



Seyfarth Shaw LLP

975 F Street, N.W.

Washington, DC 20004-1454

T (202) 463-2400

F (202) 828-5393

lerodriguez@seyfarth.com

T (202) 828-3572

www.seyfarth.com

## **Comment of Seyfarth Shaw, LLP on Department of Homeland Security Proposed Rule:**

### **Modernizing H-1B Requirements, Providing Flexibility in the F-1 Program, and Program Improvements Affecting Other Nonimmigrant Workers: (CIS No. 2745-23 DHS Docket No. USCIS-2023-0005)**

#### **Introduction**

Seyfarth Shaw LLP is one of the premier international labor and employment law firms for management. With approximately 400 employment litigators and counselors working in 10 U.S. offices and four international offices, its attorneys provide balanced, compliance-focused, and practical advice for businesses throughout the U.S. and the world.

Recognizing the critical importance of talent mobility to business success, Seyfarth Shaw's Business Immigration Group stands out as one of the largest immigration practices based in a global general practice law firm. Our roster of clients covers key sectors, including: financial services, health care and life sciences, consulting, and information technology. Our Immigration team has more than 180 members located across locations in Atlanta, Boston, Houston, New York, Los Angeles, Washington, D.C. Hong Kong, and Europe. Seyfarth Shaw attorneys operate on a state-of-the-art, innovative platform to help clients strategically and programmatically manage their workforce and leverage global talent.

Based on this experience, we write to thank USCIS for a number of key provisions in the Notice of Proposed Rulemaking, and also to offer what we believe are critical recommendations with respect to the definition of "specialty occupation" contained within the rule.

#### **The Proposed Rule Contains a Number of Positive Provisions**

We begin by commending the agency for the positive aspects of the Notice of Proposed Rulemaking (NPRM). We are pleased that the NPRM is either introducing or codifying the following flexibilities in the H-1B process:

- Clarifying that "normally" does not mean "always" within the criteria for a specialty occupation, and accordingly working to align H-1B rules with the growing importance of skill-based hiring through alternative training paths (such as apprenticeships);
- Modernizing the definition of "non-profit research organization" and "governmental research organization" by replacing "primarily engaged" and "primary mission" with "fundamental activity," thereby introducing greater

flexibility with regard to the types of organizations that can utilize the cap-exemption ;

- Automatically extending F-1 status and related employment authorization to April 1st of the relevant fiscal year rather than October, and
- Codifying the USCIS's deference policy.

Additionally, we believe that the restructuring of the H-1B CAP selection process is a laudable and important measure to ensure the integrity and fairness of the H-1B lottery process. We invite USCIS to consider whether this portion of the NPRM should proceed separately and be promulgated as an interim final rule as soon as possible in order to ensure that it is in effect in advance of the 2024 CAP registration cycle.

These provisions reflect an important commitment on USCIS's part to seek opportunities within the bounds of the law that can maximize flexibility for employers and foreign national beneficiaries alike. We also look forward to USCIS issuing robust guidance and internal training to ensure full adoption of these important provisions.

### **Concerns About Specialized Degree Requirement**

As working immigration lawyers representing organizations seeking to recruit and retain the best and brightest to the U.S. workforce, we raise a concern with respect to the definition of "specialty occupation" that the NPRM seeks to codify. The Department of Homeland Security ("DHS") proposes to amend the regulatory definition of a "specialty occupation," adding language to the specialty occupation definition that would codify existing U.S. Citizenship and Immigration Services ("USCIS") practice requiring a direct relationship between the required degree field(s) and the duties of the position; allowing more than one acceptable degree field for a specialty occupation; and holding that a general degree without further specialization – in particular citing Liberal Arts and Business Administration -- is insufficient to qualify as a "specialty occupation." However, the NPRM's proposed language declaring that a general degree without further specialization is insufficient for a specialty occupation conflicts with precedent case law, does not represent the appropriate standard, and will impair U.S. business's access to vital talent.

