

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON**

<p style="text-align: center;">[REDACTED]</p> <p style="text-align: center;">Plaintiff,</p> <p>vs.</p> <p>U.S. Citizenship and Naturalization Service, an agency of the United States Government; Department of Homeland Security, an agency of the United States Government; Defendants.</p>	<p>Case No. 14-123</p> <p>COMPLAINT</p>
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This is an action brought pursuant Section 10(b) of the Administrative Procedures Act, 5 U.S.C. Section 702, seeking a decision of the U.S. Citizenship & Immigration Services (USCIS), wherein the agency denied Plaintiff [REDACTED] H-1B skilled worker petition (I-129). The Denial misapplied the legal standard for the approval of a skilled worker petition and ignored submitted evidence.

I. JURISDICTION

1.1 This is a civil action arising under the Immigration and Nationality Act, Title 8, U.S.C. 1101 et seq., and the Administrative Procedures Act, 5 U.S.C. Section 701 et seq. Original jurisdiction of this matter is vested in this court by Title 28 U.S.C. Section 1331.

1.2 More specifically, this Court has jurisdiction under 28 U.S.C. § 1331 and Section 704 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 704.

1.3 Although the INA's jurisdictional bar precludes judicial review of most discretionary immigration decisions, that bar is not applicable here, where the Court must answer a purely legal question. *Mejia Rodriguez v. U.S. Department of Homeland Security*, 562 F.3d 1137, 1144-45 (11th Cir. 2009) ("*nondiscretionary*, statutory eligibility decisions made by USCIS fall outside the limitations on judicial review in the INA."); *Robinson v. Napolitano*, 554 F.3d 358 (3rd Cir. 2009) at 360.

1.4 This Court also has jurisdiction under 28 U.S.C. § 1361, which provides that "[t]he district courts shall have original jurisdiction over any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Petitioner." 28 U.S.C. § 1361. The remedy that Petitioner seeks from

this Court is available "if she has exhausted all other avenues of relief and only if the Respondent owes [her] a clear nondiscretionary duty." *Heckler v. Ringer*, 466 U.S. 602, 616, 104 S.Ct. 2013, 80 L.Ed.2d 622 (1984).

1.5 Clearly, the USCIS owes a clear, nondiscretionary duty to adhere to the law. Petitioner has attempted to communicate with the USCIS, has submitted evidence in support of this petition. Plaintiff has fully cooperated in submitting evidence and is available for interview(s) by the Defendant agency. Plaintiff has sought a fair and neutral review and adjudication within the administrative framework.

II. VENUE

2.1 The Defendant, U.S. Citizenship & Immigration Services, is an agency of the United States government residing in Seattle, Washington. Defendant, Department of Homeland Security is an agency of the United States government residing in Seattle, Washington. The Petitioner is a resident in the state of Washington.

2.2 Pursuant to 28 U.S.C. § 1391(e), venue is proper in the State of Washington, the residence of the Petitioner.

III. INTRADISTRICT ASSIGNMENT

3.1 A substantial part of the events or omissions, which give rise to this claim, occurred in King County, Washington, specifically

preparation and submission of administrative immigration applications with regard to the Petitioners' application for H-1b status.

IV. EXHAUSTION OF ADMINISTRATIVE REMEDIES

4.1 On information and belief Petitioner has no meaningful administrative remedy available.

4.2 Neither the Act nor the governing regulations provide that such an appeal is a prerequisite of judicial review.

4.3 Accordingly, taking such an appeal is not a prerequisite to filing an action for review under Section 10(b) of the Administrative Procedures Act. *Darby v. Cisneros*, 113 S.Ct. 2539 2542-45, 125 L. Ed. 2d 113, 61 U.S.L.W. 4679 (1993) (agency regulation specifying that party "may request" review of hearing officer's determination did not "require" exhaustion within the meaning of Section(s) 10(c) of the APA, 5 U.S.C. Section 704); *Karen Yuen Fong Young v. Reno*, 114 F. 3d 879 (CA9 1997) (Regional Service Center Director's revocation of approval of immigrant visa petition is a final decision for APA purposes despite the availability of an appeal under 8 C.F.R. § 205.2(d)).

V. STANDARD OF REVIEW

5.1 The APA empowers courts to "hold lawful and set aside" not only agency actions and conclusions that are "arbitrary" or "capricious," but also agency actions and conclusions that are "otherwise not in accordance

with law" or are in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5. U.S.C. § 706 (2) (A), (C).

5.2 Under *Chevron U.S.A., Inc. V. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 27778, 81 L.Ed.2d 694 (1984), agency actions based on statutory interpretation are only entitled to deference if the statutory language is ambiguous. The *Chevron* two-step ends when the meaning of a statute is found to be unambiguous. In that case, agency pronouncements thereon have no effect." *Josendis v. Wall to Wall Residence Repairs, Inc.*, 606 F.Supp.2d 1376 (S.D. Fla. 2009).

VI. THE COURT'S AUTHORITY TO GRANT RELIEF

6.1 The Court has authority to remand this case to the USCIS for reopening and reconsideration of an erroneous finding, or to order that specific relief be granted, per the authority given to the Court by 5 U.S.C. § 706 of the Administrative Procedure Act (APA). 5 U.S.C. § 706 reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall—

compel agency action unlawfully with-held or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

- (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
- (D) without observance of procedure required by law;
- (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
- (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

6.2 In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

VII. NARRATIVE OF EVENTS

7.1 On **October 13, 2011** Plaintiff [REDACTED] filed form I-129 requesting H-1B status for [REDACTED]. (See Exhibit 1)

7.2 On **February 2, 2012**, the USCIS issued a Request For Evidence, asking for evidence pertaining to the Plaintiff's job offer – specifically the “nature of the position” and the “nature of the petitioner's business. (See Exhibit 2)

7.3 On **April 27, 2012**, [REDACTED] responded to the Request

for Evidence by fully providing the requested information. (See Exhibit 3)

7.4 On **October 27, 2012** the USCIS denied the H-1B application, stating that “the petitioner has not demonstrated that the offered position is a specialty occupation within the meaning of the regulations.” (See Exhibit 4)

RELIEF REQUESTED

The record will show that the USCIS decision is arbitrary and capricious in that it fails to take account of facts and evidence, and fails to apply the correct legal standard.

Plaintiff respectfully requests the Court to order the USCIS to grant Plaintiff’s petition for H-1B status.

RESPECTFULLY SUBMITTED this 24th day of January 2014.



/s/ _____
William Frick
Attorney for Plaintiffs
State Bar # 26648 (WA) 65592 (PA)
7900 SE 28th Street Suite 500
Mercer Island, Wash. 98040
206 286 0167 (tel.)
206 770 7215 (fax)
william@fricklawfirm.info

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

DEFENDANTS

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| | PTF | DEF | | PTF | DEF |
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS		FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excludes Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Medical Malpractice	PERSONAL INJURY <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Management Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Employee Retirement Income Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g))	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS			
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Torts to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 440 Other Civil Rights <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 448 Education	Habeas Corpus: <input type="checkbox"/> 463 Alien Detainee <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty Other: <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition <input type="checkbox"/> 560 Civil Detainee - Conditions of Confinement		FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from Another District (specify)
- 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

Brief description of cause:

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____

AMOUNT _____

APPLYING IFP _____

JUDGE _____

MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I.(a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- (b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)
- (c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".
- II. Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
 United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
 United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
 Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an "X" in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an "X" in one of the six boxes.
 Original Proceedings. (1) Cases which originate in the United States district courts.
 Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.
 Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service
- VII. Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
 Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
 Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS 44 is used to reference related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.

Date and Attorney Signature. Date and sign the civil cover sheet.

United States District Court

for the
Western District of Washington

RAJ AND COMPANY

Plaintiff

v.

U.S. CITIZENSHIP & IMMIGRATION SERVICES,
et al.

Defendant

Civil Action No. 2:14-cv-00123-JPD

SUMMONS IN A CIVIL ACTION

To: *(Defendant's name and address)*

U.S. Attorney
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, WA 98101

A lawsuit has been filed against you.

Within 21 days after service of this summons on you (not counting the day you received it) - or 60 days if you are the United States or a United States agency, or an officer or employee of the United States described in Fed. R. Civ. P. 12 (a)(2) or (3) - you must serve on the plaintiff an answer to the attached complaint or a motion under Rule 12 of the Federal Rules of Civil Procedure. The answer or motion must be served on the plaintiff or plaintiff's attorney, whose name and address is:

William Frick
Law Office of William Frick
7900 SE 28th Street, Suite 500
Mercer Island, WA 98040

If you fail to respond, judgment by default will be entered against you for the relief demanded in the complaint. You also must file your answer or motion with the court.

Date: 2/10/2014

CLERK OF COURT

//S/ Peter H. Voelker

Signature of Clerk or Deputy Clerk



PROOF OF SERVICE

This section should not be filed with the court unless required by Fed. R. Civ. P. 4(1)

This summons for (name of individual and title, if any) U.S. Attorney, Western District of Washington

was received by me on (date) _____ .

I personally served the summons and complaint on the individual at (place)

_____ on (date) _____ ; or

I left the summons and complaint at the individual's residence or usual place of abode with (name)

_____, a person of suitable age and discretion who resides there,

on (date) _____, and mailed a copy to the individual's last known address; or

I served the summons and complaint on (name of individual) _____

who is designated by law to accept service of process on behalf of (name of organization)

_____ on (date) _____ ; or

I returned the summons unexecuted because _____ ; or

Other (specify)

Mailed via certified mail, return receipt requested, a copy of the Summons, Complaint and Exhibits; and the Court's Order Regarding Initial Disclosures, Joint Status Report, and Early Settlement.

My fees are \$^{0.00} for travel and \$^{0.00} for services, for a total of \$^{0.00} .

I declare under penalty of perjury that this information is true.

Date: 2/10/2014



Server's Signature

Christine Phillips

Printed name and title

Law Office of William Frick
7900 SE 28th Street, Suite 500
Mercer Island, WA 98040

Server's address

Additional information regarding attempted service, etc.

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS. FOLD AT DOTTED LINE

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Street, Apt.
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700 Stewart Street, Suite 5220

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Seattle, WA 98101

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[REDACTED],

Plaintiff(s),

v.

US CITIZENSHIP AND IMMIGRATION
SERVICES, et al.,

Defendant(s).

Case No. 2:14-cv-00123-JPD

ORDER REGARDING INITIAL
DISCLOSURES, JOINT STATUS
REPORT, AND
EARLY SETTLEMENT

I. INITIAL SCHEDULING DATES

The Court sets the following dates for initial disclosure and submission of the
Joint Status Report and Discovery Plan:

Deadline for FRCP 26(f) Conference:	2/24/2014
Initial Disclosures Pursuant to FRCP 26(a)(1):	3/3/2014
Combined Joint Status Report and Discovery Plan as Required by FRCP 26(f) and Local Civil Rule 26(f):	3/10/2014

The deadlines above may be extended only by the Court. Any request for an
extension should be made by e-mail to Peter Voelker, Courtroom Deputy,
at peter_voelker@wawd.uscourts.gov. If Defendants have appeared, the parties

1 are directed to meet and to confer before contacting the Court to request an extension.

2 If this case involves claims which are exempt from the requirements of
3 FRCP 26(a) and 26(f), please notify Peter Voelker, Courtroom Deputy
4 by e-mail at peter_voelker@wawd.uscourts.gov.

5 **II. JOINT STATUS REPORT & DISCOVERY PLAN**

6 All counsel and any pro se parties are directed to confer and provide the Court
7 with a combined Joint Status Report and Discovery Plan (the "Report") by
8 March 10, 2014. This conference shall be by direct and personal communication,
9 whether that be a face-to-face meeting or a telephonic conference. The Report will be
10 used in setting a schedule for the prompt completion of the case. It must contain the
11 following information by corresponding paragraph numbers:

- 12 1. A statement of the nature and complexity of the case.
- 13 2. A proposed deadline for the joining of additional parties.
- 14 3. The parties have the right to consent to assignment of this case to a full time
15 United States Magistrate Judge, pursuant to 28 U.S.C. §636(c) and Local Rule MJR 13
16 to conduct all proceedings, up to, and including entry of judgment. The Western
17 District of Washington assigns a wide range of cases to Magistrate Judges. The
18 Magistrate Judges of this district thus have significant experience in all types of civil
19 matters filed in our court. Additional information about our district's Magistrate
20 Judges can be found at www.wawd.uscourts.gov. The parties should indicate
21 whether they agree that the Honorable James P. Donohue may conduct all
22 proceedings including trial and the entry of judgment. When responding to this
23 question, the parties should only respond "yes" or "no". Individual party responses

1 should not be provided. A "yes" response should be indicated only if parties
2 consent. Otherwise, a "no" response should be provided.

3 4. A discovery plan that states, by corresponding paragraph letters (A, B, etc.),
4 the parties' views and proposals on all items in Fed. R. Civ. P. 26(f)(3), which
5 includes the following topics:

- 6 (A) initial disclosures;
- 7 (B) subjects, timing, and potential phasing of discovery;
- 8 (C) electronically stored information;
- 9 (D) privilege issues;
- 10 (E) proposed limitations on discovery; and
- 11 (F) the need for any discovery related orders.

12 5. The parties' views, proposals, and agreements, by corresponding paragraph
13 letters (A, B, etc.), on all items set forth in Local Civil Rule 26(f)(1), which includes
14 the following topics:

- 15 (A) prompt case resolution;
- 16 (B) alternative dispute resolution;
- 17 (C) related cases;
- 18 (D) discovery management;
- 19 (E) anticipated discovery sought;
- 20 (F) phasing motions;
- 21 (G) preservation of discoverable information;
- 22 (H) privilege issues;
- 23 (I) Model Protocol for Discovery of ESI; and;

1 (J) alternatives to Model Protocol.

2 6. The date by which discovery can be completed.

3 7. Whether the case should be bifurcated by trying the liability issues before
4 the damages issues, or bifurcated in any other way.

5 8. Whether the pretrial statements and pretrial order called for by Local Civil
6 Rules 16(e), (h), (i), and (k), and 16.1 should be dispensed with in whole or in part
7 for the sake of economy.

8 9. Whether the parties intend to utilize the Individualized Trial Program set
9 forth in Local Civil Rule 39.2 or any ADR options set forth in Local Civil
10 Rule 39.1.

11 10. Any other suggestions for shortening or simplifying the case.

12 11. The date the case will be ready for trial. The Court expects that most civil
13 cases will be ready for trial within a year after filing the Joint Status Report and
14 Discovery Plan.

15 12. Whether the trial will be jury or non-jury.

16 13. The number of trial days required.

17 14. The names, addresses, and telephone numbers of all trial counsel.

18 15. The dates on which the trial counsel may have scheduling difficulties to
19 be considered in setting a trial date.

20 16. If, on the due date of the Report, all defendant(s) or respondent(s) have not
21 been served, counsel for the plaintiff shall advise the Court when service will be
22 effected, why it was not made earlier, and shall provide a proposed schedule for the
23 required FRCP 26(f) conference and FRCP 26(a) initial disclosures.

1
2 17. Whether any party wishes a scheduling conference before the Court enters
3 a scheduling order in the case.

4 18. List the date(s) that each and every nongovernmental corporate party filed
5 its disclosure statement pursuant to Fed. R. Civ. P. 7.1 and Local Civil Rule 7.1.

6 If the parties are unable to agree to any part of the Report, they may answer in
7 separate paragraphs. No separate reports are to be filed. If the parties wish to have a
8 status conference with the Court at any time during the pendency of this action, they
9 should notify Peter Voelker, by e-mail at peter_voelker@wawd.uscourts.gov.

