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Submitted via public.engagement@uscis.dhs.gov

Dear Director Jaddou,

The Center for Strategy and Applied Insights is a new platform established within the Fragomen law firm, focused on identifying and analyzing issues and trends key to making the nation's immigration system function as fairly, transparently, and efficiently as possible. As a longstanding advisor to U.S. employers on immigration, this effort necessarily involves listening to and working to address employers' related concerns in practical ways.

We thus write to you about an important hiring trend that is developing in the U.S. economy. Employers increasingly are considering options to incorporate skills-based hiring into their talent strategy – *i.e.*, recruitment, for appropriate occupations, that is open to alternative means of gaining the skills necessary to the job, without requiring a college degree as an absolute minimum. Not only is this an American economic trend, it is also federal policy. Both the Biden Administration and the prior Administration imposed requirements to grow skills-based hiring for federal employment.

For these policies to have a meaningful impact on workers and employers alike, though, employers hiring and relying on a high-skill workforce must be provided greater clarity about how skills-based hiring within certain occupations will affect their ability to hire professional talent from other countries. Will opening some positions and job duties to applicants without a college degree mean that no positions and no job duties within that occupational category can be considered part of a "specialty occupation" for H-1B purposes, for which a bachelor's degree is "usually" required?

The answer should be a clear "no." Recognizing that skills-based hiring can exist alongside H-1B hiring would be faithful to statutory and regulatory requirements.¹ It would recognize the evolution of learning methods in our country and around the world. It also coincides with efforts by the world's largest and most valuable companies and by our federal and state governments to use skills-based hiring to create

¹ This letter and inquiry are separate from a conversation about the equivalency regulation. The so-called "3-for-1" rule on the role of employment experience implements the statutory mandate that foreign-born professionals with a bachelor's "or equivalent" be included in those eligible for H-1B status. Developing more modern guidance on what satisfies the "or equivalent" dictate of the statute is very important but distinct from the foundational question of when a bachelor's degree or higher (or equivalent) is or is not normally required for a set of job duties.

more open and equitable access to productive, well-paying jobs. Confirming to employers that H-1B specialty occupations can be compatible with skills-based hiring may help empower those employers to open certain positions to candidates it might not traditionally consider because they do not hold the minimally required degree.

We realize that some of the challenges your agency faces in adjudicating employment-based immigration petitions are tied to the simple fact that both the statute and regulations governing such adjudications, enacted decades ago, were not designed to accommodate current employment realities, whether the employer is in academia, industry, or government. There is here, though, an important opportunity for the agency to align its standards to the modern skills environment, fully consistent with existing law, by clarifying the intersection of skills-based hiring and H-1B hiring.

U.S. Citizenship and Immigration Services took a critical, and laudable, step in that direction earlier this year, when it revised its explanation to the public of [what constitutes a specialty occupation](#) for H-1B purposes. The discussion of occupations that "usually" require a bachelor's degree now specifies that:

“‘Normally,’ ‘common,’ and ‘usually’ are interpreted based on their plain language, dictionary definitions. They are not interpreted to mean ‘always.’”

This is a meaningful step toward necessary clarity. USCIS should make a point of formally communicating that interpretation to the regulated community as part of its upcoming H-1B Modernization notice and comment rulemaking process. To have its full effect, though, this interpretation should be further explained now, to provide employers with guidance on whether, and how, they can consider skills-based hiring initiatives for appropriate jobs and still have access to H-1B visas for occupations that “usually” – but do not always – require a degree.

USCIS can accomplish this key step forward simply by answering on its website, just as it did earlier this year, or through the agency’s Electronic Reading Room, four basic questions that arise from, and would give meaning to, the recent explanation above. Those questions, and an explanation why publicly available answers are legally justified and practically crucial, follow.

QUESTIONS

- Does USCIS recognize that each occupation covered by a single code in the Standard Occupational Classification (SOC) system includes dozens of differing jobs and skill sets?²
- Does USCIS recognize that the SOC system does not, and cannot, keep up with rapid evolutions in computer-related and engineering jobs, where 76%³ of approved H-1B professionals work, and in the skill sets needed to perform those jobs?
- Does USCIS recognize that an employer’s participation in a skills-based hiring initiative is not, standing alone, determinative of whether a particular offered job qualifies as an H-1B specialty occupation?