We believe the best approach - - which is in keeping with the letter and spirit of the H-1B category - - is to afford the employer/petitioner the opportunity to establish a nexus between *the beneficiary's course of studies* (or work experience, in the case of the employer leveraging the "3 to 1" rule) and *the enumerated duties of the job*. This can only be done through an engaged analysis of the full record, which is why the "label" placed on a degree is less relevant, and why focus on the label alone can lead to harsh results that are misaligned with Congress's intent in establishing the H-1B category and creating the concept of a "specialty occupation."

### **Specific Feedback with Respect to degrees in Business Administration**

We would go so far as to say that the final rule should not single out any degrees but rather should continue to provide the employer the space to undergo the analysis described above. For this

reason, we believe the NPRM misconstrues Business Administration degrees as general degrees and perceives them through a lens that is inconsistent with the H-1B governing laws.

USCIS, and by extension DHS, has historically relied on the precedent case of *Matter of Ling* to argue that Business Administration, in particular, is a generalized degree. See 13 I&N Dec. 35 (R.C. 1968). *Matter of Ling*, however, is not an H-1B matter. Neither is *Matter of Michael Hertz Associates*, 19 I&N Dec. 558 (Comm. 1988), which USCIS frequently and inaccurately cites as precedent authority for concluding that Business Administration is a generalized degree. In fact, nowhere in either decision do the terms “H-1B” or “specialty occupation” appear because the concept of “specialty occupation” was formed many years later. *Matter of Ling* addresses whether the term “Business Administration” or “Business Administrator” qualifies as a “member of the professions” (the predecessor to “specialty occupation”) under INA § 101(a)(32) so that the profession could be classified as a Professional Worker pursuant to an employment-based, third-preference permanent residence (e.g. green card) application under INA § 203(b)(3).

The facts of *Matter of Ling* are straightforward. The foreign national worker previously worked as a bookkeeper, bank teller, and electronic technician, and subsequently earned a Bachelor’s degree in Business Administration. His employer sought to employ him in the position of “Business Manager” and sponsored him for an employment-based immigrant visa as a member of the professions under INA § 203(b)(3).

Citing *Matter of Shin*, 11 I. & N. Dec. 686, the *Ling* court stated that the term “profession” under INA § 101(a)(32) “contemplates knowledge or learning - not merely skill - of an advance type in a given field gained by a prolonged course of specialized instruction and study of a least baccalaureate level, which is a realistic prerequisite to entry into the particular field of endeavor.” The *Ling* court proceeded to review the Department of Labor’s (“DOL’s”) Occupational Outlook Handbook (“OOH”) in its analysis and determined that “while a person may have a degree in business administration, such degree may qualify him for some but not all of the occupations included in the broad field of business administration....therefore, a petitioner with a business administration degree must:

- (1) Clearly establish a particular area and occupation in the field of business administration in which he is engaged or plans to be engaged; and
- (2) Must also establish that he meets the special academic and experience requirements of that designated activity, as a prerequisite to a determination as to professional status.” (numbers added for clarity).

The *Ling* court also cited *Matter of Chu*, 11 I. & N. Dec. 881 to argue that a “business administration degree **may** qualify for several professional occupations but not all professions in the general field of business (emphasis supplied).”

Based on this analysis, and contrary to USCIS’s historic position and proposed rule, the *Ling* court did not hold that a Bachelor’s degree in Business Administration is a “generalized degree.” Rather, the *Ling* court argued that the profession of Business Administration is a broad and generalized field, and that it encompasses both “professional and non-professional activities.” To qualify as a member of the professions under INA § 203(b)(3), the *Ling* court set up a qualification

test. To meet the requirement, a foreign national with a business administration degree must: (1) identify a specific job within the generalized field of Business Administration in which the foreign national will work; and (2) establish that the foreign national's *academic background and/or experience meets the requirements for the position* and is a "realistic prerequisite" for entry into that field (emphasis supplied). It's worthy of note that ultimately, the *Ling* court denied the immigrant visa petition because the position -- not the degree -- failed the test. According to the *Ling* court,