10 **III. PLAINTIFF'S RESPONSIBILITY**

11 This Order is issued at the outset of the case, and a copy is sent by the clerk to
12 counsel for plaintiff (or plaintiff, if pro se) and any defendants who have appeared.
13 Plaintiff's counsel (or plaintiff, if pro se) is directed to serve copies of this Order on all
14 parties who appear after this Order is filed. Such service shall be accomplished
15 within ten (10) days after each appearance. Plaintiff's counsel (or plaintiff, if pro se)
16 will be responsible for starting the communications needed to comply with this Order.

17 **IV. JUDGE SPECIFIC PROCEDURAL INFORMATION**

18 All counsel and unrepresented parties should review Judge Donohue's web page
19 for procedural information applicable to cases before Judge Donohue. The judges'
20 web pages, in addition to the Local Rules, Electronic Filing Procedures for Civil and
21 Criminal Cases, court forms, instruction sheets, and General Orders, can be found on
22 the Court's website at www.wawd.uscourts.gov.

23 **V. EARLY SETTLEMENT CONSIDERATION AND NOTIFICATION**

If settlement is achieved, counsel shall immediately notify Peter Voelker,

1 Courtroom Deputy, at peter_voelker@wawd.uscourts.gov.

2 The parties are responsible for complying with the terms of this Order. The Court
3 may impose sanctions on any party who fails to comply fully with this Order.

4
5 DATED: The 27th of January 2014.

6 s/ James P. Donohue

7 James P. Donohue
8 United States Magistrate Judge

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HONORABLE RICARDO S. MARTINEZ

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON**

[REDACTED]

Plaintiff,

CASE NO. 2:14-cv-00123-RSM

vs.

**JOINT STATUS REPORT
AND PROPOSED
DISCOVERY PLAN**

**U.S. CITIZENSHIP AND
IMMIGRATION
SERVICES**, an agency of the
United States Government; and
**U.S. DEPARTMENT OF
HOMELAND SECURITY**,
an agency of the United States
Government.

Defendants.

As directed by the Court in its Order, the Plaintiff and Defendant, through their attorneys, hereby respectfully submit the following Joint Status Report and Proposed Discovery Plan.

JOINT STATUS REPORT & DISCOVERY PLAN - 1

1 All counsel and parties have conferred and provide the Court
2 with the following Joint Status Report and Discovery Plan:

3
4 **1. Nature and Complexity of the Case**

5 Plaintiff contends that Defendant has failed to properly consider
6 the evidence and apply the legal standard(s) for approval of an H-1B
7 skilled worker petition (I-129). This is not a complex case.
8

9
10 To the extent the Court has jurisdiction over the subject matter
11 of this action, it is pursuant to Section 10(b) of the Administrative
12 Procedures Act, 5 U.S.C. § 702 (“APA”). As such, it is “an action for
13 review of an administrative record”, and therefore, exempt, pursuant
14 to Rule 26(a)(1)(B)(i) of the Federal Rules of Civil Procedure, from
15 the requirements set forth in Rules 26(a) and (f) pertaining to initial
16 disclosures, the participation of the parties in a discovery conference,
17 and the presentation of a joint discovery plan.
18

19
20
21
22 **2. ADR Method.**

23 The parties agree that Plaintiff’s claims, if not mooted by
24 agency action, will be decided through dispositive motions.
25

26 Furthermore, the parties do not believe that formal ADR would
27 be effective in this case, because of the nature of the relief sought by
28 Plaintiff.
29
30

1 Therefore, the parties do not believe that mediation will be
2 necessary or appropriate.

3
4 **3. Scheduling of Mediation.**

5 The parties do not believe it is necessary to schedule mediation
6 at this time.

7
8 **4. Deadline for Joining Additional Parties.**

9
10 The parties do not believe that any additional parties will be
11 joined.

12
13 The parties agree that if any additional parties are joined, they
14 will be joined by April 18, 2014.

15
16 **5. Proposed Discovery Plan.**

17 Because this action is brought under the APA, the case will be
18 decided on the administrative record, and discovery is not appropriate.

19
20 **6. Date By Which Discovery Can Be Completed.**

21
22 Not applicable.

23
24 **7. Magistrate.**

25 The parties do not agree that a full-time Magistrate Judge may
26 conduct all proceedings.

27
28 **8. Bifurcation.**

29 Not applicable.

1 **9. Pretrial Statements and Order.**

2 Not applicable.

3
4 **10. Other Suggestions.**

5 The parties agree that the issues in this case can and should be
6
7 decided on dispositive motions.

8 The parties, therefore, request that the Court issue a briefing
9
10 schedule setting forth the dates for Plaintiff to file a Motion for
11 Summary Judgment; Defendant to file a response thereto; and any
12
13 cross-motion, as well as replies thereto.

14 The parties do not, at this time, have any other suggestions for
15
16 simplifying or shortening the case.

17 **11. Trial Date.**

18
19 Not applicable.

20 **12. Trial by Jury.**

21
22 Not applicable.

23 **13. Number of Trial Dates.**

24
25 Not applicable.

26 **14. Trial Counsel.**

27
28 Not applicable.

1 **15. Service.**

2 Not applicable.

3
4 **16. Scheduling Conference.**

5 The parties do not request a scheduling conference prior to a
6 scheduling order being entered in this case.
7

8
9 RESPECTFULLY SUBMITTED this 17th day of March 2014.
10

11
12 

13 /s/ Kristen B. Johnson

14 /s/ _____
15 WILLIAM FRICK, WSBA
16 26648
17 Law Office of William Frick
18 7900 SE 28th Street, Suite 500
19 Mercer Island, WA 98040
20 Phone: (206) 286-0167
21 Facsimile: (206) 770-7215
22 Email: william@crossborders.us
23 Attorney for Plaintiff

24 _____ KRISTIN B. JOHNSON, WSBA
25 #28189
26 Assistant United States Attorney
27 United States Attorney's Office
28 700 Stewart Street, Suite 5220
29 Seattle, WA 98101-1271
30 Phone: (206) 553-7970
 Fax: (206) 553-4067
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 kristin.b.johnson@usdoj.gov
 Attorney for Defendants

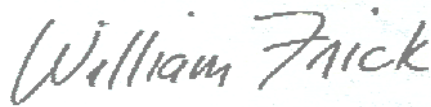
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant:

KRISTIN B. JOHNSON, WSBA #28189
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Attorney for Defendant

DATED this 17th day of March 2014.



/s/ _____
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HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

[REDACTED],

Plaintiff,

vs.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES, an agency of the United States Government; and **U.S. DEPARTMENT OF HOMELAND SECURITY**, an agency of the United States Government.

Defendants.

CASE NO. 2:14-cv-00123-RSM

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

*Noting Date: August 1, 2014
Without Oral Argument*

Plaintiff, [REDACTED], brings this Motion for Summary Judgment on all claims of their Complaint pursuant to FRCP 56 and LCR 7.

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INTRODUCTION

The issue in this matter is whether the proffered position of *Market Research Analyst* qualifies as a specialty occupation.

Plaintiff, [REDACTED] has provided in its Form I-129, Petition for a Nonimmigrant Worker, and in response to the Defendant's Request for Evidence, that this job offer of Market Research Analyst meets the statutory and regulatory requirements for approval of [REDACTED] Form I-129, Petition for a Nonimmigrant Worker.

STANDARD FOR REVIEW

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The APA empowers courts to "hold lawful and set aside" not only agency actions and conclusions that are "arbitrary" or "capricious," but also agency actions and conclusions that are "otherwise not in accordance with law" or are in excess of statutory jurisdiction, authority or limitations, or short of statutory right." 5. U.S.C. § 706 (2) (A), (C).

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Under *Chevron U.S.A., Inc. V. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 27778, 81 L.Ed.2d 694 (1984), agency actions based on statutory interpretation are only entitled to deference

1 if the statutory language is ambiguous. The *Chevron* two-step ends
2 when the meaning of a statute is found to be unambiguous. In that
3 case, agency pronouncements thereon have no effect." *Josendis v.*
4 *Wall to Wall Residence Repairs, Inc.*, 606 F.Supp.2d 1376 (S.D. Fla.
5 2009).

8 **PROCEDURAL HISTORY AND STATEMENT OF FACTS**

9
10 On **October 13, 2011** Plaintiff [REDACTED] filed form I-
11 129, requesting H-1B status for [REDACTED]. (CAR 000250)

12
13 On **February 2, 2012**, the USCIS issued a Request for
14 Evidence, asking for evidence pertaining to the Plaintiff's job offer –
15 specifically the "nature of the position" and the "nature of the
16 petitioner's business". (CAR 000027)

17
18
19 On **April 27, 2012**, [REDACTED] responded to the Request
20 for Evidence by fully providing the requested information. (CAR
21 000014)

22
23
24 On **October 27, 2012**, the USCIS denied the H-1B application,
25 stating "the petitioner has not demonstrated that the offered position is
26 a specialty occupation within the meaning of the regulations." (CAR
27 000002)

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LEGAL ARGUMENT

Petitions for H-1B works must be proved by a “preponderance” of the evidence. This standard has been reaffirmed in a USCIS memorandum¹ and in a USCIS Adopted Decision. *See Matter of Chawathe* (AAO Jan. 11, 2006).

Preponderance of the evidence means:

“The standard of proof should not be confused with the burden of proof. ... 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. Cardoza-Fonseca*, 480 U.S. 421 (1987) (defining “more likely than not” as a greater than 50 percent probability of something occurring). 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.”

Aytes Memo, *supra* note 10.

¹ USCIS Memorandum. M. Aytes, “Delegation of Authority for I-751, ‘Petition to Remove Conditions on Residence’” (Jan. 11, 2006), *published on* AILA InfoNet at Doc. No. 06021313 (*posted* Jan. 21, 2006).

1 Plaintiff, [REDACTED], is a small, growing enterprise at
2 present; the law makes no distinction between a small company's
3 need to hire a professional into an H-1B position, and a large
4 business' desire to do the same. *See, e.g., Assuta Med. Ctr. v. DHS*,
5 265 Fed. Appx. 542, 2008 U.S. App. LEXIS 2135 (9th Cir. 2008),
6
7 *Fred 26 Importers, Inc. v. DHS*, 445 F.2d 1174 (C.D. Cal. 2006).
8

9
10 Plaintiff owns and operates a convenience store and boutique
11 motel, and seeks to employ [REDACTED] as a Market Research
12 Analyst, as classified as the beneficiary of a nonimmigrant worker in a
13 special occupation pursuant to Section 101(a)(15)(H)(i)(b) of the
14 Immigration & Nationality Act (INA), 8 U.S.C. §
15 1101(a)(15)(H)(i)(b), as the corporation reviews and considers
16 acquisition and expansion of their convenience store and boutique
17 motel operations.
18
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22 Section 214(i)(1) of the INA, and 8 U.S.C. § 1184(i)(1), define
23 the term "specialty occupation" as an occupation that requires:
24

- 25 (A) Theoretical and practical application of a body of highly
26 specialized knowledge, and
27
28
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30

1 (B) Attainment of a bachelor's or higher degree in the
2 specific specialty (or its equivalent) as a minimum for
3 entry into the occupation in the United States.
4

5 The term "specialty occupation" is further defined at 8 C.F.R.

6
7 §214.2(h)(4)(ii) as:

8 An occupation which requires theoretical and practical
9 application of a body of highly specialized knowledge in
10 fields of human endeavor including, but not limited to,
11 architecture, engineering, mathematics, physical
12 sciences, social sciences, medicine and health, education,
13 ***business specialties***, accounting, law, theology, and the
14 arts, and which requires the attainment of a bachelor's
15 degree or higher in a specific specialty, or its equivalent,
16 as a minimum for entry into the occupation in the United
17 States.

[Emphasis added].

18 To establish the criteria of such specialty occupation pursuant to 8
19 C.F.R. §214.2(h)(4)(iii)(A), a petitioning employer must demonstrate
20 that the beneficiary possesses:
21

- 22 1. A ***baccalaureate*** or higher ***degree*** or its equivalent is
23 normally the minimum requirement for entry into the
24 particular position;
25
- 26 2. The ***degree*** requirement ***is common to the industry in***
27 ***parallel positions*** among similar organizations or, in the
28
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1 alternative, an employer may show that its particular
2 position is so complex or unique that it can be performed
3 only by an individual with a degree;
4

5 3. The *employer normally requires a degree or its*
6 *equivalent for the position*; or
7

8 4. The *nature of the specific duties* is so specialized and
9 complex that knowledge *required* to perform the duties is
10 usually associated with the attainment of a *baccalaureate*
11 or higher *degree*.
12
13

14 [Emphasis added].
15

16 Pursuant to 8 C.F.R. §214.2(h)(4)(iii)(A), to qualify as a
17 specialty occupation, the position *must meet one of the above-*
18 *referenced criteria*. Plaintiff has met this criterion in its petition for
19

20 
21

22 Further, the U.S. Bureau of Labor Statistics shows that a
23 Market Research Analyst's education level is that of a bachelor's
24 degree; this indicates the education level required is that of a
25 bachelor's degree (71%) and may include a master's degree (25%)
26 and doctoral or professional degree (4%). (CAR 000029) These
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1 occupational reports do, in fact, show the specialized nature,
2 education and complexity of knowledge required to perform the duties
3 associated with Market Research Analyst. 8 C.F.R. §
4 214.2(h)(4)(iii)(A)(4).
5

6
7 The denial of this petition by the Defendant deprives Plaintiff
8 of their ability to employ and reap the presumed benefits of
9 employing ██████████ as a Market Research Analyst. *See Wong v.*
10 *Napolitano*, 654 F.Supp.2d 1184, 1189 (D. Oregon 2009):
11

12
13 “[b]ecause the denial of [a] visa application would
14 deprive the employer of [a] prospective employee, each
15 employer ha[s] a concrete and particularized injury,
16 namely the inability to hire a specific employee it would
17 have hired absent the agency’s action.”

18 The judicial opinion in *Wong* specifically states there is “no
19 requirement” an employer show that it cannot find another employee
20 to fill the market research analyst position. The court in this matter
21 granted the employer’s motion for summary judgment, and ordered
22 the Department to grant the employer’s H1-B petition.
23

24
25 In its denial, the Defendant states, “the only issue to be
26 discussed is whether the position offered to the beneficiary qualifies
27 as a specialty occupation.” The Defendant asserts that the
28
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1 *Occupational Outlook Handbook (OOH)* describes the qualifications
2 and training for a Market Research Analyst does not require a
3
4 baccalaureate level of education, although *admits* that a baccalaureate
5 level of training is “typical” for such a position and occupation, and
6
7 this requirement lies with an employer for the proffered position.

8 Defendant further relies on its denial “factors often considered
9
10 by the USCIS”, *yet not required*, that when determining the industry
11 standard - whether the OOH requires a degree, or the particular
12 industry professional association requires a degree for minimum entry
13 requirement. *Shanti, Inc. v. Reno*, 36 F.Supp.2d 1151, 1165 (D.Min.
14 1999); *Hird/Blaker Corp. v. Slattery*, 764 F.Supp. 872, 1102
15 (S.D.N.Y. 1991).

