Remember, though, that establishing the minimum *degree level* required is only half the battle. You must also establish that the occupation requires a degree at that level “in a specific specialty” for entry into the occupation. The “degree specialty” requirement is discussed in the next section.

Degree specialty

The definition of “specialty occupation” at 8 CFR 214.2(h)(4)(ii) shows that the degree that is the basis of the H-1B petition cannot be just any degree. It must be “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.”

Specialty occupation means an occupation which 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 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.

It is also possible for an occupation to have too broad an educational requirement to satisfy the specialty occupation definition. For example, in an April 7, 2011 decision, the AAO pointed out that:

"there must be a close correlation between the required specialized studies and the position, the requirement of a degree with a generalized title, such as business administration, without further specification, does not establish the position as a specialty occupation"

and that,

"Although the Handbook indicates that a bachelor's degree is typically the minimum requirement for entry into this occupational category, it also indicates that acceptable degrees include those in business administration, liberal arts, or other disciplines. Therefore, a bachelor's degree in a specific specialty is not required for entry into the proffered position."

Particularly where the Occupational Outlook Handbook or O*NET indicate a bachelor's degree as a minimum requirement, but do not mention a specific specialty, or where the range of specialties is too broad, petitioners will have a heavier "lift" to establish the "specialty" that qualifies the position as a specialty occupation. For example, compare these two OOH entries, found under the "How to Become One" tab:

Postsecondary Teachers	Postsecondary Education Administrators
"Postsecondary teachers who work for 4-year colleges and universities typically need a doctoral degree in their field."	"Educational requirements vary for different positions. A bachelor's degree may be sufficient, but a master's degree or Ph.D. is generally required. Degrees can be in a variety of disciplines, such as social work, accounting, or marketing. Provosts and deans often must have a Ph.D. Some provosts and deans begin their career as professors and later move into administration. These administrators have doctorates in the field in which they taught. Other provosts and deans have a Ph.D. in higher education or a related field."

The OOH entry for Postsecondary Teachers references both degree level and a requirement that the degree be "in their field." The petitioner should narrowly establish what "the field" is. Most postsecondary teachers are also listed as "professional occupations" in Appendix D (see Appendix D of DOL's prevailing wage guidance, on page 10). The entry for Postsecondary Education Administrators, although it establishes that at least a bachelor's degree is required, presents a wide range of degree specializations, which USCIS will likely view as too broad to satisfy the definition of "specialty" based on the OOH description alone.

The petitioner sponsoring a Postsecondary Education Administrator, however, may have to establish that the position qualifies under criterion 2 ("The degree requirement is common to the industry in parallel positions among similar organizations"), rather than criterion 1, which is a heavier lift as it will require the petitioner to establish what the "specialty" is and how it relates to the specific position and to the occupation as a whole.

Beneficiary possesses the specialty degree

8 CFR 214.2(h)(4)(iii)(C) is the regulatory authority for demonstrating how the beneficiary possesses the required specialty degree. The petitioner must establish the beneficiary's credentials meet one of the following alternative criteria:

- (1) Hold a **United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;**
- (2) Hold 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;

(3) Hold 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; or

(4) Have 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.

Occupations that have traditionally be viewed as “specialty occupations”

Some occupations by their very nature have been recognized in law, policy, and adjudications as a specialty occupation. Even if the job in your petition is in one of those traditionally recognized occupations, you must still also establish the minimum degree level and the “specific specialty” that these professions require.

INA 101(a)(15)(32) definition of “profession”

The Immigration and Nationality Act defines the term *profession*:

(32) The term "profession" shall include but not be limited to **architects, engineers, lawyers, physicians, surgeons, and teachers** in elementary or secondary schools, colleges, academies, or seminaries.

The burden of establishing that a job in one of the above fields or occupations might generally be easier to meet than for positions that do not have such a traditional background as a “profession.”

You might argue that if the job is in an occupation in one of the “professions” listed in INA 101(a)(15)(32), it should be considered a specialty occupation. However, you must still also establish the minimum degree level and the “specific specialty” that these professions require.