*"we cannot find that it has been established that 'business administration' is a profession. The record has failed to establish in what profession, if any, petitioner is either qualified for or intends to engage in. He has not established that he has been engaged in any profession. Occupations in which he has work experience -- bookkeeper, bank teller, and electronic technician -- are not professions."*

The *Ling* court established the premise and test for determining whether a position requiring a degree in Business Administration can qualify as a "specialty occupation". But the *Ling* court does not state, nor does it suggest, that a degree in Business Administration is a "generalized" degree. Instead, the *Ling* court confirms that the profession of Business Administration is a generalized field that requires analysis, in the form of the *Ling* test, to determine whether the position can qualify as a member of the professions, or in the H-1B context for "specialty occupation" status.

### **The NPRM's Language Regarding "General" Degrees is Inconsistent with Case Law**

The proposed language declaring that a "general" degree without further specialization is insufficient for a "specialty occupation" is inconsistent with precedent case law. Consistent with the so-called *Ling* test, an employer could indeed identify a specific profession within the generalized field of Business Administration in which the foreign national will work. The specific profession would not necessarily be a generalized position, but rather a specific position characterized by discrete tasks requiring specialized academic training in focused areas (for example: economic research, competitive benchmarking, business modeling, economic and financial analysis, pricing analytics, accounting, strategic thinking, and managerial leadership). A degree in Business Administration could in fact act as a "realistic prerequisite" for the specific profession, and the foreign national could meet the requirements for the position through a degree in Business Administration, which academic training could be precisely related to the proposed duties. The knowledge and skills obtained by the foreign national during an academic program in Business Administration form a "realistic prerequisite" to successfully performing the duties of a specific position, and thereby renders the foreign national eligible for H-1B classification. The proposed language specifically identifying Business Administration and Liberal Arts by name (and therefore as "generalized" degrees insufficient for designation as a "specialty occupation") runs counter to established case law. In *Residential Finance Corporation v. U.S. Citizenship and Immigration Services*, an employer filed an H-1B petition for a foreign national to work as a Market Research Analyst, which USCIS denied concluding that the proffered role was not a "specialty occupation" because a Bachelor's or higher degree in a specific academic discipline was not required. USCIS specifically cited that the *OOH* did not indicate that a degree in a specific specialty directly related to Market Research was necessary for entry into the occupation. The

court rejected the premise that the name of the field of study controls whether an individual qualifies for an H-1B, noting that “diplomas rarely come bearing occupation-specific majors.” No. 2:2012cv00008 - Document 20 (S.D. Ohio 2012).

Notably, the *Residential Finance* court reversed denial of the H-1B petition as arbitrary and capricious because USCIS focused on the title (or “label”) of the degree, rather than on the actual substantive knowledge obtained through the courses taken to earn the degree. The court concluded, “What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge.”

As a result, by specifically identifying Business Administration and Liberal Arts degrees as insufficient to qualify for a “specialty occupation,” the proposed rule violates precedent case law. A “general” degree, such as a Liberal Arts degree, is one in which a student completes coursework in a variety of academic subjects that lack a common, unifying, and central theme. “General” degrees support a myriad of different career paths because the diverse skills acquired can apply to any number of industries and employment fields.

In contrast, a Business Administration degree is a specialized degree that teaches unified skills in Economic Analysis, Financial Modeling, Corporate Finance, Managerial Decision-Making, Marketing Strategy, Accounting, Statistics, and Consumer Behavior. In fact, a common theme in seemingly every MBA program is that students are required to complete coursework in Economics, Finance, Management, Statistics, Accounting, Marketing, and Leadership. These core topics relate precisely to the duties of a corporate executive, management consultant, and numerous other 21<sup>st</sup> Century positions within the business sector. These positions will involve designing competitive business strategies, performing financial and economic analysis, building financial models, identifying and quantifying market growth opportunities, and preparing corporate analysis and strategy reports for senior client management- - among other duties.