16
17
18
19 Plaintiff owns and operates convenience stores and small
20 boutique motels in small towns, where tourism is its “bread and
21 butter”. Though the corporation is not a large entity with a collection
22 of large hotel and gas station/convenience store inventory, it still
23 would like to expand its business properties and would like a Market
24 Research Analyst to provide them the geographic and financial
25 direction to make these investment decisions. Plaintiff has established
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1 that the position requires someone with a bachelor degree. The
2 position is unique in that Plaintiff invests in small motels in small
3 tourist towns, and renovates them to preserve the uniqueness of the
4 community, while providing accommodations to passing travelers.
5 The Plaintiff is a careful and prudent investor; denying its petition for
6 a Market Research Analyst denies the Plaintiff of business
7 opportunities and employment to those who would fill those
8 employment vacancies from Plaintiff's convenience store and
9 boutique hotel properties.
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14 **CONCLUSION & REQUEST FOR RELIEF**

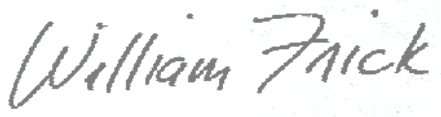
15 WHEREFORE, Plaintiff, [REDACTED], respectfully
16 request the Court grant Plaintiff summary judgment in this matter,
17 and find that:
18
19

- 20 1. Defendant, U.S. Citizenship & Immigration Services has
21 unreasonably and unlawfully denied Plaintiff's petition
22 for H-1B status;
23
- 24 2. Review *de novo* Plaintiff's petition for H-1B status;
25
- 26 3. If necessary, order that a hearing take place before this
27 Court concerning Plaintiff's petition for H-1B status;
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- 4. Award reasonable attorney's fees and costs pursuant to the Equal Access to Justice Act; and
- 5. Grant any and all further relief this Court deems just and proper.

RESPECTFULLY SUBMITTED on this 23rd day of May 2014.



/s/ _____
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(206) 770-7215 – Fax
E-mail: william@fricklawfirm.info
Attorney for Plaintiff

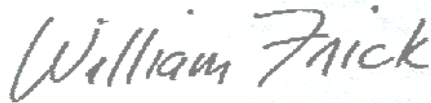
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant:

KRISTIN B. JOHNSON, WSBA #28189
Assistant United States Attorney
United States Attorney's Office
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Email: kristin.b.johnson@usdoj.gov
Attorney for Defendant

DATED this 23rd day of May 2014.



/s/

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[Proposed] ORDER

Plaintiff's Motion For Summary Judgment is granted.

The Clerk is directed to send copies of this Order to all
counsel of record.

DATED this _____ day of _____,
2014.

HONORABLE RICARDO S.
MARTINEZ

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

████████████████████,

Plaintiff,

v.

U.S. CITIZENSHIP AND
IMMIGRATION SERVICES, and U.S.
DEPARTMENT OF HOMELAND
SECURITY,

Defendants.

No. C14-123-RSM

**DEFENDANTS’ OPPOSITION TO
PLAINTIFF’S MOTION FOR
SUMMARY JUDGMENT AND
CROSS-MOTION FOR SUMMARY
JUDGMENT**

Noting Date: August 1, 2014

I. INTRODUCTION

Plaintiff ██████████, dba ██████████ brought this action against United States Citizenship and Immigration Services (“USCIS”) under the Administrative Procedures Act (“APA”) challenging USCIS’s denial of ██████ H1-B visa petition. USCIS denied the petition because ██████ failed to prove that the proffered position of market research analyst qualified as a “specialty occupation” under the relevant statutes and regulations. The Court should uphold USCIS’s decision because it is supported by substantial evidence and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

1 **II. STATEMENT OF FACTS**

2 [REDACTED] is a [REDACTED], Washington, company operating gas stations, convenience
3 stores, and hotels. See Dkt. No. 14, Certified Administrative Record (“CAR”) at 218.
4 [REDACTED] has [REDACTED] employees and a gross annual income of \$ [REDACTED]. *Id.* On October 13,
5 2011, Raj filed a Form I-129 Petition for Nonimmigrant Worker with USCIS seeking to
6 classify [REDACTED], a citizen of the [REDACTED], as a nonimmigrant working in an
7 H-1B specialty occupation. CAR 213-417. Specifically, [REDACTED] sought to employ [REDACTED]
8 [REDACTED] as a “Marketing Analyst & Specialist” in its [REDACTED] office, for a three-year
9 period, at an annual salary of \$36,192.00. CAR 213-219. In its petition, [REDACTED] described
10 the duties of the proffered position as follows:

11 Research market situations to determine possible sales of a service or product &
12 assess their promotional needs. Develop & analyze research plan, & offer
13 marketing strategies.

14 CAR 224.

15 In support of its petition, [REDACTED] submitted the following: (1) the Labor Condition
16 Application for Nonimmigrant Workers it filed with the Department of Labor; (2) a
17 copy of [REDACTED] bachelor’s degree, management marketing certificate, academic
18 transcript, passport, visa, and employment authorization card; and (3) a copy of [REDACTED]
19 business license and its corporate tax returns for 2008, 2009, and 2010. CAR 252-411.

20 On February 2, 2012, USCIS issued a Request for Evidence, asking [REDACTED] to
21 submit additional evidence pertaining to the nature of the proffered position and the
22 nature of [REDACTED] business. CAR 10-13, 207-210. [REDACTED] submitted a response on April 27,
23 2012. CAR 14-206. In its response, [REDACTED] described the duties of the proffered position
24 as follows:

25 Market Research Analyst will study and evaluate market and geographical
26 options for expanding the hotel/motel and convenience store business of [REDACTED]
27 [REDACTED]. The Market Research Analyst will present to the organization
28 these findings and assist the Company in making market expansion decisions.

The Market Research Analyst will also research market situations to determine possible sales of a service, and assess their promotional needs. Gather pertinent

1 information on sales, methods of marketing, competitors, prices, marketing
2 outlets, and distribution channels to develop sales and marketing strategies. The
3 Market Research Analyst will culminate the results based on the information
4 collected to use survey results to design marketing campaign.

5 **Duties & Responsibilities**

- 6 ● Develop a research plan, analyzing the research results and offering market
7 expansion strategies.
- 8 ● Analyze customers, organizations, and competitors using graphs, charts, and
9 explanatory text.
- 10 ● Collect customer demographic information such as income, gender, age and
11 market information through principal research methods.
- 12 ● Conduct research on marketing strategies and consumer opinions,
13 collaborating with statisticians, pollsters, hotel/motel and convenience store
14 market professionals, and other professionals.
- 15 ● Generate reports of findings, placing difficult findings on paper, and
16 illustrating data graphically.
- 17 ● Collect information on competitors and analyzing their sales, prices, and
18 methods of distribution and marketing.
- 19 ● Measure the effectiveness of advertising, marketing, and communications
20 strategies and programs.
- 21 ● Attend department conferences to provide proposals and information
22 concerning the distribution, promotion, pricing, and design of company services
23 or products.
- 24 ● Provide information to help determine [REDACTED] business positioning
25 in the current marketplace.
- 26 ● Develop and implement procedures to identify advertising needs, and direct
27 trained survey interviewers.
- 28 ● Devise and evaluate methods and procedures to collect data such as opinion
polls, surveys, or questionnaires or arranging them to obtain accessible data.

22 CAR 23.

23 [REDACTED] also submitted the following additional evidence in support of its petition: (1)
24 a summary report for market research analysts and marketing specialists published by
25 the Occupational Information Network (“O*NET”)¹; (2) a summary for market research
26 analysts published by the Department of Labor in its Occupational Outlook Handbook

27 ¹ The O*NET is being developed under the sponsorship of the U.S. Department of Labor/Employment
28 and Training Administration. The O*NET database contains information on hundreds of standardized
and occupation-specific descriptors.

1 (“OOH”); (3) two job postings for market research analysts; (4) the curriculum vitae of
2 a market research analyst; (5) two articles about the convenience store market; (6)
3 information about professional associations and memberships in the convenience store
4 and gas industries; and (7) information about ■■■, including its organizational chart,
5 company profile, business plans, market research analyst report, photographs of its
6 facilities, a letter from its accountant, and its corporate tax returns for 2009, 2010, and
7 2011. CAR 24-206.

8 On October 27, 2012, USCIS issued a decision denying ■■■ H-1B petition
9 because ■■■ failed to prove that the proffered position qualifies as a “specialty
10 occupation” under the relevant statutes and regulations. CAR 2-9. Specifically, USCIS
11 found that ■■■ failed to meet its burden of proving that the proffered position meets any
12 of the four criteria in 8 C.F.R.

13 § 214.2(h)(4)(iii)(A). *Id.*

14 Under the first criterion, USCIS found that ■■■ failed to prove that a bachelor’s
15 degree in a specific specialty is the normal minimum for entry into the occupation.
16 First, USCIS found that although ■■■ titled the proffered position as a “Marketing
17 Analyst & Specialist,” an analysis of the proposed duties revealed that the position
18 described reflected the duties of a “Market Research Analyst” as listed in the OOH.
19 CAR 7. Next, USCIS found that although the OOH does state that a bachelor’s degree
20 is typical, it does not state that a bachelor’s degree *in a specific specialty* is the *normal*
21 *minimum* for entry into the occupation. CAR 7-8. Rather, according to the OOH, the
22 requirements for entry into the occupation vary by employer as to what course of study
23 might be appropriate or preferred. CAR 8.

24 Under the second criterion, USCIS found that ■■■ failed to prove that a
25 bachelor’s degree requirement is common to the industry in parallel positions among
26 similar organizations. CAR 8. Although ■■■ submitted sample job listings, USCIS
27 found that they were not sufficient evidence because it was not clear that the employers
28 who published the announcements were similar to ■■■ organization. *Id.* Furthermore,
although ■■■ provided evidence of membership associations within its industry, it did

1 not at all establish that those associations have made a degree requirement common to
 2 the industry for a position similar to the proffered position. *Id.* Finally, USCIS found
 3 that ■ failed to prove that the proffered position is so complex or unique that it can be
 4 performed only by an individual with a degree. *Id.* Neither the duties ■ described,
 5 nor the evidence it submitted, established that ■'s business is so specialized,
 6 distinctive, and/or exceptional that it would require the services of a market research
 7 analyst even though it is not standard within ■ industry to employ one. CAR 9.

8 Under the third criterion, USCIS found that ■ failed to prove that it normally
 9 requires a bachelor's degree or its equivalent for the position because ■ had never
 10 offered the proffered position before and ■ did not submit any evidence on this
 11 criterion. *Id.*

12 Finally, under the fourth criterion, USCIS found that ■ failed to prove that the
 13 nature of the specific duties for its position is so specialized and complex that
 14 knowledge required to perform them is usually associated with the attainment of a
 15 bachelor's degree or higher. *Id.* The record contained insufficient information to
 16 establish the specialized and complex nature of the proffered position. *Id.* Specifically,
 17 the evidence failed to distinguish the difference between the duties to be performed by
 18 the beneficiary and those normally performed by a market research analyst, and how the
 19 duties of the proffered position were more specialized and complex. *Id.*

20 Therefore, because ■ failed to establish that any of the four criteria enumerated
 21 in 8 C.F.R. § 214.2(h)(4)(iii)(A), are present, USCIS found that ■ failed to prove that
 22 the proffered position is a "specialty occupation" and denied the petition. *Id.*

23 **III. SCOPE OF REVIEW**

24 ***A. Summary Judgment Standard***

25 Summary judgment is appropriate if there is no genuine issue as to any material
 26 fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.
 27 56(c). The moving party has the initial burden of demonstrating that summary
 28 judgment is proper. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The
 moving party must identify the pleadings, depositions, affidavits, or other evidence that

1 it “believes demonstrates the absence of a genuine issue of material fact.” *Celotex*
2 *Corp. v. Catrett*, 477 U.S. 317, 323 (1986). “A material issue of fact is one that affects
3 the outcome of the litigation and requires a trial to resolve the parties’ differing versions
4 of the truth.” *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

5 The burden then shifts to the opposing party to show that summary judgment is
6 not appropriate. *Celotex*, 477 U.S. at 324. The opposing party’s evidence is to be
7 believed, and all justifiable inferences are to be drawn in its favor. *Anderson v. Liberty*
8 *Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, to avoid summary judgment, the
9 opposing party cannot rest solely on conclusory allegations. *Berg v. Kincheloe*, 794
10 F.2d 457, 459 (9th Cir. 1986). Instead, it must designate specific facts showing there is
11 a genuine issue for trial. *Id.*; see also *Butler v. San Diego District Attorney’s Office*,
12 370 F.3d 956, 958 (9th Cir. 2004) (stating if defendant produces enough evidence to
13 require plaintiff to go beyond pleadings, plaintiff must counter by producing evidence
14 of his own).

15 ***B. Standard of Review Under the APA***

16 Under the APA, “[a] person suffering legal wrong because of agency action, or
17 adversely affected or aggrieved by agency action within the meaning of a relevant
18 statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. However, a reviewing
19 court may not set aside final agency action unless the action is found to be “arbitrary,
20 capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5
21 U.S.C. § 706(2)(a); *Brazil Quality Stones, Inc. v. Chertoff*, 531 F.3d 1063, 1067 (9th
22 Cir. 2008). The standard is “highly deferential, presuming the agency action to be
23 valid.” *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006)
(citation omitted).

24 The Court reviews an agency’s factual findings for “substantial evidence.”
25 *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1315 (9th Cir.
26 2006). Under this deferential standard, a court may not substitute its own judgment for
27 the agency’s and may only reverse an agency’s findings when the evidence presented
28 “would *compel* a reasonable finder of fact to reach a contrary result.” *Id.* (citation

1 omitted; emphasis in original). An agency decision should be upheld even if it is “of
 2 less than ideal clarity,” so long as “the agency’s path may reasonably be discerned.”
 3 *Northwest Motorcycle Association v. United States Department of Agriculture*, 18 F.3d
 4 1468, 1478 (9th Cir. 1994) (citation omitted).

5 The Court’s review of an agency action is confined to the administrative record
 6 “and the basis for the agency’s decision must come from the record.” *National*
 7 *Association of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003) (citation
 8 omitted). “[W]here an agency interprets its own regulation, even if through an informal
 9 process, its interpretation of an ambiguous regulation is controlling . . . ‘unless plainly
 10 erroneous or inconsistent with the regulation.’” *Bassiri v. Xerox Corp.*, 463 F.3d 927,
 11 930 (9th Cir. 2006) (citation omitted). If the agency has erred, the Court must still
 12 “evaluate whether such an error was harmless.” *Kazarian v. U.S. Citizenship and*
 13 *Immigration Services*, 596 F.3d 1115, 1118 (9th Cir. 2010) (citation omitted).

14 IV. ARGUMENT

15 USCIS properly denied Raj’s H-1B visa petition because ■ did not sustain its
 16 burden of proving that the proffered position was a “specialty occupation” under the
 17 relevant statutes and regulations. Specifically, ■ failed to establish that any of the
 18 four criterion enumerated in 8 C.F.R. § 214.2(h)(4)(iii)(A) are present. On appeal to
 19 this Court, ■ challenges USCIS’s findings regarding the first, second, and fourth
 20 criteria. *See* Dkt. No. 16, pg. 7-10.

21 A. *Applicable Law and Regulations*

22 A United States employer may file an H-1B visa petition on behalf of an alien
 23 worker. *See* 8 U.S.C. § 1184(c). An H-1B visa grants a “nonimmigrant alien”
 24 admission to the United States for an initial period of no more than three years. 8
 25 C.F.R. § 214.2(h)(9)(iii)(A)(1). The H-1B visa grants an alien temporary admission
 26 into the United States to:
 27
 28

1 perform services ... in a specialty occupation described in section 1184(i)(1) of
 2 this title ... who meets the requirements for the occupation specified in section
 3 1184(i)(2) of this title ... and with respect to whom the Secretary of Labor
 4 determines and certifies to the Attorney General that the intending employer has
 5 filed with the Secretary an application under section 1182(n)(1) of this title.

6 8 U.S.C. § 1101(a)(15)(H)(i)(b).

