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*This material is not intended to substitute as legal advice.

Background

We are continuing to see high adjudicatory scrutiny and requests for evidence (RFEs) for many nonimmigrant and immigrant visa petitions. USCIS data shows that during fiscal year 2019, about 60% of all completed H-1B cases received an RFE as a result of the “Buy American, Hire American” Executive Order among other initiatives.

Fortunately, we are also seeing that the majority of our petitions undergoing RFEs are ultimately approved after another very strong and over-documented response.

This FAQ is intended to answer some of the most common questions we receive about RFEs, particularly as they relate to specialty occupations H-1B petitions.

1. What is an RFE?

An RFE is a request from a government agency – typically USCIS – to provide further information relating to a pending petition or application.

2. Why did we receive an RFE?

While immigration laws and regulations have not significantly changed over the last few years, USCIS’ adjudicatory policies, procedures and discretion have changed significantly. USCIS has been observably more unpredictable, inconsistent and keeps moving the goal post.

For example, USCIS no longer accepts factual statements made by a petitioning employer or others. All facts and statements must be backed up by extensive documentary evidence.

Additionally, under a new USCIS memo, adjudicators must apply an elevated level of scrutiny to extension requests. USCIS officers are required to re-adjudicate the petition and evidence even though it was previously evaluated and satisfactory.

3. How long does it take to prepare the RFE response?

It takes time to strategically develop a response, as all issues raised in the RFE must be answered fully and clearly and must be supported by strong probative evidence. Depending on the complexity of the RFE, a response typically takes a few weeks to 2 months to prepare and submit. The ability to prepare and submit a timely response also depends on the partnership and responsiveness between the attorney, the employer, and employee.

4. How long does USCIS take to adjudicate the case after the RFE response has been filed?

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If the petition was filed under premium processing, it will take 15 days when the response is received by USCIS. If the petition was filed under regular processing, it could take 6-12 months for USCIS to issue a response. Premium processing the response should be considered in some cases.

5. What are the most common current reasons cited in an H-1B RFE?

These reasons include failure to establish to USCIS' satisfaction:

- that the position qualifies as a specialty occupation;
- that the beneficiary has the required qualifications;
- availability of work (in-house);
- that the beneficiary has maintained his/her immigration status; and
- that the prevailing wage is appropriate.

6. How do we establish that the position is a specialty occupation?

The petition must demonstrate to USCIS' satisfaction that the position is one that requires not only the understanding and application of a highly specialized body of knowledge but also that the employer and the industry normally require at least a bachelor's degree or its equivalent in a particular specialty field, not a general field of education.

In recent years, USCIS has significantly narrowed its interpretation of a specialty occupation, requiring extensive evidence and links between the work to be performed, the background of the employer, the educational requirements for the position, and the foreign national's education.

There are four qualifying criteria to establish that the position is a specialty occupation:

- The position requires a Bachelor's Degree at a minimum
- A Bachelor's degree is the common entry-level requirement for the industry
- The employer normally requires a Bachelor's Degree or its equivalent
- The nature of the specific duties is so specialized and complex that the position requires a Bachelor's degree

There is specific evidence to establish each qualifying criteria.

7. How do we establish that a Bachelor's degree is normally the minimum requirement?

This includes, but is not limited to, the following:

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Evidence of the Nature and Complexity of the Employer’s Business and H-1B Position this evidence includes:

Responses to requests for proposals, marketing and business plans, brochures, technical specifications, contracts, agreements, statement of work orders, invoices, budgets, project timelines, job site photos, news articles, and others. The goal is to further show how the position fits within the needs of the employer’s business and to establish the complexity of the business and position.

Very Detailed Project(s) with Duties Breakdown and Educational Requirements. This includes an extremely detailed breakdown of each job duty with specific tasks performed as part of each job duty and explanations as to how the beneficiary’s education (specific coursework) is used and necessary to perform the duties. The goal is to tie each duty to the beneficiary’s courses in the specific field.

Employer’s Hiring Practices. This includes evidence of educational documents (diploma, certification, resume/CV, degree verification record, background information) of workers who previously or currently occupy the H-1B position or similar and have the same or closely related degree as the beneficiary. This also includes evidence of the hiring of these workers (W-2, pay records, performance evaluation, benefits summary). Additionally, it includes organizational chart(s) showing the employer’s hierarchy and staffing levels, and how the offered position fits within the organization’s structure (to illustrate the multifaceted nature of the position).

Industry Requirements (Similar Employers). This evidence includes establishing primarily through letters from seasoned professionals (such as HR Directors, Managers, Principals) that similar employers in the field also require a bachelor’s degree in the specific field when they hire for similar positions. This can also include: documents or letters from an authoritative career source or industry association, job advertisements/postings, and/or online bios or background information for similar positions by other employers in the field that require at least a bachelor’s degree in a specific field.

Third-Party Expert Opinion. This includes one or more opinion letters from a subject matter expert in the relevant field - usually an experienced university professor with credentials to provide this opinion. The expert letter includes an analysis of the position’s duties and supports the requirement of a bachelor’s degree or higher in a specific field.

We engage experts that also discuss the employer and its particular business and specifically focus on analyzing the detailed position job duties and establish, based on the expert’s experience and knowledge of the industry, that the duties are consistent with having a bachelor’s degree in a specific field (or narrow list of fields).

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