While some students choose to complete additional concentrations or majors, at its core an MBA degree equips students with the necessary skills to quantitatively analyze a business, assess market opportunities, manage business functions and personnel, and make strategic decisions to advance an organization’s reputation and drive revenue growth and profitability.

If “generalized” degrees provide graduates with a broad-based academic background that can support their employment in a myriad of different industries, “specialized” degrees provide graduates with narrow and tailored academic backgrounds that support their employment in highly-specific industries. Consequently, if nearly half of all MBA graduates are being recruited and accepting positions with one specific industry above all others by such a wide margin (management consulting), it stands to reason that a Business Administration degrees cannot be deemed a degree that cannot support a “specialty occupation” that would qualify the foreign national for H-1B status.

In addition to MBA recruitment trends, research from the National Foundation for American Policy (NFAP) confirms that graduates of Business programs not only start their careers in management positions, but the vast majority remain in management-related occupations even ten years after their graduation. Specifically, NFAP found that “within one to ten years of earning a master’s degree in business, 79% of foreign-born and 70% of U.S.-born work in management and management-related occupations in the United States.” NFAP’s research also shows that “within

one to ten years of earning a master's degree in business, 94% of individuals say their work in a management and management-related occupation is related to their degree.” (Source: NFAP analysis and estimates of the National Science Foundation’s 2021 National Survey of College Graduates.)

According to NFAP, if the vast majority of MBA graduates continue to work in a management-related occupation up to ten years after they graduate, “the data show business administration is a specialized field of study” and that it is “incorrect for the proposed regulation to consider business administration a “general degree.”

Importantly, this data comports with our own experience managing the employment-based immigration portfolios of major U.S. financial services and consulting businesses.

### **Other potential areas of concern: Requirement of Engineering Degrees**

The preamble to the NPRM notes as an example 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 it is unlikely the petitioner could establish how the fields of study within any engineering degree provide a body of highly specialized knowledge directly related to the duties and responsibilities of the software developer position (emphasis supplied).”

However, according to the U.S. Bureau of Labor Statistics Occupational Outlook Handbook (OOH) – a source routinely referenced by USCIS in connection with its “specialty occupation” analysis – software developers “typically need a bachelor’s degree in computer and information technology or related field such as *engineering* or mathematics.” The OOH does not specify a particular subspecialty or Engineering major that would be required for employment as a Software Developer. In practice, employers would typically focus on the body of knowledge attained during a degree program, together with subsequent work experience when making hiring decisions, rather than the label on the applicant’s degree to determine adequate academic and professional preparation.

A general degree in Engineering could – under certain circumstances – qualify an individual for entry into a “specialty occupation.” A Bachelor’s degree in Engineering prepares students to solve Engineering problems using Mathematics, Analytics, and scientific principles together with new methods and technologies. **In pursuit of a general Engineering degree, a student may complete significant coursework in an Engineering discipline that could directly relate to “specialty occupation” job duties.** Most universities offer distinct Engineering majors in Computer Science, Computer Engineering, Electrical Engineering, Biomedical Engineering, Robotics, Industrial Engineering, Civil Engineering, and Mechanical Engineering, among others. As such, it would be relatively uncommon for an employer to consider a general Engineering applicant for a software developer or other specialized role. However, depending on the specific requirements of the position and considering the relevant coursework completed by the applicant, together with the knowledge attained, there could be a meaningful nexus between a range of engineering degrees and the duties of a given position.