7 In order to qualify for a nonimmigrant H-1B visa, the petitioning employer and
 8 the alien beneficiary must satisfy a two-prong test: (1) the position that the alien seeks
 9 to occupy must qualify as a “specialty occupation;” and (2) the alien must herself be
 10 qualified to perform services in said occupation.² *See Shanti, Inc. v. Reno*, 36
 11 F.Supp.2d 1151, 1153 (D.Minn. 1999). The employer petitioning for an H-1B visa and
 12 the alien beneficiary have the burden of proof in an administrative proceeding to prove
 13 that both prongs of the test are satisfied. *See* 8 U.S.C. § 1361 (“Whenever any person
 14 makes application for a visa ... the burden of proof shall be upon such person to
 15 establish that he is eligible to receive a visa.”).

16 Section 1184(i)(1) in Title 8 of the United States Code describes a “specialty
 17 occupation” as requiring:

- 18 (A) theoretical and practical application of a body of highly specialized
 19 knowledge, and
- 20 (B) attainment of a bachelor’s or higher degree in the specific specialty (or its
 21 equivalent) as a minimum for entry into the occupation in the United States.

22 Additionally, 8 U.S.C. § 1184(i)(2) mandates that an alien petitioning for
 23 employment in a “specialty occupation” must satisfy one of the following requirements:

- 24 (A) full state licensure to practice in the occupation, if such licensure is required
 25 to practice in the occupation,
- 26 (B) completion of the degree described in paragraph (1)(B) for the occupation, or
- 27 (C)(i) experience in the specialty equivalent to the completion of such degree,
 28 and (ii) recognition of expertise in the specialty through progressively
 responsible positions relating to the specialty.

² USCIS did not reach the second prong of the H-1B visa test - that the alien must herself be qualified to perform services in said occupation – because it found that Raj failed to meet the first prong.

1 Finally, 8 C.F.R. § 214.2(h)(4)(ii) further describes a “specialty occupation” and
2 provides a non-exhaustive list of professions that typically qualify as “specialty
3 occupations:”

4
5 Specialty occupation means an occupation which requires theoretical and
6 practical application of a body of highly specialized knowledge in fields of
7 human endeavor including, but not limited to, architecture, engineering,
8 mathematics, physical sciences, social sciences, medicine and health, education,
9 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.

10 Since this list is non-exhaustive, USCIS developed a set of criteria to determine
11 whether an occupation qualifies as a “specialty occupation.” The four criteria, one of
12 which a particular position must satisfy, are set forth in 8 C.F.R. § 214.2(h)(4)(iii)(A):

- 13 (1) a baccalaureate or higher degree or its equivalent is normally the minimum
14 requirement for entry into the particular position;
15 (2) the degree requirement is common to the industry in parallel positions among
16 similar organizations or, in the alternative, an employer may show that its
17 particular position is so complex or unique that it can be performed only by an
18 individual with a degree;
19 (3) the employer normally requires a degree or its equivalent for the position; or
20 (4) the nature of the specific duties are so specialized and complex that
21 knowledge required to perform the duties is usually associated with the
22 attainment of a baccalaureate or higher degree.

23
24 ***B. Burden of Proof***

25 The burden of proof to establish eligibility for a desired preference rests with the
26 petitioner. *See Matter of Brantigan*, 11 I. & N. Dec. 493 (Feb. 8, 1996). Eligibility for
27 an H-1B visa must be demonstrated by a preponderance of the evidence. *See Matter of*
28 *Chawathe*, 25 I. & N. Dec. 369, 275-76 (Oct. 20, 2010).

1 *C. Denial of the H-1B visa petition was not arbitrary, capricious, an abuse of*
2 *discretion, or otherwise not in accordance with law.*

3 The only issue is whether [REDACTED] proffered position qualifies as a “specialty
4 occupation” under the statutes and regulations cited above. *See* Dkt. No. 16, pg. 2.
5 Resolution of this issue involves an analysis of whether [REDACTED] was able to prove that any
6 of the four criteria set forth in
7 8 C.F.R. § 214.2(h)(4)(iii)(A) were met. In its motion for summary judgment, [REDACTED]
8 challenges USCIS’s determination that [REDACTED] failed to meet the first, second, and fourth
9 criteria. *See* Dkt. No. 16, pg. 7-10. Defendants will discuss each challenged criteria.

10
11 1. *A baccalaureate or higher degree of its equivalent is normally the minimum*
12 *requirement for entry into the particular position.*

13 In analyzing [REDACTED] petition under the first criterion, USCIS first determined that
14 the job title [REDACTED] submitted of “Marketing Analyst & Specialist” is not controlling. CAR
15 7. USCIS analyzed the actual proposed duties [REDACTED] submitted and found that they are
16 more analogous to those of a “Market Research Analyst.” *Id.* [REDACTED] does not contest this
17 finding on appeal. *See* Dkt. No. 16, pg. 2 (“The issue in this matter is whether the
18 proffered position of *Market Research Analyst* qualifies as a specialty occupation.”).
19 Indeed, courts have found that regardless of the position title submitted by the
20 petitioner, it is the actual position duties that serve as the basis for determining
21 eligibility. *See EG Enterprises, Inc. v. Dept. of Homeland Sec.*, 467 F.Supp.2d 728,
22 736-37 (E.D.Mich., Dec. 19, 2006). The duties of the proffered position, combined
23 with the position title and business size, are all components in the H-1B visa petition
24 analysis. *Id.*

25 Second, USCIS properly relied on the 2012-2013 edition of the OOH to analyze
26 the generic position requirements of a market research analyst under the first criterion.
27 CAR 7-8. The OOH provided that:

28 Market research analysts typically need a bachelor’s degree in market research or
 a related field. Many have degrees in fields such as statistics, math, or computer

1 science. Others have a background in business administration, one of the social
2 sciences, or communications. Courses in statistics, research methods, and
3 marketing are essential for these workers; courses in communications and social
4 sciences – such as economics, psychology, and sociology – are also important.

5 Many market research analyst jobs require a master’s degree. Several schools
6 offer graduate programs in marketing research, but many analysts complete
7 degrees in other fields, such as statistics, marketing, or a Master of Business
8 Administration (MB). A master’s degree is often required for leadership
9 positions or positions that perform more technical research.

10 CAR 7. USCIS found that the OOH does state that a bachelor’s degree is typical but it
11 does not state that a bachelor’s degree *in a specific specialty* is the *normal minimum* for
12 entry into the occupation. CAR 7-8. Rather, according to the OOH, the requirements
13 for entry into the occupation vary by employer as to what course of study might be
14 appropriate or preferred. CAR 8.

15 On appeal, ■■■ appears to argue that USCIS’s reliance on the OOH was
16 improper. ■■■ states, “Defendant further relies on its denial ‘factors often considered by
17 the USCIS’, *yet not required*, that when determining the industry standard - whether the
18 OOH requires a degree, or the particular industry professional association requires a
19 degree for minimum entry requirement.” Dkt. No. 16, pg. 9. But ■■■ fails to cite any
20 authority that prohibits USCIS from referencing the OOH in determining H1-B
21 eligibility. Indeed, courts have noted that USCIS relies on the OOH because in making
22 H1-B eligibility determinations because “[t]he OOH provides occupational descriptions
23 and minimum entrance requirements generally expected for entry into a particular
24 employment field in the United States.” *EG Enterprises*, 467 F. Supp. 2d at 737.

25 Furthermore, the OOH is the primary evidence ■■■ submitted in support of its
26 proof of the first criterion. CAR 28-36. In its response to USCIS’s Request for
27 Evidence, ■■■ argued that the OOH establishes that a market research analyst’s
28 education is that of a bachelor’s degree. CAR 20. ■■■ cannot now argue on appeal that
USCIS improperly considered the very authority that ■■■ submitted and relied on in
support of its petition.

1 Notably, the summary from the OOH that ■ submitted to USCIS appears to
2 have been printed on April 24, 2012, three days before ■ submitted it to USCIS, but it
3 is not from the 2012-2013 edition of the OOH. CAR 29-36. All of the statistics
4 reported in the summary ■ submitted are for 2010. CAR 29. The description of the
5 education requirement in the 2010 summary ■ submitted is identical to the 2012-2013
6 edition that USCIS cited in its decision *except that* it omits the word “typically” from
7 the first sentence. The summary ■ submitted states, “[m]arket research analysts need
8 a bachelor’s degree in market research or a related field” rather than, “[m]arket research
9 analysts **typically** need a bachelor’s degree in market research or a related field.” CAR
10 32, 7 (emphasis added). Thus, it appears that ■ submitted a summary from a prior
11 edition of the OOH that omitted the word “typically.” Nevertheless, the OOH summary
12 was the primary authority ■ relied on in establishing that the proffered position
13 satisfied the degree requirement of the first criterion. And USCIS properly relied on the
14 current 2012-2013 edition of the OOH in determining whether ■ met the first prong.

15 Although ■ first argues on appeal that USCIS improperly relied on the OOH,
16 ■ also repeats the argument it made to USCIS initially - that the definition of market
17 research analyst in the OOH actually satisfies the first criterion because the OOH states
18 that a bachelor’s degree is typically required. *See* Dkt. No. 16, pg. 7, 9. But ■
19 focuses only on the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), which do specify the
20 need for a bachelor’s degree or higher. What ■ overlooks is the statutory
21 requirements that the bachelor’s degree must be **in a specific specialty** (or its
22 equivalent) and is required **as a minimum for entry into** the specialty occupation. *See*
23 8 U.S.C. § 1184(i)(1). Thus, the statute requires that the bachelor’s degree be in a field
24 that is the same as the proffered position or in an “equivalent” specialty and that it be
25 required as the minimum for entry into the position.

26 In contrast, the OOH provides that a whole variety of majors can be satisfactory
27 for market research analysts - ranging from statistics to social sciences or
28 communications. According to the OOH, market research analysts may have majored
in widely disparate fields. The OOH does not indicate that an individual would follow

1 any particular career path to become a market research analyst; rather, although a
 2 bachelor's degree is typically required for entry into the field, there are a number of
 3 degrees one could pursue in order to launch a career as a market research analyst.
 4 Therefore, market research analysts simply cannot meet the requirements of the first
 5 criterion under 8 C.F.R. § 214.2(h)(4)(iii)(A) and 8 U.S.C. § 1184(i).

6 The Administrative Appeals Office for USCIS has recently issued several
 7 decisions rejecting the exact argument ■■■ makes in this appeal - that a market research
 8 analyst position, as defined by the OOH, can meet the requirements of the first criterion.
 9 *See, e.g., In re Petitioner [Identifying information redacted by Agency]*, 2013 WL
 10 8124091, *8-11 (Dec. 24, 2013); *In re Petitioner [Identifying information redacted by*
 11 *Agency]*, 2012 WL 9160030, *5-6 (July 17, 2012); *In re Petitioner [Identifying*
 12 *information redacted by Agency]*, 2011 WL 9082126, *4-5 (Nov. 1, 2011). This Court
 13 should do the same.

14 2. *The degree requirement is common to the industry in parallel positions*
 15 *among similar organizations or, in the alternative, an employer may show*
 16 *that its particular position is so complex or unique that it can be performed*
 17 *only by an individual with a degree.*

18 i. *The degree requirement is common to the industry in parallel positions*
 19 *among similar organizations*

20 In determining whether ■■■ met the second criterion's requirement that a
 21 bachelor's degree is common to the industry in parallel positions in similar
 22 organizations, USCIS reviewed the two job listings ■■■ submitted and found that they
 23 are insufficient because it is unclear that the employers are similar to ■■■
 24 organization.³ CAR 8. Indeed, a review of the two job listings ■■■ submitted reveals
 25 that they contain little evidence about the organization who reportedly posted the job

26
 27 ³ USCIS's decision states that it reviewed three job listings ■■■ submitted from Brooks Sports, Piraeus
 28 Data, and the NPD Group. CAR 8. But a review of the record reveals that ■■■ only submitted two job
 listings; one from Brooks Sports and one from Piraeus Data. The evidence ■■■ submitted related to the
 NPD Group is a curriculum vitae from a marketing analyst who worked at the NPD Group. CAR 42-43.

1 listing. And the information that is present confirms that the employers are not in
2 similar industries to [REDACTED].

3 The job posting for Brooks Sports indicates that the company is in “the running
4 and active lifestyle industries” and is located in Bothell, Washington. CAR 38. The job
5 posting for Piraeus Data indicates that it is a “Management Consulting and Business
6 Intelligence firm” with forty employees located “in the heart of downtown Seattle.”
7 CAR 40. Neither of these employers is in the gas station, convenience store, or hotel
8 business in Eastern Washington. Furthermore, although the Brooks Sports posting
9 appears to require a bachelor’s degree in marketing, economics, business, statistics or
10 related field, the Piraeus Data posting only requires a “B.A. or equivalent experience.”
11 CAR 38, 41.

12 Thus, not only do the job postings [REDACTED] submitted fail to show that they are from
13 employers similar to [REDACTED] organization, they also do not prove that a bachelor’s degree
14 **in a specific specialty** (or its equivalent) is required **as a minimum for entry into** the
15 specialty occupation. *See* 8 U.S.C. § 1184(i)(1). On appeal, [REDACTED] does not challenge
16 USCIS’s finding that the job listings it provided were insufficient to meet the second
17 criterion. *See generally* Dkt. No. 16.

18 USCIS also found that, although [REDACTED] provided evidence of membership
19 associations within its industry, it did not at all establish that those associations have
20 made a degree requirement common to the industry for a position similar to the
21 proffered position. CAR 8. Indeed, a review of the evidence [REDACTED] submitted from
22 professional associations reveals that there is not a single reference to a bachelor’s
23 degree. One document is a three-page print out of the names and addresses of
24 associations related to convenience stores. CAR 57-59. Another is a one-page article
25 about the growth of the convenience store industry. CAR 60. There is also a one-page
26 description of the National Association of Convenience Stores and a blank application
27 for membership. CAR 61-64. Another document [REDACTED] submitted is a print-out of the
28 Membership Benefits page from Western Petroleum Marketers Association. CAR 65.
This document shows that the association awards merit scholarships “to help children of

1 WPMA members receive a higher education.” CAR 65. It does not establish that a
2 bachelor’s degree **in a specific specialty** (or its equivalent) is required **as a minimum**
3 **for entry into** the field of market research analyst. Finally, the last document [REDACTED]
4 submitted is information on SIGMA America’s Leading Fuel Marketers, but it also does
5 not discuss the minimum educational requirements of a market research analyst. CAR
6 66-67.

7 On appeal, [REDACTED] does not challenge USCIS’s finding that the membership
8 associations it submitted were insufficient to satisfy the second criterion. *See generally*
9 Dkt. No. 16. Rather, [REDACTED] appears to challenge USCIS’s consideration of whether the
10 particular industry’s professional associations require a bachelor’s degree as evidence of
11 the second criterion. [REDACTED] states, “Defendant further relies on its denial ‘factors often
12 considered by the USCIS’, *yet not required*, that when determining the industry
13 standard – whether the OOH requires a degree, or the particular industry professional
14 association requires a degree for minimum entry requirement.” Dkt. No. 16, pg. 9. But
15 similar to the OOH, [REDACTED] is the party that submitted the evidence pertaining to
16 membership associations to USCIS in support of its I-129 petition. [REDACTED] cannot now
17 argue on appeal that USCIS improperly considered the very evidence it submitted.