² As just one example, the SOC code for [Software Developer](#) from O*Net lists 10 common employer job titles, 19 primary job tasks or duties, 35 in-demand skills, and 63 technology skill areas.

³ The agency’s [H-1B Characteristics Report](#) (March 2023) shows that 66% of approved H-1B petitions are in computer-related jobs with approximately 10% more in engineering jobs (Table 7, these percentages have hovered at this mark for many years).

- Can USCIS confirm that in those limited cases when an employer is asked to document its recruitment standards for an offered job that is subject to an H-1B petition, that the formal documentation initiating recruitment is not determinative, and instead that documentation illustrating the actual hiring decisions can control? For example, an employer open to skills-based hiring may choose never to formally require a bachelor's degree in its recruitment notices as part of its overall recruitment strategy. That employer should still be able to sponsor an H-1B professional when the employer can demonstrate, if requested by USCIS, that it in fact typically hires individuals with a bachelor's degree, or equivalent, for the certain set of job duties the H-1B beneficiary is assigned within a job family.

THE SKILLS-BASED HIRING CONTEXT

In recent years, there has been a movement afoot, shared by the priorities of both Republican and Democratic administrations, to promote a “skills first culture” in hiring,⁴ focused on the notion that for many positions it is employers, not the jobs, that require four-year college degrees. For example, the Trump administration recognized it was a value proposition to “better identify and secure talent through skills- and competency-based hiring,” and issued an [Executive Order](#) (EO 13932, June 26, 2020) announcing exactly that. Additionally, in May 2022, the Biden administration issued [OPM Guidance](#) to take concrete steps, related to [federal employment occupational questionnaires](#), so that federal government hiring can ultimately prioritize “what candidates know how to do, not where they learned it.” Moreover, it is clear that a variety of activities related to building skills-based hiring tools for employers in all sectors are a key component of enhancing opportunity for underrepresented and underserved communities.⁵

A. Skills First Culture – Current Status

Skills-based hiring activity is brisk in the U.S. employment marketplace. There are dozens of federal departments and agency components considering, developing, and assessing various aspects of such initiatives;⁶ multiple associations surveying members and developing initiatives;⁷ and academics⁸ starting to research case studies, employer best practices, skills frameworks, and human resource technologies, including those leveraging artificial intelligence. Analysis of that activity helps demonstrate, though, that skills-based hiring is only a part of the overall hiring environment, that degree

⁴ See, e.g., [Dismissed by Degrees](#) (Oct. 2017, Harvard Business School), positing that “the rising demand for a four-year college degree for jobs that previously did not require one—is a substantive and widespread phenomenon that is making the U.S. labor market more inefficient. Postings for many jobs traditionally viewed as middle skills jobs (those that require employees with more than a high school diploma but less than a college degree) in the United States now stipulate a college degree as a minimum education requirement, while only a third of the adult population possesses this credential.”

⁵ See, e.g., ["U.S. Corporations Say They'll Hire One Million Black Workers in the Next Decade"](#) (Dec. 10, 2020, New York Times), discussing the new [OneTen](#) initiative, working to draw more Black talent into family-sustaining jobs, understanding that “would probably require dropping certain college-education requirements (given that only about 22 percent of Black people over the age of 25 in the United States have attained a bachelor's degree – a markedly lower percentage than white and Asian people).”

⁶ See, e.g., [Commitments to Inspire, Prepare, and Employ the Space Workforce](#) (Sept 9, 2022), [Administration Launches Apprenticeship Ambassador Initiative to Create Pathways to High-Paying Jobs](#) (Sept 1, 2022), [Administration Launches Talent Pipeline Challenge for Infrastructure Jobs](#) (June 17, 2022).