For example, one of our firm's clients is an economic consulting firm with a dedicated Energy practice. This firm's clients include utility and energy providers, renewable energy firms and power producers, oil and gas companies, system and network operators and distribution companies, investors, and other players across the Energy and infrastructure sector. The nature of this client's work requires consultants to closely collaborate with senior management, leading experts, and key decision-makers in the Energy sector while developing strategies, solutions, and thought leadership at the forefront of the Energy transition. Consultants who work for this client are required to apply advanced qualitative and quantitative analytical skills in order to carry out nuanced, in-depth analyses. Thus, while an individual would not qualify for this role with a general Liberal Arts degree or an irrelevant quantitative degree, the Consultant must have rigorous quantitative analysis knowledge and ability, coupled with practical skills to execute the duties of the position – *which could have been gained through the attainment of a degree in a range of Engineering disciplines*. Therefore, an analysis of the close connection between the Consultant's degree and the duties of the position would always be required as part of the hiring process, and possession of a general degree in Engineering should not automatically foreclose an applicant from consideration. In other words, the degree should be closely related to the job duties and a range of Engineering disciplines – including General Engineering – could be considered within the definition of "specialty occupation."

### **Relationship Between Education and Position**

We additionally urge USCIS to reconsider the proposed regulatory text concerning the relationship between a course of study and the offered H-1B position. We believe that such changes will more faithfully adhere to the INA, codify existing practices, and effectuate USCIS's overall intent in promulgating this change.

The NPRM seeks to "codify existing USCIS practice that there must be a direct relationship between the required degree field(s) and the duties of the position." To do so, USCIS proposes the following addition to the definition of "Specialty Occupation":

*'The required specialized studies must be **directly related** to 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 (emphasis supplied).'*

The NPRM states that "[u]nder this proposed addition...the petitioner would continue to have the burden of demonstrating that there is a direct relationship between the required degree in a specific specialty (in other words, the degree field(s) that would qualify someone for the position) and the duties of the position."

We note that although the proposed regulatory text incorporates the "bodies of highly specialized knowledge" language, USCIS has explained the change throughout the NPRM in terms of "degree fields." Due to this inconsistency, we are concerned that adjudicating officers may exercise unintended discretion in their willingness to look at the totality of a Beneficiary's educational studies.

Under current practice, Petitioners may demonstrate the nexus between an offered job and the course of study by looking beyond the *name* or *label* of the degree field - - which may be wildly inconsistent among educational institutions -- and not adequately account for a specialization (formal or informal) gained through various coursework, and otherwise not accurately encapsulate the body of knowledge that was attained during such studies. In current state, Petitioners can highlight specific coursework (and the corresponding curricula) that has imparted the Beneficiary with the requisite knowledge to perform the offered role, including situations where that connection may not be apparent from the nomenclature of the degree. This is the proper formulation for evaluating the relatedness of the educational studies. Indeed, USCIS cites this very proposition in the NPRM, noting the finding in *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.* that “knowledge and not the title of the degree is what is important.”

To codify existing practice and eliminate any future ambiguity, it is crucial that any regulatory revisions maintain the existing framework for evaluating the body of a Beneficiary’s highly specialized knowledge through a full evaluation of the educational studies, and not just the name of a degree field. This framework also more closely adheres to the reality of today’s rapidly evolving workforce, in which employers are actively seeking candidates with courses of study that equip workers with unique perspectives on emerging technologies, skillsets to solve problems through non-traditional lenses, and otherwise serve as a catalyst for U.S. economic development.

Accordingly, we propose that USCIS modify the proposed definition of “Specialty Occupation” to specifically resolve any ambiguity. We propose the following text (emphasis supplied):

*“The required specialized studies must be directly related to 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. **The relatedness of specialized studies may be established through an evaluation of the coursework (and applications of that coursework) that comprise the degree.**”*

## **Conclusion**

We thank USCIS for the opportunity to comment on the proposed regulation. We commend USCIS for its broader effort to address deficiencies in the system and improve flexibility. At the same time, we appeal to USCIS to look beyond degree titles and instead to their substance, and in particular to avoid singling out specific degrees and to forego presumptively disqualifying Business Administration degrees as specialized degrees.