18 *ii. The employer’s particular position is so complex or unique that it can be*
19 *performed only by an individual with a degree.*

20 USCIS found that [REDACTED] failed to prove the alternative in the second criterion that
21 [REDACTED] position was so complex or unique that it can be performed only by an individual
22 with a degree. CAR 8-9. USCIS found that “[n]either the duties [REDACTED] described, nor the
23 evidence it submitted, establish that [REDACTED] business is so specialized, distinctive, and/or
24 exceptional that it would require the services of a Market Research Analyst even though
25 it is not standard within [REDACTED] industry to employ a Market Research Analyst.” CAR 9.
26 Thus, USCIS found that [REDACTED] failed to submit sufficient documentation to show that this
27 position involves duties seen as either unique or complex so that only an individual with
28 a degree in a specific specialty could perform them. *Id.*

1 Indeed, ■ did not submit any evidence to show that ■ itself requires a
2 bachelor's degree in a specific specialty for the position of market research analyst. ■
3 represented to USCIS that it had never employed a market research analyst in the past
4 because "it has not been in a financial position to require such an analyst until recently."
5 CAR 18. It also stated that "[t]he principals and owners of ■ have
6 performed market research analysis duties for the company in the past." CAR 18. But
7 ■ failed to submit any evidence to USCIS to show that the market research analysis
8 duties its principals and owners provided in the past were so complex and unique that
9 they had to be performed by an individual with a bachelor's degree in a specific
10 specialty.

11 Further, ■ did not present the job duties of the proffered position in a way that
12 would suggest that the duties are especially complex or unique compared with other
13 such positions. Indeed, ■ description of the duties and responsibilities for its
14 position are nearly identical to those found in the general description of a market
15 research analyst in the Department of Labor documents. Eight of the eleven bullet
16 points in ■ Duties & Responsibilities description are nearly verbatim to the bullet
17 points in the O*NET summary ■ submitted with its application. CAR 23, 25. The
18 remaining duties ■ described are similarly generic duties and responsibilities
19 associated with market research analysts in general and are not especially complex or
20 unique duties above and beyond what other market research analysts would perform.

21 For the first time on appeal ■ argues, "[t]he position is unique in that ■]
22 invests in small motels in small tourist towns, and renovates them to preserve the
23 uniqueness of the community, while providing accommodations to passing travelers."
24 Dkt. No. 16, pg. 10. But ■ did not sufficiently present the proffered position to
25 USCIS as one that would involve duties unique to renovating small motels in tourist
26 towns to preserve the uniqueness of the community. Rather, ■ stated that the market
27 research analyst would assist ■ in (1) pursuing an aggressive investment strategy
28 during an economic downturn, and (2) overcoming negative publicity surrounding one
of their prior investments. CAR 14.

1 ■ stated that a “significant portion” of the duties the market research analyst
2 will perform involve developing a long-term strategy for “rehabilitating” or
3 “rebranding” the hotel that received negative publicity. CAR 15. ■ also stated that
4 the market research analyst would research, monitor and advise on the market
5 opportunities in Central Washington - and, in fact, throughout the Pacific Northwest.”
6 *Id.* ■ stated that its current focus is in businesses related to hotels, recreation services,
7 gas and convenience stores, as well as trucking, overland shipping, and transportation of
8 goods throughout Washington, Oregon and Idaho. *Id.* And that ■ is not limiting itself
9 to these areas of business but is looking for other opportunities to invest, and the
10 research performed by the market research analyst will be crucial part of that strategy.
11 *Id.* ■ also stated that the market research analyst would determine whether it would
12 be prudent to continue to expand its convenience store and/or motel collection, whether
13 focus on purchase and renovation of historical motels would be financially prudent, and
14 how geographically widespread they can or should expand. CAR 18.

15 Thus, the proffered position ■ described to USCIS was that of a general market
16 research analyst, it was not for a market research analyst who specializes in investing in
17 small motels in small tourist towns, and renovating them to preserve the uniqueness of
18 the community, while providing accommodations to passing travelers. And, as
19 discussed above, the duties ■ listed for the position were generic duties for a market
20 research analyst copied directly from the general information posted on O*NET. There
21 were no duties listed in ■ petition or supplemental evidence that were specific to a
22 market research analyst for a unique niche in renovating small motels in tourist towns to
23 preserve the uniqueness of the community.

- 24 3. *The nature of the specific duties are so specialized and complex that*
25 *knowledge required to perform the duties is usually associated with the*
26 *attainment of a baccalaureate or higher degree.*

27 In analyzing the fourth criterion, which is similar to the alternative in the second
28 criterion discussed above, USCIS found that the record contained insufficient
information to establish the specialized and complex nature of the proffered position.

1 CAR 9. Specifically, the evidence failed to distinguish the difference between the
2 duties to be performed by the beneficiary and those normally performed by a market
3 research analyst, and how the duties of the proffered position are more specialized and
4 complex. *Id.*

5 On appeal, ■■■ makes the sweeping statement that the Department of Labor
6 statistics “occupational reports” it submitted show the specialized nature, education and
7 complexity of knowledge required to perform the duties associated with market research
8 analyst and satisfies the fourth criterion. *See* Dkt. No. 16, pg. 7-8. But this information
9 only describes the position of market research analyst in the most general terms.
10 Contrary to ■■■ assertion, the “occupational reports” ■■■ submitted do not contain
11 sufficient supporting evidence to suggest that there exists a standard, industry-wide
12 requirement of at least a bachelor’s degree in a specific specialty, or its equivalent for
13 the position of market research analyst. Specifically, no professional association has
14 provided such documentation, nor has ■■■ collected supporting letters or affidavits from
15 other individuals or entities in the industry to support its claim that a market research
16 analyst is a specialty occupation requiring at least a bachelor’s degree in a specific field.
17 And as discussed above, USCIS properly found that ■■■ failed to prove that the duties
18 of the proffered position were so specialized and complex as to require a bachelor’s
19 degree.

20 CONCLUSION

21 WHEREFORE, USCIS properly denied ■■■’s H-1B petition because ■■■ failed
22 to prove that the proffered position qualifies as a “specialty occupation” under the
23 relevant statutes and regulations. ■■■ failed to meet its burden of proving that the
24 proffered position meets any of the four criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A). The
25 Court should uphold USCIS’s decision because it is supported by substantial evidence
26 and is not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance
27 with law.
28

1 DATED this 20th day of June, 2014.
2

3 Respectfully submitted,

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5 United States Attorney

6 /s/ Kristin B. Johnson

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on the below date she electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record as follows:

William Frick william@crossborders.us

DATED this 20th day of June, 2014.

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HONORABLE RICARDO S. MARTINEZ

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON**

[REDACTED]

Plaintiff,

CASE NO. 2:14-cv-00123-RSM

vs.

**U.S. CITIZENSHIP AND
IMMIGRATION
SERVICES**, an agency of the
United States Government; and
**U.S. DEPARTMENT OF
HOMELAND SECURITY**,
an agency of the United States
Government.

**PLAINTIFF’S REPLY TO
DEFENDANT’S MOTION
FOR SUMMARY
JUDGMENT AND
OPPOSITION TO
DEFENDANT’S CROSS-
MOTION FOR SUMMARY
JUDGEMENT**

*Noting Date: August 8, 2014
Without Oral Argument*

Defendants.

Introduction

Defendants ask the Court to dismiss Plaintiff’s claim because
the USCIS’ denial of its H-1B petition “is supported by substantial

1 evidence and is not arbitrary, capricious, an abuse of discretion, or
2 otherwise not in accordance with law.” (Dkt. 19 page 1)

3
4 Defendants’ motion, however, points out that the core basis of
5 the USCIS’ denial rests on the agency’s assignment of a dissimilar
6 meaning to words that are commonly used interchangeably. The
7 parsing of these words is, in fact, an arbitrary and capricious abuse of
8 the agency’s discretion.
9

10
11 Assigning dissimilar meanings to the words “typical”,
12 “normal”, and “common” - as the agency asks this Court to condone -
13 is far-fetched and illogical.
14

15 Argument

16
17 The USCIS’ denial states that the agency denied the H-1B
18 application “specifically” because “█ failed to meet the burden of
19 proving that the proffered position meets **any** of the four criteria in 8
20 C.F.R. 214.2(h)(4)(iii)(A). (Dkt .19 p. 4, emphasis not in original)
21

22 8 C.F.R. 214.2(h)(4)(iii)(A) reads as follows:
23

24
25 “214.2(h)(4)(iii) Criteria for H-1B petitions
26 involving a specialty occupation.

27
28 214.2(h)(4)(iii)(A) Standards for specialty
29 occupation position. To qualify as a specialty
30

1 occupation, the position must meet one of the
2 following criteria:

3 214.2(h)(4)(iii)(A)(1) A baccalaureate or higher
4 degree or its equivalent is normally the minimum
5 requirement for entry into the particular position;

6 214.2(h)(4)(iii)(A)(2) The degree requirement is
7 common to the industry in parallel positions
8 among similar organizations or, in the alternative,
9 an employer may show that its particular position
10 is so complex or unique that it can be performed
11 only by an individual with a degree;

12 214.2(h)(4)(iii)(A)(3) The employer normally
13 requires a degree or its equivalent for the
14 position; or

15 214.2(h)(4)(iii)(A)(4) The nature of the specific
16 duties are so specialized and complex that
17 knowledge required to perform the duties is
18 usually associated with the attainment of a
19 baccalaureate or higher degree.”

20 As is clear from the agency’s regulation, Plaintiff need only
21 show, by a *preponderance* of the evidence, that the offered position
22 meets *one* of these four criteria in order to qualify as a specialty
23 occupation. *See Matter of Chawathe*, 25 I.&N. Dec. 369 (2010).

24 Plaintiff meets the preponderance standard for each of the first
25 two criteria because the U.S. government’s own *Occupational*
26 *Outlook Handbook* (OOH) states that a bachelor’s degree is the
27
28
29
30

1 “Entry-Level Education” for the position of Market Research Analyst¹
2 - making the requirement for a bachelor’s degree both “normally the
3 minimum requirement” for the position (*See* 214.2(h)(4)(iii)(A)(1));
4 and “common to the industry for parallel positions among similar
5 organizations” (*See* 214.2(h)(4)(iii)(A)(2)).
6
7

8 Plaintiff meets the third criteria because, although this is a new
9 position created because of its success and its desire to expand its
10 business, the requirement of a bachelor’s degree is reasonable, and
11 ordinarily would be expected to be a minimum requirement for the
12 position, based upon OOH standards.
13
14

15
16 We ask the Court to note that Defendants admit that the degree
17 requirement is “typical” for the field of Market Research Analyst,
18 while asserting that a “typical” requirement does not fundamentally
19 equate with a “normal” or “common” requirement for the position.
20
21

22 (Dkt. 19 p 4)
23
24

25 1 The Occupational Outlook Handbook is a biennial publication by the United
26 States Department of Labor's Bureau of Labor Statistics. It includes detailed
27 information about the nature of work, working conditions, training and education,
28 earnings, and job outlook for hundreds of different occupations. It is commonly
29 known to be the most authoritative resource available on U.S. job types. See
30 Occupational Outlook Handbook: a review of 50 years of change Monthly Labor
Review May 1999; see also
http://en.wikipedia.org/wiki/Occupational_Outlook_Handbook

1 Defendant states that:

2 “USCIS found that although the OOH does state
3 that a bachelor’s degree is typical, it does not
4 state that a bachelor’s degree in a specific
5 specialty is the normal minimum for entry into
6 the occupation. CAR 7-8. Rather according to
7 the OOH the requirements for entry into the
8 occupation vary by employer as to what course of
study might be appropriate or preferred. CAR 8.”

9 (Dkt. 19 p 4 paragraph 3)

10
11 It should also be noted that Defendants’ assertion that the OOH
12 does not declare that a bachelor’s degree is the normal minimum
13 entry-level educational credential for the occupation is incorrect. *The*
14 *OOH states exactly the opposite. See CAR 29*

15
16 We also ask the Court to consider that the agency’s own
17 language in 8 C.F.R. 214.2(h)(4)(iii)(A) does not require “a bachelor’s
18 degree in a specific specialty” as Defendants’ motion seeks to define
19 the applicable standard.²

20
21
22
23
24
25 ² Defendant does not dispute ██████████, the intended H-1B beneficiary has the
26 appropriate educational qualifications. The record indicates that her educational
27 credentials qualify her for the position of Market Research Analyst. (CAR 268-
28 273) Although ██████████ degree is in the field of Market Research Analysis, the
29 plain language of the agency’s own regulation indicates that the skills obtained in
30 achieving a bachelor’s degree, i.e. analysis, writing, perseverance, etc. are the
minimum requirement for a beneficiary under 214.2(h)(4)(iii)(A)(1) and satisfy
the “specific specialty” language of 8 U.S.C. 1184(i)(1)(B), INA 214 (i)(1)(B).

1 According to Defendant’s motion, the agency’s reasoning in
2 finding that the position does not meet the OOH’s definition of a
3 specialty occupation boils down to its definition of the words
4 “normally”, “common” and “typical.” We ask the Court to find that
5 these words are almost interchangeable in their meanings.
6
7

8 The Agency’s own regulation states that H-1b status is
9 appropriate when:
10

11 “A baccalaureate or higher degree or its
12 equivalent is normally the minimum requirement
13 for entry into the particular position” (See
14 214.2(h)(4)(iii)(A)(1)); **or when**

15 “The degree requirement is common to the
16 industry in parallel positions among similar
17 organizations [...]” (See 214.2(h)(4)(iii)(A)(2)).
18

19 Defendants admit that a bachelor’s degree is “typical”, (Dkt. 19
20 p. 4), but does not acknowledge that if a requirement is “typical” it is,
21 therefore, “normal” and/or “common” within the meaning of the
22 statute.
23
24

25 Similarly, despite the unquestioned expertise of the OOH,
26 which defines the educational requirements for a Market Research
27 Analyst as follows:
28
29
30

1 its hotel. In fact, [REDACTED] is seeking to grow and expand the
2 corporate business - in the best and most admirable American
3 tradition.
4

5 The corporate business is not limited to the areas in which the
6 company has so far been successful. The corporation's horizons are
7 unlimited. The company is carefully planning its expansion by
8 creating a position to help direct its growth.
9

10 The "industry" that [REDACTED] is involved in is, broadly,
11 the service industry. Currently, the company owns several businesses
12 that involve retail sales and hospitality, as well as long haul trucking.
13

14 The USCIS' attempt to define - and confine - the business of
15 [REDACTED] to that of a convenience store indicates an
16 inappropriate - and unlawful - bias against small businesses who are
17 seeking to expand. *See, e.g., Assuta Med. Ctr. v. DHS*, 265 Fed.
18 Appx. 542, 2008 U.S. App. LEXIS 2135 (9th Cir. 2008), *Fred 26*
19 *Importers, Inc. v. DHS*, 445 F.2d 1174 (C.D. Cal. 2006).
20

21 We ask the Court to consider the unhealthy – and un-American
22 – dual standard that will develop between what large and small
23
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1 businesses are allowed to do under U.S. immigration law, if such a
2 bias is adhered to.

3
4 Conclusion

5 Under the plain language of the OOH, a bachelor's degree in a
6 Marketing field is the normal, typical, common, entry-level
7 educational requirement for a position as a Market Research Analyst.
8

9
10 The reasoning of the USCIS' denial rests solely on its
11 conclusion that such a degree is not *normally* or *commonly* required –
12 but that it is *typically* required.
13

14 Plaintiff asks the Court to find that this difficult logic is both
15 wrong and arbitrary, and to grant summary judgment in its favor, or in
16 the alternative to order this matter to trial.
17

18
19 RESPECTFULLY SUBMITTED on this 18th day of July 2014.

20
21 

22 /s/

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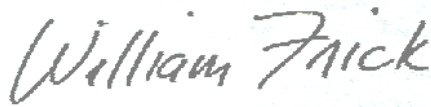
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant:

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DATED this 18th day of July 2014.



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Plaintiff's Reply and Opposition - 10

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[REDACTED],

Plaintiff,

No. C14-123-RSM

v.