⁷ See, e.g., [Business Roundtable](#), e.g., [Skills Focus: A Guide to Improving Recruitment, Retention, Advancement and Equity](#) (Sept. 2022) and [Placing a Greater Emphasis on Skills in Hiring and Advancement](#) (Dec. 2022); U.S. Chamber Foundation [Talent Pipeline Management Initiative](#), e.g., [Lessons Learned from Leveraging Opportunity Population Talent](#) (July 2022); Society for Human Resource Management, e.g. [Survey of 1,688 HR Professionals about Pre-Employment Assessments](#) (Aug. 2022); Opportunity @Work, [Survey of 900 Workers and 200 Managers on Workers Skilled Through Alternative Routes \(STARS\)](#) (July 2022).

⁸ E.g., Sean Gallagher, Ed.D., Executive Director, [Center for the Future of Higher Education & Talent Strategy](#), Northeastern University.

requirements remain essential across the high-skill hiring landscape,⁹ and that skills-based hiring can operate naturally in a variety of occupations that “usually” require a degree.

First, while “skills-based hiring is on the rise,”¹⁰ only about 34% of HR leaders report that they “are making a strategic commitment to skills-based hiring practices by focusing on demonstrated competency, rather than over-relying on college degrees.”¹¹ A practice being used among about one-third of human resources leadership does not change what is normally required for particular positions.

Further, the “degree reset” underway is primarily focused on middle-skill positions, which are not typically subject to H-1B petitions. In the middle-skill arena, degrees are increasingly *not* identified as minimum requirements by a noticeably higher number of employers and percentage of hiring.¹² Looking at 2017, 2019, and 2020 recruiting and hiring data, Emsi Burning Glass and the Harvard Project on Workforce concluded in early 2022:

“While few high-skill occupations experienced resets, the phenomenon is much more pronounced in middle-skill jobs. For instance, in a high-skill position like IT Project Manager, degree requirements have barely changed, decreasing by a single percentage point from 92% to 91% between 2017 and 2019. ***Significant reductions in degree requirements of above 5% remain rare in high-skill jobs broadly***” (emphasis added).¹³

Lastly, a significant number of the nation’s unfilled positions are computer-related yet represent a wide-range of job duties. For example, in September 2022, it was estimated that about 8% (804,000) of the ten million open positions then available were computer-related jobs.¹⁴ But the SOC codes used to classify these computer-related jobs do not signify the important dichotomy between an *occupation*, reflected in a SOC code, and the multiple different *skill sets and job duties* an individual might use and undertake in a particular position within that occupation. Perhaps equally integral to H-1B specialty occupation determinations, it is worthwhile to consider how few SOC codes are available to distinguish between the thousands of varied but related job duties performed by H-1B professionals.

B. Skills First Culture – Fits Within the H-1B Legal Framework

Congress has limited H-1B visa holders to, principally, those foreign professionals coming to the United States to provide services “in a specialty occupation.” In the Immigration and Nationality Act (INA), primarily through revisions enacted in the Immigration Act of 1990, Congress delineated the definition of “specialty occupation” in INA § 214(i)(1) as an occupation that requires: (A) a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree, or its equivalent. In

⁹ See, e.g., [“Let’s Stop Pretending College Degrees Don’t Matter”](#) (Aug. 21, 2023, New York Times).

¹⁰ [Harvard Business Review](#), (Feb. 11, 2022).

¹¹ IMS Global Learning Consortium, [Competency Frameworks – Exploring Employer Readiness](#) (Nov. 2021), at p. 10. In 2018, Northeastern University’s research surveying HR leaders found about 29% of HR leaders were moving to put skills-based hiring practices in place ([Educational Credentials Come of Age](#) (Dec. 2018)), so the 34% figure in a survey three years later solidifies the trend.

¹² Emsi Burning Glass and Harvard Project on Workforce, [The Emerging Degree Reset](#) (Feb. 2022, Burning Glass Institute). See also, Rework American Business Network, [How Digital Literacy Can Create a More Resilient American Workforce](#) (Oct. 2019) which talks about the value of focusing on not only the digital skills of today but middle skills that create “digital resilience and a growth mindset” enabling workers to continually upskill in their career.

¹³ Burning Glass [Emerging Degree Reset](#) at p. 11.