Regulatory definition of “specialty occupation”

DHS regulations at 8 CFR 214.2(h)(4)(ii) further define the statutory term “specialty occupation” as:

“An occupation which requires theoretical and practical application of a body of highly specialized knowledge **in fields of human endeavor including, but no limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts...**”

Although the burden of establishing that a job in one of the above fields or occupations might generally be easier to meet than for positions not in one of those fields, you must still also establish the minimum degree level and the “specific specialty” that the job requires.

AAO Case Examples

Typical non-precedential decisions by the AAO (e.g., [AAO Decision WAC 10 008 50309 (April 7, 2011)]), assert that:

“USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as **engineers, computer scientists, certified public accountants, college professors, and other such occupations**. These professions, for which petitioners have regularly been able to establish a minimum entry requirement in the United States of a baccalaureate or higher degree in a specific specialty, or its equivalent, fairly represent the types of specialty occupations that Congress contemplated when it created the H-1B visa category.”

Another non-precedential case example is Matter of P-D-S-, ID# 283927 (AAO July 31, 2017), which states at footnote 10:

“The issue here is that the Petitioner’s designation of this position as a Level I position undermines its claim that the position is particularly complex, specialized, or unique compared to other positions within the same occupation. Nevertheless, **it is important to note that a Level I wage-designation does not preclude a proffered position from classification as a specialty occupation**. In certain occupations (doctors or lawyers, for example), such a position would still require a minimum of a bachelor’s degree in a specific specialty, or its equivalent, for entry. Similarly, however, a Level IV wage-designation would not reflect that an occupation qualifies as a specialty occupation if that higher-level position does not have an entry requirement of at least a bachelor’s degree in a specific specialty or its equivalent. That is, a position’s wage level designation may be a consideration but is not a substitute for a determination of whether a proffered position meets the requirements of section 214(i)(1) of the Act.”

Remember, though, that adjudicators are not bound to follow non-precedent decisions and decisions that have not been “adopted” by USCIS. You can, however, cite such cases to support and persuade.

[Appendix D of DOL’s prevailing wage guidance](#)

Another persuasive source of occupations that have traditionally required at least a bachelor’s degree or higher can be found in [Appendix D: Professional Occupations, Education and Training Categories](#), of the DOL November 2009 Prevailing Wage Determination Policy Guidance. Appendix D is a list of “professional” occupations wherein the corresponding “education and training categories assigned to those occupations shall be considered the usual education and training required when considering the education level for prevailing wage determinations.” Appendix D’s five “Education and Training Categories” are:

1. First professional degree. Completion of the academic program usually requires at least 6 years of fulltime equivalent academic study, including college study prior to entering the professional degree program.
2. Doctoral degree. Completion of the degree program usually requires at least 3 years of fulltime equivalent academic work beyond the bachelor's degree.
3. Master's degree. Completion of the degree program usually requires 1 or 2 years of fulltime equivalent study beyond the bachelor's degree.
4. Work experience, plus a bachelor's or higher degree. Most occupations in this category are managerial occupations that require experience in a related nonmanagerial position.
5. Bachelor's degree. Completion of the degree program generally requires at least 4 years but not more than 5 years of fulltime equivalent academic work.

Since all five education and training categories on Appendix D require at least a Bachelor’s degree, one might argue that if the job is in an occupation on Appendix D, it should be considered a specialty occupation, but you must also establish that the degree must be in a “specific specialty.”

Other challenging RFE language linked to specialty occupation concept

In some RFEs, USCIS asserts that an LCA based on a Wage Level 1 PWD:

- “the LCA does not show that the proffered position is more complex or unique than only an individual with a bachelor’s degree or higher in a specific specialty can perform them” or
- “you have not shown how this position is more complex than other positions within the occupation”