DEFENDANTS' REPLY

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, and U.S. DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

In its reply brief, Plaintiff incorrectly states that United States Citizenship and Immigration Services (“USCIS”) denied its visa petition because USCIS improperly assigned dissimilar meanings to the words “typical,” “normal,” and “common.” Dkt. No. 22, pg. 2-5. Plaintiff claims that USCIS improperly found that although the Occupational Outlook Handbook (“OOH”) states that the degree requirement is “typical” for the field of Market Research Analyst, the term “typical,” as found in the OOH, does not equate with the terms “normal” or “common,” as found in 8 C.F.R. § 214.2(h)(4)(iii)(A). *Id.* at pg. 4. But USCIS did not make this finding or base the denial of Plaintiff’s visa petition on this finding.

Rather, USCIS’s denial of Plaintiff’s visa petition is based on the fact that Plaintiff failed to prove that a bachelor’s degree **in a specific specialty** is the normal minimum for entry into the occupation. CAR 7-8. USCIS found that although the OOH does state that a bachelor’s degree is typical, it does not state that a bachelor’s degree **in a specific specialty** is the normal minimum for entry into the occupation. CAR 7-8. According to the OOH, the

1 requirements for entry into the occupation vary by employer as to what course of study might
2 be appropriate or preferred. CAR 8.

3 Thus, Plaintiff incorrectly asserts that USCIS's denial is based on the fact that the term
4 "typical," as used in the OOH, is not the same as the terms "normal" or "common," as used in
5 the statutes and regulations. USCIS's denial is focused on the language in the statutes and
6 regulations requiring that the degree be **in a specific specialty**. Here, there is no requirement
7 that a degree **in a specific specialty** is typical, normal, or common because the OOH allows for
8 degrees of varying specialties - or no specialty at all - for entry into the position of Market
9 Research Analyst.

10 Next, Plaintiff argues that USCIS's own regulations do not require a bachelor's degree
11 **in a specific specialty**, citing 8 C.F.R. § 214.2(h)(4)(iii)(A). *Id.* at pg. 5. Plaintiff focuses only
12 on the regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), which do specify the need for a bachelor's
13 degree or higher. But Plaintiff overlooks the statutory and regulatory requirements that the
14 bachelor's degree must be **in a specific specialty** (or its equivalent). *See* 8 C.F.R. § 214(i)(1),
15 8 U.S.C. § 1184(i)(1) (emphasis added).

16 As discussed in Defendants' prior briefing, the Administrative Appeals Office for
17 USCIS has recently issued several decisions rejecting the same argument Plaintiff advances.
18 *See In re Petitioner [Identifying information redacted by Agency]*, 2013 WL 8124091, *8-11
19 (Dec. 24, 2013); *In re Petitioner [Identifying information redacted by Agency]*, 2012 WL
20 9160030, *5-6 (July 17, 2012); *In re Petitioner [Identifying information redacted by Agency]*,
21 2011 WL 9082126, *4-5 (Nov. 1, 2011). These cases held:

22 As a threshold issue, it is noted that 8 C.F.R. § 214.2(h)(4)(iii)(A) must logically be
23 read together with section 214(i)(1) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). In other
24 words, this regulatory language must be construed in harmony with the thrust of the
25 related provisions and with the statute as a whole. As such, the criteria stated in 8
26 C.F.R. § 214.2(h)(4)(iii)(A) should logically be read as being necessary but not
27 necessarily sufficient to meet the statutory and regulatory definition of specialty
28 occupation. To otherwise interpret this section as stating the necessary *and* sufficient
conditions for meeting the definition of specialty occupation would result in particular
positions meeting a condition under 8 C.F.R. § 214.2(h)(4)(iii)(A) but not the statutory
or regulatory definition. To avoid this illogical and absurd result 8 C.F.R.

§ 214.2(h)(4)(iii)(A) must therefore be read as stating additional requirements that a
position must meet, supplementing the statutory and regulatory definitions of specialty
occupation. As such and consonant with section 214(i)(1) of the Act and the regulation
at 8 C.F.R. § 214.2(h)(4)(h), United States Citizenship and Immigration Services
(USCIS) consistently interprets the term "degree" in the criteria at 8 C.F.R.

1 § 214.2(h)(4)(iii)(A) to mean not just any baccalaureate or higher degree, but one in a
2 specific specialty that is directly related to the proffered position.

3 *See In re Petitioner [Identifying information redacted by Agency]*, 2013 WL 8124091, *8-11
4 (Dec. 24, 2013) (citations omitted).

5 WHEREFORE, USCIS properly denied Plaintiff's H-1B visa petition because Plaintiff
6 failed to prove that the proffered position qualifies as a "specialty occupation" under the
7 relevant statutes and regulations. Defendants properly found that Plaintiff was required to
8 prove by a preponderance of the evidence that a bachelor's degree **in a specific specialty** is the
9 normal minimum for entry into the occupation and Plaintiff failed to do so. The Court should
10 uphold USCIS's decision because it is supported by substantial evidence and is not arbitrary,
11 capricious, an abuse of discretion, or otherwise not in accordance with law.

12 DATED this 8th day of August, 2014.

13 Respectfully submitted,

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15 United States Attorney

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on the below date she electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record as follows:

William Frick william@crossborders.us

DATED this 8th day of August, 2014.

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HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

[REDACTED]

Plaintiff,

vs.

U.S. CITIZENSHIP AND IMMIGRATION SERVICES, an agency of the United States Government; and **U.S. DEPARTMENT OF HOMELAND SECURITY**, an agency of the United States Government.

Defendants.

CASE NO. 2:14-cv-00123-RSM

PLAINTIFF’S SURREPLY

*Noting Date: August 8, 2014
Without Oral Argument*

Defendants’ Reply (Dkt. 23) indicates that Defendants assert that Plaintiff’s petition for H-1B worker was denied because “Plaintiff failed to proved that a bachelor’s degree **in a specific specialty** is the

Plaintiff’s Surreply - 1

1 normal minimum for entry into the occupation.” (Dkt. 23, page 2,
2 emphasis in original)

3
4 Defendants quote a redacted administrative decision as
5 precedent for their assertion that a degree “in a specific specialty” is
6 required and /or *adequately defined* under the statutes and regulations
7 that establish eligibility for H-1B status.
8

9
10 Defendants’ regulations are contradictory. Compare 8 C.F.R. §
11 214.2(h)(4)(iii)(A) – the most comprehensive regulation, listing the
12 “standards to qualify as a specialty occupation,” and which *does not*
13 use the “specific specialty” language; compare that with 8 C.F.R. §
14 214.2(h)(4)(ii)’s definition of specialty occupation, which *does* use the
15 “bachelor’s degree or higher in a specific specialty” language.
16
17

18
19 The statute itself, INA § 214(i)(1), defines a specialty
20 occupation as one “that requires attainment of a bachelor’s or higher
21 degree in a specific specialty.”
22

23
24 Assuming, arguendo, Defendants’ assertion that the undefined
25 words “specific specialty” mean that the commonly-required
26 educational training for a specialty occupation is a bachelor’s degree
27 *in a specific specialty*, we turn to the unquestioned expertise of the
28
29
30

1 Occupational Outlook Handbook (OOH) and find the following listing
2 of “specific specialties” for bachelor’s degrees for Market Research

3
4 Analysts:

5 **“Market research analysts need a bachelor's**
6 **degree in market research or a related field.**

7 Many have degrees in fields such as statistics,
8 math, or computer science. Others have a
9 background in business administration, one of the
10 social sciences, or communications. **Courses in**
11 **statistics, research methods, and marketing**
12 **are essential for these workers;** courses in
13 communications and social sciences-such as
14 economics, psychology, and sociology-are also
15 important.

16 Many market research analyst jobs require a
17 master's degree. Several schools offer graduate
18 programs in marketing research, but many
19 analysts complete degrees in other fields, such as
20 statistics, marketing, or a Master of Business
21 Administration (MBA). A master's degree is
22 often required for leadership positions or
23 positions that perform more technical research.”

24 (CAR 32, emphasis added)

25 No less an authority that the OOH lists the bachelor’s degree,
26 and academic coursework “specific specialties” required for a Market
27 Research Analyst position. The OOH list of these specialties is finite.
28 All are clearly business or marketing related. The very first sentence
29
30

1 indicates that the very degree that [REDACTED] has earned – a bachelor’s
2 degree specializing in Market Research – is the “specific specialty”
3
4 required – “needed” – for the position. (CAR 273-277)¹

5 Under Defendant’s own interpretation of the standard for
6
7 approving this application, the position qualifies as a specialty
8
9 occupation because it requires the attainment of a bachelor’s degree
10 with a “specific specialty” in Market Research.

11
12
13 RESPECTFULLY SUBMITTED on this 12th day of August
14 2014.

15
16 

17 /s/

18 _____
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27 _____
28 1 The Defendants’ Certified Administrative Record omits the copy of [REDACTED]
29 academic transcript that Plaintiff provided. The CAR shows only the envelopes
30 that contained the transcript. The transcript shows [REDACTED] specialized study
in Market Research Analysis.

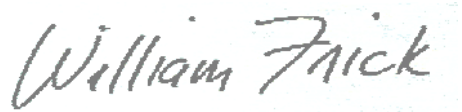
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant:

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DATED this 12th day of August 2014.



/s/

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Plaintiff's Surreply - 5

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

██████████,

Plaintiff,

v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, and U.S. DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

Case No. C14-123RSM

ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

This matter comes before the Court pursuant to Motion for Summary Judgment by Plaintiff, ██████████ (Dkt. # 16), and Cross-Motion for Summary Judgment by Defendants, United States Citizenship and Immigration Services (“USCIS”) and the United States Department of Homeland Security (Dkt. # 19). Plaintiff moves the Court to reverse USCIS’s denial of Plaintiff’s petition for an H-1B “specialty occupation” visa. Neither party has requested oral argument, and the Court deems it unnecessary. Having considered the parties’ memoranda and the underlying administrative record, and for the reasons stated herein, the Court grants Plaintiff’s Motion for Summary Judgment and denies Defendants’ Cross-Motion for Summary Judgment.

BACKGROUND

Plaintiff ██████████ is a ██████████ company based in Yakima, Washington that operates gas stations, convenience stores, and hotels. Dkt. # 14, Certified Administrative Record (“AR”) at 218. On October 13, 2011, ██████████ filed a Form I-129 Petition for

1 Nonimmigrant Worker with USCIS seeking to classify ██████████, a citizen of the
2 ██████████, as a nonimmigrant special occupation worker under section
3 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (“INA”). AR at 213 *et seq.* ██████████
4 sought to employ ██████████ as “Marketing Analyst & Specialist” out of its Yakima office for
5 a three-year period in order to assist the company in assessing market and geographical
6 opportunities for expanding its hotel and convenience store business in the region and
7 throughout the state. *Id.* at 23, 217-18. ██████████ has earned a Bachelor of Science degree and
8 certificate in Business Management and Marketing from ██████████ University in
9 Hawaii and provided copies of her diploma and transcripts to USCIS. *Id.* at 269-70.

11 On February 2, 2012, USCIS issued a Request for Evidence, asking ██████████ to submit
12 additional evidence pertaining to the subject job offer, including evidence of the need for the
13 proffered position, information regarding ██████████’s business operations, and any documentation
14 about industry practices or ██████████’s own past employment practices related to employment of
15 market research analysts. AR at 12-13. Plaintiff responded with substantial amounts of
16 evidence on April 27, 2012. *Id.* at 14 *et seq.* USCIS nonetheless denied the H-1B visa
17 application on October 27, 2012 on the sole grounds that ██████████ had failed to demonstrate that
18 the proffered position qualifies as a specialty occupation within the meaning of applicable
19 regulations. *Id.* at 2-9.

21 As a result, Plaintiff filed the instant Complaint on January 25, 2014. Dkt. # 1
22 (Compl.). Plaintiff thereby moves the Court to reverse USCIS’s decision and order the agency
23 to grant Plaintiff’s H1-B Petition, pursuant to section 706 of the Administrative Procedure Act
24 (“APA”), 5 U.S.C § 706. Plaintiff filed the instant Motion for Summary Judgment (Dkt. #
25 16), and Defendants filed a response and Cross-Motion for Summary Judgment (Dkt. # 19).

APPLICABLE LEGAL STANDARDS

A. Judicial Review of Administrative Decision

The Administrative Procedure Act authorizes judicial review where a person “suffer[s] legal wrong because of agency action, or [is] adversely affected or aggrieved by agency action within the meaning of the relevant statute.” 5 U.S.C. § 702. The reviewing district court is, in turn, empowered to set aside a final agency action if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The standard is “highly deferential, presuming the agency action to be valid.” *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). Even so, the reviewing court properly sets aside an agency decision where “there is no evidence to support the decision or if the decision was based on an improper understanding of the law.” *Kazarian v. U.S. Citizenship and Immigration Services*, 596 F.3d 1115, 1118 (9th Cir. 2010) (internal citation omitted).

The agency’s factual findings are reviewed for substantial evidence and will not be disturbed “unless the evidence presented would *compel* a reasonable finder of fact to reach a contrary result.” *Family Inc. v. U.S. Citizenship and Immigration Services*, 469 F.3d 1313, 1315 (9th Cir. 200) (internal citation omitted; emphasis in original). Similarly, the court gives the agency’s interpretation of its own regulations “substantial deference” and “controlling weight unless doing so is inconsistent with the regulation or plainly erroneous.” *Independent Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9th Cir. 2000). If the agency has erred, the Court must still “evaluate whether such an error was harmless.” *Kazarian*, 596 F.3d at 1118.

B. Summary Judgment Standard

Courts routinely resolve APA challenges through summary judgment motions. *See Northwest Motorcycle Ass’n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471-72 (9th Cir.

1 1994); *Caremax Inc. v. Holder*, 2014 WL 1493621, *3 (N.D. Cal. 2014). Summary Judgment
2 is proper where, viewing the evidence and inferences therefrom in favor of the nonmoving
3 party, “the movant shows that there is no genuine dispute as to any material fact and the
4 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *Anderson v. Liberty*
5 *Lobby, Inc.*, 477 U.S. 242, 247 (1986). Material facts are those that may affect the outcome of
6 the suit under governing law, and an issue of material fact is genuine “if the evidence is such
7 that a reasonable jury could return a verdict for the nonmoving party.” *Anderson*, 477 U.S. at
8 248.

9
10 Judicial review of an agency action is confined to the administrative record. *National*
11 *Association of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003). In ruling on a
12 motion for summary judgment, the court does “not weigh the evidence or determine the truth
13 of the matter but only determine[s] whether there is a genuine issue for trial.” *Crane v.*
14 *Conoco*, 41 F.3d 547, 549 (internal citations omitted). The function of the district court on
15 summary judgment is consequently “to determine whether or not as a matter of law the
16 evidence in the administrative record permitted the agency to make the decision it did.”
17 *Occidental Engineering Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985).

18 ANALYSIS

19
20 Plaintiff argues that USCIS abused its discretion in denying ■■■’s H-1B visa petition.
21 Specifically, Plaintiff contends that USCIS reached a decision not supported by the evidence
22 when it determined that ■■■ had failed to sustain its burden of proving that the proffered
23 position qualifies as a “specialty occupation.” USCIS, by contrast, argues that the agency
24 properly acted within the scope of its discretion when it found that ■■■ had failed to establish
25 that any of the enumerated criteria for qualification as a “specialty occupation” were met.
26

1 **I. Applicable Statutory and Regulatory Framework**

2 The INA permits qualified nonimmigrant aliens to temporarily perform services in the
3 United States if they are sponsored by an employer in a “specialty occupation.” 8 U.S.C. §
4 1101(a)(15)(H)(i)(b). Before a visa may issue, an employer must obtain certification from the
5 Department of Labor that it has filed a labor condition application in the specific occupational
6 specialty. 8 C.F.R. § 214.2(h)(4)(ii). The employer must then file an H-1B visa petition on
7 behalf of the alien worker, which shows that the proffered position satisfies the statutory and
8 regulatory requirements. 8 U.S.C. § 1184(c). The INA defines a “specialty occupation” as an
9 occupation that requires:
10

- 11 (A) Theoretical and practical application of a body of highly specialized
12 knowledge, and
13 (B) Attainment of a bachelor’s or higher degree in the specific specialty (or
14 its equivalent) as a minimum for entry into the occupation in the United States.