¹⁴ On unfilled tech jobs, see, e.g. [“Tech Job Openings Remain High, But Congress is Not Taking Action”](#) (Sept. 27, 2022, Forbes), which includes an analysis concluding that in September 2022 there were 326,014 active job vacancy postings for “software developers” or “software quality assurance analysts” and over 475,000 other open jobs in over 10 other computer-related occupations.

implementing these statutory requirements, the former Immigration and Naturalization Service (INS) promulgated regulations in 1991¹⁵ at 8 C.F.R. § 214.2(h)(4)(ii)-(iii), to which USCIS is bound today.

None of the 2023 realities surrounding the rise of a skills-first culture in the 21st century talent pipeline in the United States should control or necessarily revise a USCIS adjudicator's approach and flexibility in assessing whether a particular position normally requires a degree or equivalent in the H-1B context. Thus, USCIS should acknowledge that skills-based hiring trends do not, standing alone, impact whether a particular position qualifies to be classified as a specialty occupation for H-1B status eligibility.

The agency made clear in 1991 that the illustrative list of specialty occupations codified in the regulations was not exhaustive, while also communicating that the agency fully anticipated that positions in the identified fields were indeed expected to be specialty occupations and that the standard of review focused on the job duties in the offered job.¹⁶ The practical result is that the agency's regulations list certain occupations as qualifying specialty occupations, even though a university degree is *not* always (100% of the time) required.¹⁷ The regulations correctly focus on "specific duties" and the "particular position."¹⁸ Thus, for over 30 years INS and USCIS have consistently approved H-1B petitions when the particular job duties identified by the sponsoring H-1B employer are in an occupation that "normally, typically, or usually" requires a degree without a corresponding requirement to show that it is always a requirement.

CONCLUSION

We may be far away from skills-based hiring supplanting degree requirements as being normal for high-skill occupations, as opposed to solidifying the potential awareness of and interest level in such hiring. It is vital to recognize that any shifts in degree requirements could be based on cyclical changes, instead of structural ones. For example, cyclical patterns could be the result of Covid-19-induced changes (that created dramatically higher demand to fill low-skill jobs) as well as the very tight labor market. The Bureau of Labor Statistics' Job Openings and Labor Turnover Survey (JOLTS) says there currently are 8.8 million unfilled jobs across the U.S. economy.¹⁹ When employers struggle to find qualified, skilled candidates to fill middle-skill and low-skill open jobs, they are more likely to abandon degree requirements when those requirements are merely a litmus test for "soft skills," such as writing, communication, and attention to detail, which are assumed to come with a college education.²⁰

Nevertheless, USCIS took a wise and critical step forward when it revised its online information to stakeholders earlier this year to confirm that the standard for analyzing whether a bachelor's degree or equivalent is "normally" required to be hired to perform a certain set of job duties *does not* mean "always." We hope that the agency can also answer the follow-up questions above. Without this further guidance, it is difficult for employers that often file H-1B petitions to also consider skills-based hiring.

¹⁵ Final rule at 8 CFR 214.2(h)(4)(ii)-(iii) published at 56 FR 61111, December 2, 1991 (see p. 61121). Proposed rule published at 56 FR 31553, July 11, 1991 (see p. 31559).

¹⁶ See 56 FR 61111, at 61112 (December 2, 1991): "[T]he list of fields of endeavor *are included in the regulation as examples*. That list is by no means exhaustive." (Emphasis added.)

¹⁷ For example, accounting and architecture are identified by regulation as specialty occupations, at 8 CFR 214.2(h)(4)(ii), but it is well-understood by employers and the Department of Labor (e.g., Occupational Outlook Handbook) that accounting jobs "usually" but not "always" require a degree and that earning a bachelor's is "typically" the first step in becoming an architect.

¹⁸ 8 CFR 214.2(h)(4)(iii)(A)(4) refers to "specific duties," (iii)(A)(1) and (2) refer to "particular position," and (iii)(A)(3) refers to "the position."

¹⁹ As of August 29, 2023, JOLTS identifies 8,827,000 as the latest job openings level, through July 2023 <https://www.bls.gov/jlt/>.