These RFE elements appear to be based on a faulty analogy to the guidance in the March 31, 2017 USCIS Policy Memorandum, [Guidance memo on H1B computer related positions](#), which involved the occupation of computer programmer. USCIS reasoned in that memo that since the Occupational Outlook Handbook “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.” The memo goes on to reason that if the occupation does not generally require at least a bachelor’s degree, i.e., it does not satisfy the specialty occupation criteria of 8 CFR 214.2(h)(4)(iii)(A)(1) [i.e., “A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position”], then the petitioner would have to demonstrate that the position meets one of the alternative specialty occupation criteria at 8 CFR 214.2(h)(4)(iii)(A)(2)-(4), namely:

(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 memo then properly reasons that if the normal entry requirement for the occupation of computer programmer in general is an associate’s degree, then asking for a bachelor’s degree, while perhaps satisfying an alternative specialty occupation criterion from 8 CFR 214.2(h)(4)(iii)(A)(2)-(4), would also likely be considered by DOL to be a requirement beyond the minimum that would usually be reflected by adding points to the DOL PWD worksheet that would result in a Wage Level above Level 1.

In some RFEs, USCIS seems to have improperly peppered their request with the alternative specialty occupation criteria of 8 CFR 214.2(h)(4)(iii)(A)(2)-(4), in a way that conflates those elements into a general requirement for all H-1B petitions. In responding to the RFE, a petitioner might consider arguing that those criteria should only be relevant in cases like a computer programmer, where *less than* a baccalaureate degree or its equivalent is normally the minimum requirement for entry into the occupation, but the specific position requires at least a bachelor’s degree.

Reminder of the “preponderance of the evidence” standard

It will also be helpful to gently explain to USCIS how you have met the “preponderance of the evidence” standard that is used in immigration cases such as H-1B petitions, which requires the petitioner to establish that “it is more likely than not that each of the required elements has been met.” Sources to cite on the preponderance standard include:

[USCIS Adjudicator's Field Manual 11.1\(c\)](#)

“The standard of proof applied in most administrative immigration proceedings is the ‘preponderance of the evidence’ standard. Thus, even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is ‘probably true’ or ‘more likely than not,’ the applicant or petitioner has satisfied the standard of proof. See [U.S. v. Cardozo-Fonseca](#), 480 U.S. 421 (1987) (defining ‘more likely than not’ as a greater than 50 percent probability of something occurring).”

[Requests for Evidence and Notices of Intent to Deny](#), USCIS Policy Memorandum PM-602-0085 (June 3, 2013)

“Understand the standard of proof that applies to the particular application, petition, or request. In most instances, the individual has the standard of proving eligibility by a preponderance of the evidence. Under that standard, the individual must prove it is more likely than not that each of the required elements has been met.”

[Matter of Chawathe](#) (precedent decision) 25 I&N Dec. 369 (AAO Oct. 20, 2010).

“The ‘preponderance of the evidence’ standard requires that the evidence demonstrate that the applicant’s claim is ‘probably true,’ where the determination of ‘truth’ is made based on the factual circumstances of each individual case. [Matter of E-M-](#), 20 I&N Dec. 77, 79-80 (Comm’r 1989). In evaluating the evidence, [Matter of E-M-](#) also stated that ‘[t]ruth is to be determined not by the quantity of evidence alone but by its quality.’ *Id.* at 80. Thus, in adjudicating the application pursuant to the preponderance of the evidence standard, the director must examine each piece of evidence for relevance, probative value, and credibility, both individually and within the context of the totality of the evidence, to determine whether the fact to be proven is probably true.

Even if the director has some doubt as to the truth, if the petitioner submits relevant, probative, and credible evidence that leads the director to believe that the claim is ‘more likely than not’ or ‘probably’ true, the applicant or petitioner has satisfied the standard of proof. See [INS v. Cardoza-Fonseca](#), 480 U.S. 421, 431 (1987) (discussing ‘more likely than not’ as a greater than 50% chance of an occurrence taking place). If the director can articulate a material doubt, it is appropriate for the director to either request additional evidence or, if that doubt leads the director to believe that the claim is probably not true, deny the application or petition.”

NAFSA resources provide general information for educational purposes. They do not constitute legal advice, and are not a substitute for close and careful reading and application of relevant law and government policy. Individuals who need legal assistance should contact an experienced immigration lawyer.