15 8 U.S.C. § 1184(i).

16 USCIS has also enacted agency regulations fleshing out H1-B requirements. The
17 regulations define “specialty occupation” and provide a non-exhaustive list of fields that may
18 satisfy the definition:

19 Specialty occupation means an occupation which requires theoretical and
20 practical application of a body of highly specialized knowledge in fields of
21 human endeavor including, but not limited to, architecture, engineering,
22 mathematics, physical sciences, social sciences, medicine and health,
23 education, business specialties, accounting, law, theology, and the arts, and
24 which requires the attainment of a bachelor’s degree or higher in a specific
25 specialty, or its equivalent, as a minimum for entry into the occupation in the
26 United States.

27 8 C.F.R. § 214.2(h)(4)(ii). USCIS further developed a set of four criteria to determine whether
28 an occupation qualifies as a “specialty occupation,” one of which must be satisfied:

- 29 (1) A baccalaureate or higher degree or its equivalent is normally the
30 minimum requirement for entry into a particular position;

1 (2) The degree requirement is common to the industry in parallel positions
2 among similar organization or, in the alternative, an employer may show that
3 its particular position is so complex or unique that it can be performed only by
4 an individual with a degree;

(3) The employer normally requires a degree or its equivalent for the
5 position; or

(4) The nature of the specific duties are so specialized and complex that
6 knowledge required to perform the duties is usually associated with the
7 attainment of a baccalaureate or higher degree.

8 8 C.F.R. § 214.2(h)(4)(iii)(A). The burden of proving that a particular occupation comes
9 within this taxonomy rests with the petitioner. *Royal Siam Corp. v. Chertoff*, 484 F.3d 139,
10 145 (1st Cir. 2007) (citing 8 U.S.C. § 1361).

11 Upon establishing that a position is a “specialty occupation,” the H-1B visa petitioner
12 must also demonstrate that the alien worker is qualified to work in such a position. *See* 8
13 U.S.C. § 1184(i)(2); *Caremax*, 2014 WL 1493621, *3. The Regulations require that the
14 beneficiary alien satisfy one of four qualifying criteria: that the alien (1) hold a U.S. bachelor
15 or higher degree required by the specialty occupation from an accredited college or university,
16 (2) hold an equivalent foreign degree, (3) hold an equivalent state license, registration, or
17 certification authorizing her to full practice the specialty occupation, or (4) hold an equivalent
18 combination of education, specialized training, and work experience. 8 C.F.R. §
19 214(h)(4)(iii)(C).

20 **II. Application of the Regulatory Criteria**

21 The parties agree that the only issue before the Court is whether [REDACTED]’s proffered
22 position qualifies as a “specialty occupation” under the statutory and regulatory framework.
23 Dkt. # 16, p. 2; Dkt. # 19, p. 10. The parties also agree that USCIS did not abuse its discretion
24 in determining that, despite the job title of “Marketing Analyst & Specialist” submitted by
25 [REDACTED], the proposed duties are most closely analogous to those of a “Market Research Analyst.”
26 AR at 7; Dkt. # 16, p. 2; Dkt. # 19, p. 10. Rather, [REDACTED] challenges the USCIS’s findings that the

1 position of “Market Research Analyst” in general, and the position ■ seeks to fill in
2 particular, do not meet the first, second, and fourth criteria enumerated in 8 C.F.R. §
3 214.2(h)(4)(iii)(A). The Court agrees with Plaintiff that USCIS abused its discretion in
4 determining that a “Market Research Analyst” does not come within the first qualifying
5 criteria and thus reverses USCIS’s denial.
6

7 As an initial matter, the parties disagree as to whether a generalized bachelor degree
8 requirement is sufficient to render a position sufficiently specialized to qualify for H-1B
9 status. To this extent, the Court agrees with Defendant and finds the answer to this question
10 well-settled in the case law and USCIS’s reasonable interpretations of the regulatory
11 framework. While 8 C.F.R. § 214.2(h)(iii)(A)(1) does not use the language of “specific
12 specialty,” USCIS does not abuse its discretion in reading this regulation together with 8
13 C.F.R. § 214(h)(4)(ii), which defines a “specialty occupation” as one that “requires the
14 attainment of a bachelor’s degree or higher in a specific specialty, or its equivalent.” *See In re*
15 *Petitioner [Identifying information redacted by Agency]*, 2013 WL 8124091, **8-11 (Dec. 24,
16 2013) (explaining that the “regulatory language must be construed in harmony with the thrust
17 of the related provisions and with the statute as a whole”). This latter definition is identical to
18 that provided by the INA itself. *See* 8 U.S.C. § 1184(i)(1). The requirement of a specialized
19 degree, or its equivalent, is also in keeping with the intent of the H-1B visa program, which
20 “allows an employer to reach outside of the U.S. to fill a temporary position because of a
21 special need, presumably one that cannot be easily fulfilled within the U.S.” *Caremax*, , 2014
22 WL 1493621, *4. Permitting an occupation to qualify simply by requiring a generalized
23 bachelor degree would run contrary to congressional intent to provide a visa program for
24 specialized, as opposed to merely educated, workers. *See Royal Siam Corp.*, 484 F.3d at 147
25 (providing that an employer should not be able to “ensure the granting of a specialty
26

1 occupation visa petition by the simple expedient of creating a generic (and essentially
2 artificial) degree requirement”).

3 That said, the Court agrees with Plaintiff that it has plainly met its burden to show that
4 the position of a “market research analyst” satisfies the first qualifying criterion. The first
5 regulatory criterion requires the agency to examine the generic position requirements of a
6 market research analyst in order to determine whether a specific bachelor’s degree or its
7 equivalent is a minimum requirement for entry into the profession. In making this
8 determination, USCIS relied, as is its practice, on the Department of Labor’s Occupation
9 Outlook Handbook (“OOH”) profile of the market research analyst position. *See Royal Siam*
10 *Corp.*, 484 F.3d at 1456 (“In its review of petition for nonimmigrant work visas, CIS
11 frequently—and sensibly—consults the occupation descriptions collected in the [OOH].”).
12 The OOH describes the typical training and qualification requirements for a market research
13 analyst, in relevant part, as follows:
14
15

16 Market research analysts typically need a bachelor’s degree in market research
17 or a related field. Many have degrees in fields such as statistics, math, or
18 computer science. Others have a background in business administration, one of
19 the social sciences, or communications. Courses in statistics, research methods,
20 and marketing are essential for these workers; courses in communications and
21 social sciences—such as economics, psychology, and sociology—are also
22 important.

23 Many market research analyst jobs require a master’s degree. Several schools
24 offer graduate programs in marketing research, but many analysts complete
25 degrees in other fields, such as statistics, marketing, or a Masters of Business
26 Administration (MBA). A master’s degree is often required for leadership
positions or positions that perform more technical research.

AR at 7. Based on this description, USCIS determined that “although a baccalaureate level of
training is typical, the position of a Market Research Analysts is an occupation that does not
require a baccalaureate level of education in a specific specialty as a normal, minimum for
entry into the occupation.” AR at 7-8. This interpretation of the evidence cannot be sustained.

1 Defendant's approach impermissibly narrows the plain language of the statute. The
2 first regulatory criterion does not restrict qualifying occupations to those for which there
3 exists a single, specifically tailored and titled degree program. Indeed, such an interpretation
4 ignores the statutory and regulatory allowance for occupations that require the attainment of
5 the "equivalent" of specialized bachelor's degree as a threshold for entry. 8 C.F.R. §
6 214.2(h)(4)(ii); 8 U.S.C. § 1184(i). By including this language, Congress and the INA
7 recognized that the needs of a specialty occupation can be met even where a specifically
8 tailored baccalaureate program is not typically available for a given field. *See Tapis Intern. v.*
9 *INS*, 94 F.Supp.2d 172, 176 (D. Mass. 2000) (rejecting agency interpretation because it would
10 preclude any position from satisfying the specialty occupation requirements where a
11 specifically tailored degree program is not available). While an agency has considerable
12 leeway to interpret statutes and regulations it enforces, it is not at liberty to read plain
13 language out of a statute. *See Bennett v. Spear*, 520 U.S. 154, 173 ("It is the cardinal principle
14 of statutory construction that it is our duty to give effect, if possible, to every clause and word
15 of a statute rather than to emasculate an entire section.") (internal quotations and alterations
16 omitted).

17
18
19 To this Court's knowledge, the only reviewing court to have considered the "market
20 research analyst" position found that it qualifies under the first H-1B criterion. In *Residential*
21 *Finance Corp. v. USCIS*, the District Court for the Southern District of Ohio found based on a
22 reading of the OOH profile that a market research analyst "is a distinct occupation with a
23 specialized course of study that includes multiple specialized fields." 839 F.Supp.2d 985, 996
24 (S.D. Ohio 2012). Explaining that "[d]iplomas rarely come bearing occupation-specific
25 majors," the court determined that the market research analyst position satisfies the regulatory
26 requirement that the occupation demand "highly specialized knowledge and a prospective

1 employee who has attained the credentialing indicating possession of that knowledge.” *Id.* at
2 997. Here too, the Court finds that the evidence in the record shows that the proffered
3 position requires as a minimum for entry a specialized degree in “market research,” or where
4 no such degree is available, an equivalent technical degree accompanied by relevant
5 coursework in “statistics, research methods, and marketing.” The position announcements
6 offered into evidence by Plaintiff corroborate the necessity of a relevant, technical bachelor
7 degree accompanied by specific experience in market research. AR 38-41. The patently
8 specialized nature of the position sets it apart from those that merely require a generic degree.
9 *Cf. Caremax*, 2014 WL 1493621, *4 (affirming USCIS’s denial of H-1B petition for a public
10 relations specialist position for which “the OOH makes clear that employers are not
11 particularly concerned with what type of bachelor’s an applicant has achieved”).
12

13
14 While judicial review of agency decisions is highly deferential, it is not without teeth.
15 Agency action cannot survive judicial review where the agency fails to “articulate a
16 satisfactory explanation for its action including a rational connection between the facts found
17 and the choice made.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc., v. State Farm Mut. Auto. Ins.*
18 *Co.*, 463 U.S. 29, 43 (1983) (internal quotation omitted). The Court finds that Defendants
19 have failed to articulate a satisfactory explanation for the agency’s denial based on the record
20 that it had before it. USCIS thus abused its discretion in reaching a decision that was not in
21 accordance with its own interpretation of the statutory and regulatory framework, and its
22 decision shall be reversed. The agency’s error, on which its denial of Plaintiff’s visa petition
23 was presumed, was not a harmless one. As the agency determined that “[t]he only issue is
24 whether the position offered to the beneficiary qualifies as a specialty occupation,” AR at 5,
25 this Court’s decision on that issue is dispositive as to the grant of the H-1B visa.
26

CONCLUSION

For the reasons discussed herein, the Court FINDS that USCIS committed an abuse of discretion by denying [REDACTED]'s petition for an H-1B visa for [REDACTED]. Accordingly, the Court hereby GRANTS Plaintiff's Motion for Summary Judgment (Dkt. # 16) and DENIES Defendants' Cross-Motion for Summary Judgment (Dkt. # 19). Defendants are ORDERED to GRANT Plaintiff's Petition for H-1B status.

Although Plaintiff included a request for attorney's fees in the conclusion of its Motion, it has not demonstrated an entitlement to a fee award. Plaintiff must therefore file a separate motion for attorney's fees within twenty (20) days of the entry of this Order should it wish to pursue a fee award.

DATED this 14 day of January 2015.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE

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HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

[REDACTED],

Plaintiff,

vs.

U.S. CITIZENSHIP AND
IMMIGRATION SERVICES,
an agency of the United States
Government; and U.S.
DEPARTMENT OF
HOMELAND SECURITY, an
agency of the United States
Government.

Defendants.

CASE NO. 2:14-cv-00123-RSM

PLAINTIFF’S Motion for
Attorney’s Fees

*Noted for Hearing:
February 20, 2015*

Petitioner [REDACTED], through counsel, seeks
recovery of fees and costs pursuant to the Equal Access to
Justice Act (“EAJA”), 28 U.S.C. § 2412(d), for time

Plaintiff’s Motion for Attorney’s Fees - 1

1 reasonably expended and expenses incurred challenging the
2 U.S. Citizenship and Immigration Service (USCIS) refusal to
3 approve Plaintiff's H-1B application.
4

5 [REDACTED] is a prevailing party, the position of
6 the government was not substantially justified, and the fees
7 requested are reasonable.
8

9 1. This fee request is timely.

10 A party seeking attorney's fees and other expenses
11 must file the application within "thirty days of final judgment
12 in the action." 28 U.S.C. § 2412(d)(1)(B).
13
14

15 Congress amended the EAJA in 1985 to define "final
16 judgment" as a "judgment that is final and *not* appealable."
17 Al-Harbi v. INS, 284 F.3d 1080, 1082 (9th Cir. 2002), *quoting*
18 28 U.S.C. § 2412(d)(2)(G). In the present case, this Court
19 found that the USCIS committed an abuse of discretion by
20 denying Raj and Company's H-1B petition and ordered the
21 USCIS to grant the H-1b status.
22
23
24

25 The Court ordered [REDACTED] to file a motion
26 for attorney's fees within 20 days of January 14, 2015, which
27 [REDACTED] has done.
28
29
30

1 2. Plaintiff meets the requirements for an award of
2 EAJA fees.

3
4 To qualify for an EAJA award, a plaintiff must first
5 establish that she is the prevailing party. 28 U.S.C. §
6 2412(d)(1)(B)(2005). At that point, the burden shifts to the
7 government, which may avoid fees only if it can show that its
8 pre-litigation conduct and its litigation position were both
9 “substantially justified.” 28 U.S.C. §2412(d)(1)(B), (2)(D).

10 As demonstrated below, petitioner is indisputably the
11 prevailing party and the government cannot meet its “heavy
12 burden” of demonstrating “substantial justification.”

13
14
15 A. Plaintiff is Prevailing Party.

16
17 A “prevailing party” is one who “has been awarded
18 some relief by a court.” Bukhannon Board of Care & Home
19 Inc. v. West Virginia Department of Health and Human
20 Resources, 532 U.S. 598, 603 (2001). [REDACTED] is a
21 prevailing party because it received the relief it sought,
22 namely the positive adjudication of its H-1B application.

23
24
25 B. The government’s position was not
26 substantially justified.

1 Unless the government can prove that its position was
2 “substantially justified,” EAJA fees must be awarded.
3 Congress placed a heavy burden of proof on the government
4 to demonstrate that its position was substantially justified.
5 H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 10, 13-4 (1980);
6 Gutierrez v. Barnhart, 274 F.3d 1255, 1258 (9th Cir. 2001),
7 *citing* Meinhold v. U.S. Dep’t of Defense, 123 F.3d 1275,
8 1277 (9th Cir.), *amended by* 131 F.3d 842 (9th Cir.1997).
9 “‘Substantial justification’ is equated with ‘reasonableness.’ ...
10 The government’s position is ‘substantially justified’ if it ‘has
11 a reasonable basis in law and fact.’” Thangaraja v. Gonzalez,
12 428 F.3d 870, 874 (9th Cir. 2005) (*quoting* Ramon-Sepulveda
13 v. INS, 863 F.2d 1458, 1459 (9th Cir. 1988) (*quoting* Pierce v.
14 Underwood, 487 U.S. 552, 566 n.2 (1988)).