²⁰ Burning Glass [Emerging Degree Reset](#) at p. 3, 9-10 and see Appendix tables that show occupations experiencing significant structural reset and cyclical reset in degree requirements.

Providing more predictability and certainty about how skills-based hiring initiatives intersect with H-1B standards will help to open the path for skills-based hiring to evolve to full productivity for American employers and workers alike, while affirming the importance of degree requirements in positions for which such education is a necessary qualifier and honoring the degree requirements that Congress intended as a measure for H-1B eligibility.

Very respectfully,

Fragomen Center for Strategy and Applied Insights



Bo Cooper
Executive Director

Cc: Douglas B. Rand, Senior Advisor to the Director
Leah L. Rogal, Senior Advisor to the Chief, Office of Policy & Strategy



U.S. Citizenship
and Immigration
Services

November 20, 2023

Bo Cooper, Executive Director
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Dear Mr. Cooper:

Thank you for your September 20, 2023 letter to U.S. Citizenship and Immigration Services (USCIS).

USCIS is aware of the skills-based hiring trend as you noted in your letter. We recently provided additional clarification on our website pertaining to the H-1B specialty occupation regulatory criteria. Specifically, USCIS added an asterisk to the explanation of the applicable regulatory criteria to note that “normally,” “common,” and “usually” are interpreted based on their plain language, dictionary definitions and they are not interpreted to mean “always.”¹

Please see the enclosure for detailed responses to your questions.

Thank you again for your letter. Should you wish to discuss this matter further, please email our Office of Citizenship, Partnership and Engagement at public.engagement@uscis.dhs.gov.

Sincerely,

A handwritten signature in black ink that reads "Ur M. Jaddou".

Ur M. Jaddou
Director

¹ See USCIS, “H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models,” <https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations> (updated Feb. 8, 2023).

U.S. Citizenship and Immigration Services' Response to Bo Cooper's September 20, 2023 Letter

- Does USCIS recognize that each occupation covered by a single code in the Standard Occupational Classification (SOC) system includes dozens of differing jobs and skill sets?

USCIS response: USCIS is familiar with the SOC system and understands that a single SOC code may include differing job duties and skill sets. Officers consult the SOC system frequently, in conjunction with other resources and evidence submitted by the petitioner, when adjudicating H-1B petitions.

- Does USCIS recognize that the SOC system does not, and cannot, keep up with rapid evolutions in computer-related and engineering jobs, where 76 percent of approved H-1B professionals work, and in the skill sets needed to perform those jobs?

USCIS response: USCIS recognizes that all aspects of a given position may not be captured within a single SOC code. However, petitioners should select the SOC code that most closely matches the proffered position. USCIS adjudicators refer to the SOC code provided by the petitioner, among other information that the petitioner may provide, when determining whether the petitioner has established that the proffered position is a specialty occupation.

- Does USCIS recognize that an employer's participation in a skills-based hiring initiative is not, standing alone, determinative of whether a particular offered job qualifies as an H-1B specialty occupation?

USCIS response: USCIS recognizes that an employer that has adopted skills-based hiring initiatives may, depending on the particular facts, still be able to establish that the particular position in which the beneficiary will be employed is a specialty occupation. "Normally," "common," and "usually" are interpreted based on their plain language, dictionary definitions. They are not interpreted to mean "always."

- Can USCIS confirm that in those limited cases when an employer is asked to document its recruitment standards for an offered job that is subject to an H-1B petition, that the formal documentation initiating recruitment is not determinative, and instead that documentation illustrating the actual hiring decisions can control? For example, an employer open to skills-based hiring may choose never to formally require a bachelor's degree in its recruitment notices as part of its overall recruitment strategy. That employer should still be able to sponsor an H-1B professional when the employer can demonstrate, if requested by USCIS, that it in fact typically hires individuals with a bachelor's degree, or equivalent, for the certain set of job duties the H-1B beneficiary is assigned within a job family.

USCIS response: USCIS recognizes that no one factor alone, such as formal recruitment documentation, is determinative as to whether or not a particular position qualifies as a specialty occupation.