15 In determining whether the government met its burden,
16 this Court must consider, first, the reasonableness of the
17 underlying government action at issue, and second, the
18 reasonableness of the position asserted by the government in
19 defending the validity of the action in court. 28 U.S.C. §
20 2412(d)(2)(D)(2005); Al-Harbi v. INS, *supra*, 284 F.3d at
21 1094.

1 In the present case, the Court found that the USCIS
2 committed an abuse of discretion. Such an abuse cannot be
3 substantially justified.
4

5 C. There are no special factors that warrant denial
6 of fees in this case.
7

8 While it is the government's burden to demonstrate the
9 existence of any special factors, Plaintiff is not aware of any
10 factors that would suggest that attorney's fees be denied in
11 this case.
12

13 D. Plaintiff meets the net worth requirements.
14

15 Raj and Company is corporation that, at all times, has
16 had a net worth of much less than seven million dollars, and
17 at all times employed fewer than 500 workers. See
18 Declaration of [REDACTED], attached.
19

20 Plaintiff is therefore eligible pursuant to EAJA's net
21 worth requirements.
22

23
24
25 3. The hours claimed by Plaintiff, and the hourly
26 rates, are reasonable.
27

28 Plaintiff seeks an award of fees for the work of one
29 attorney, William Frick. Mr. Frick represented [REDACTED]
30

1 [REDACTED] in this Court since December 2013. He prepared
2 and filed Plaintiff's Complaint in January 2014, and Plaintiff's
3 Motion For Summary Judgment in May 2014, Plaintiff's
4 Response to Defendant's Motion for Summary Judgment in
5 July 2014 and Plaintiff's Surreply in August 2014. Mr. Frick
6 prepared this motion for attorney's fees.
7
8

9 Plaintiff has submitted time records documenting the
10 time that its attorney has spent working on this case. The
11 hours requested are reasonable. A portion of the fee request
12 represents time spent in preparing this fee application. These
13 are also reimbursable. Commissioner, INS v. Jean, 496 U.S.
14 154 (1990).
15
16

17 Plaintiff's attorney seeks compensation at the standard
18 hourly rate under the EAJA, adjusted for inflation. The
19 inflation adjustment in this case requires an inquiry into the
20 cost of living increase since March 1996 when EAJA was last
21 amended and the statutory rate, prior to any adjustment, was
22 changed from \$70/hr. to \$125/hr. Rueda-Menicucci, 132 F.3d
23 at 496; Lucas, 63 F.Supp.2d at 1060.
24
25
26

27 The statutory cap is adjusted by the change in the
28 Consumer Price Index for urban consumers ("CPI-U") using
29
30

1 the appropriate regional category. United States v. Real
2 Property Known as 22249 Dolorosa Street, 190 F.3d 977, 984
3 (9th Cir. 1999)(using the regional CPI-U to calculate cost of
4 living adjustment).
5

6 As set forth in Ramon-Sepulveda v. INS, 863 F.2d
7 1458, 1463 n.4 (9th Cir. 1988), the increase is determined by
8 the following equation: 125 (current statutory rate) \times (Current
9 CPI-U – 232.957 as of December 2014) \div (March 1996 CPI-U
10 – 155.7). The cost of living adjustment applies to each year in
11 which the work was performed. Sorenson v. Mink, 239 F.3d
12 1140, 1148-49 (9th Cir. 2001). The Ninth Circuit Court of
13 Appeals has published on its website a schedule of appropriate
14 hourly rates for attorney’s fees under the EAJA for recent
15 years.¹
16
17
18
19

20 Petitioner submits this application at the **calculated**
21 **hourly 2014 rate of \$190.06**, as the bulk of the work was
22 done during 2014.
23

24 The declaration of Plaintiff’s counsel is attached. The
25 total award sought, is compensation for **35.67 hours** for the
26 work of Mr. Frick (\$6779.44) and \$411.30 in expenses
27
28

29
30 ¹ http://www.ca9.uscourts.gov/content/view.php?pk_id=0000000039

1 (\$11.30 in mailing and \$400.00 in filing fees). **The total**
2 **amount requested is \$7,190.74.** Additional fees will be
3 requested if respondent opposes the motion and petitioner's
4 counsel needs to spend time on a reply.²
5
6

7
8 V. CONCLUSION

9 This case presents precisely the type of circumstance
10 that EAJA intended to address and for which [REDACTED]
11 [REDACTED], as a prevailing party, is entitled to compensation.

12
13 For the reasons set forth in this motion, the award should be in
14 the amount requested, namely \$ 7,190.74.
15

16 Dated this on this 31st day of January 2015.

17
18 

19 /s/

20 William Frick
21 Law Office of William Frick
22 719 Second Avenue
23 Millennium Tower Suite 701
24 Seattle, Washington 98104
25 (206) 286-0167
26 (206) 770-7215 – Fax
27 E-mail: william@fricklawfirm.info
28 Attorney for Plaintiff

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2 Should the government oppose this motion, Petitioner reserved the right to amend this request to not only include any additional time, but to recalculate the hours at a higher hourly rate.

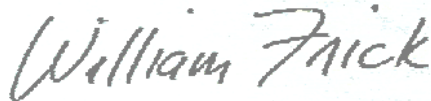
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant:

KRISTIN B. JOHNSON, WSBA #28189
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Attorney for Defendant

DATED this 31st day of January 2015.



/s/

WILLIAM FRICK, WSBA 26648
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The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[REDACTED],

Plaintiff,

v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, and U.S. DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

No. C14-123-RSM

**DEFENDANTS' OPPOSITION
TO PLAINTIFF'S MOTION FOR
ATTORNEY'S FEES**

I. Plaintiff is Not Entitled to EAJA Fees If the Government's Position Was Substantially Justified.

Plaintiff has filed a motion seeking \$7,190.74 in attorney's fees pursuant to the Equal Access to Justice Act ("EAJA"). *See* Dkt. No. 26. The EAJA authorizes the payment of attorney's fees to a prevailing party in an action against the United States, unless the government shows that its position in the underlying litigation "was substantially justified." *See* 28 U.S.C. § 2412(d)(1)(A). Although the EAJA creates a presumption that fees will be awarded to a prevailing party, Congress did not intend fee shifting to be mandatory. *Flores v. Shalala*, 49 F.3d 562, 567 (9th Cir. 1995). The decision to deny EAJA attorney's fees is within the discretion of the court. *Id.*; *Lewis v. Barnhart*, 281 F.3d 1081, 1083 (9th Cir. 2002).

1 A court applies a reasonableness standard in determining whether the government's
2 position was substantially justified. *Flores*, 49 F.3d at 569; *see also Al-Harbi v. INS*, 284 F.3d
3 1080, 1084 (9th Cir. 2002) (“ ‘Substantial justification’ in this context means ‘justification to a
4 degree that could satisfy a reasonable person.’ ”) (*quoting Pierce v. Underwood*, 487 U.S. 552,
5 565 (1988)). “The government has the burden of proving its positions were substantially
6 justified.” *Hardisty v. Astrue*, 592 F.3d 1072, 1076 n.2 (9th Cir. 2010). It must demonstrate
7 that its position had a reasonable basis in both law and fact. *Flores*, 49 F.3d at 569-70; *see also*
8 *Thangaraja v. Gonzales*, 428 F.3d 870, 874 (9th Cir. 2005) (noting that “ ‘substantial
9 justification is equated with reasonableness.... The government’s position is substantially
10 justified if it has a reasonable basis in law and fact.’ ” (*quoting Ramon-Sepulveda v. INS*, 863
11 F.2d 1458, 1459 (9th Cir. 1988) (alteration in original))). The reasonableness standard is met if
12 the government’s position is “justified in substance or in the main” or “to a degree that could
13 satisfy a reasonable person.” *Gutierrez v. Barnhart*, 274 F.3d 1255, 1258 (9th Cir. 2001)
14 (citation and quotation marks omitted); *Lewis*, 281 F.3d at 1083. The government must justify
15 both the original agency action and its litigation position. *Gutierrez*, 274 F.3d at 1259.

16 The government’s failure to prevail in its position on the underlying issues is not
17 dispositive of the issue of whether the government’s position was “substantially justified.” *See,*
18 *e.g., Pierce*, 487 U.S. at 569 (“Conceivably, the Government could take a position that is not
19 substantially justified, yet win; even more likely, it could take a position that is substantially
20 justified, yet lose.”). A court’s finding that an agency decision was unsupported by substantial
21 evidence is, however, “a strong indication” that the position of the United States in the
22 litigation was not substantially justified. *Thangaraja*, 428 F.3d at 874.

23 **II. USCIS’s Position Was Substantially Justified.**

24 USCIS’s pre-litigation position - the decision to deny Plaintiff’s visa petition - was
25 substantially justified. On October 27, 2012 USCIS denied Plaintiff’s H-1B petition finding
26 that Plaintiff failed to meet its burden of proving that the proffered position qualifies as a
27 “specialty occupation” under any of the four criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A). USCIS
28 articulated specific reasons why Plaintiff failed to establish any of the four prongs, and each
reason was supported by substantial evidence. Thus, USCIS’s pre-litigation position was
supported by substantial evidence.

1 USCIS's litigation position was also substantially justified. There, the question is
2 whether the Government was substantially justified in defending the validity of USCIS's denial
3 of Plaintiff's visa petition in court. *Gutierrez*, 274 F.3d at 1258. The government defended
4 USCIS's denial on the three prongs that Plaintiff challenged in this Court; prong one, two, and
5 four. First, the Court did not address, nor find, that the government's findings on prongs two
6 and four were arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
7 the law. Rather, the Court only found that USCIS's findings on prong one were an abuse of
8 discretion.

9 Second, in finding that USCIS abused its discretion on prong one, the Court agreed with
10 the government's primary argument regarding the statutory requirements of prong one.
11 Plaintiff repeatedly argued that prong one does not require a bachelor's degree in a specific
12 specialty. The government, on the other hand, argued that prong one must be read in context
13 with other regulations which do require a bachelor degree in a specific specialty. The Court
14 agreed with the government finding, "the Court agrees with Defendant and finds the answer to
15 this question well-settled in the case law and USCIS's reasonable interpretations of the
16 regulatory framework." Dkt. No. 25, pg. 7. Thus, the government was substantially justified in
17 arguing that a degree in a specific specialty is required to qualify as a "specialty occupation."

18 Third, although the Court agreed with the government's arguments on the statutory
19 requirements, it disagreed with USCIS's interpretation of the evidence in this case. USCIS
20 relied on the Occupational Outlook Handbook ("OOH") and found that the position of market
21 research analyst did not require a bachelor's degree in a specific specialty because the OOH
22 provides that a whole variety of majors can be satisfactory for market research analysts -
23 ranging from statistics to social sciences or communications. The Court found that USCIS's
24 interpretation of the evidence impermissibly narrowed the plain language of the statute and
25 ignored the fact that the statutes and regulations allow for occupations that require the
26 attainment of the "equivalent" of a specialized bachelor's degree. *Id.* at pg. 8-9.

27 Even though the Court disagreed with USCIS's interpretation of the evidence, the
28 government's litigation position was substantially justified. Given that the government was
substantially justified in arguing that a degree in a specific specialty is required to qualify as a
"specialty occupation," the government was also justified in arguing that when the OOH lists
eight to ten different fields that could be sufficient for a market research analyst, that position

1 does not require a sufficiently specialized degree. Although the government was ultimately
2 found incorrect on this point, it was a reasonable argument to make. Not only did the
3 government's argument have a reasonable basis in fact, it also had a reasonable basis in law
4 because this was a matter of first impression for this Court. There are no appellate level
5 decisions on this issue. And it appears this issue has only been considered nationwide once by
6 an Ohio District Court. *Id.* at pg. 9 (*citing Residential Finance Corp. v. USCIS*, 839 F.Supp.2d
7 985, 996 (S.D. Ohio 2012)). The government is justified in litigating a matter where there is no
8 guiding case law. As such, the government's litigation position was substantially justified.

8 III. CONCLUSION

9 Fees can only be granted pursuant to the EAJA if the Government's position had no
10 reasonable basis in law and fact. *Pierce*, 487 U.S. at 565; *see also League of Women Voters of*
11 *California v. FCC*, 798 F.2d 1255, 1257 (9th Cir. 1986)(*citing* H.R. Rep. No. 1418, 96th Cong.,
12 2d Sess. 10, reprinted in 1980 U.S. Code Cong. & Admin. News 4953, 4984, 4989); *Foster v.*
13 *Tourtellotte*, 704 F.2d 1109, 1112 (9th Cir. 1983). Here, USCIS's decision to deny Plaintiff's
14 visa petition, and to defend that decision in court, had at least a reasonable basis in law and in
15 fact, despite the fact that this Court ruled in Plaintiff's favor. Thus, Plaintiff's motion for
16 attorney's fees should be denied.

17 Dated this 13th day of February, 2015.

18
19 Respectfully submitted,

20 ANNETTE L. HAYES
Acting United States Attorney

21 s/Kristin B. Johnson

22 KRISTIN B. JOHNSON, WSBA #28189

23 Assistant United States Attorney

24 700 Stewart Street, Suite 5220

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Attorney for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee in the Office of the United States Attorney for the Western District of Washington and is a person of such age and discretion as to be competent to serve papers;

That on the below date she electronically filed the foregoing document(s) with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the attorney(s) of record as follows:

William Frick william@crossborders.us

DATED this 13th day of February, 2015.

s/ Linda Seilinger
LINDA SEILINGER
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HONORABLE RICARDO S. MARTINEZ

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
SEATTLE, WASHINGTON

[REDACTED]

Plaintiff,

vs.

U.S. CITIZENSHIP AND
IMMIGRATION SERVICES,
an agency of the United States
Government; and U.S.
DEPARTMENT OF
HOMELAND SECURITY, an
agency of the United States
Government.

Defendants.

CASE NO. 2:14-cv-00123-RSM

PLAINTIFF’S Response to
Defendant’s Opposition to
Motion for Attorney’s Fees

*Noted for Hearing:
February 20, 2015*

Defendants oppose Plaintiff’s motion for attorney fees pursuant to the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412(d). Plaintiffs assert that the agencies’ pre-litigation position, and the position taken during litigation,

Plaintiff’s Response to Opposition - 1

1 was “substantially justified” and therefore attorney fees
2 should be denied.¹

3
4 However, the Court should dismiss Defendants’
5 assertions because the Court specifically found that
6 Defendants actions in this case “*failed to articulate a*
7 *satisfactory explanation for the agency’s denial based on*
8 *the record that it had before it.*”

9
10 The Court further found that “*USCIS thus abused its*
11 *discretion in reaching a decision that was not in accordance*
12 *with its own interpretation of the statutory and regulatory*
13 *framework.*” (Dkt. 25 page 10, emphasis added)

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18 An Abuse of Discretion Cannot Be “Substantially Justified”

19 “An abuse of discretion is a plain error, discretion
20 exercised to an end not justified by the evidence, a judgment
21 that is clearly against the logic and effect of the facts as are
22 found.” *Rabkin v. Oregon Health Sciences Univ.*, 350 F.3d
23
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26 1 Plaintiff does not seek attorney fees for the work performed prior to
27 this litigation, despite Ninth Circuit precedent indicating that it is
28 potentially entitled to reimbursement for at least a portion of that work.
29 *Thangaraja v. Gonzales*, 428 F.3d 870, 873–74 (9th Cir.2005); *Meier v.*
30 *Colvin*, 727 F.3d 867, 871–872 (9th Cir. 2013)

1 967, 977 (9th Cir. 2003) (citation and internal quotation
2 marks omitted); *see also In re Korean Air Lines Co., Ltd.*, 642
3 F.3d 685, 698 n.11 (9th Cir. 2011).
4

5 Under the abuse of discretion standard, a reviewing
6 court cannot reverse an agency action absent a definite and
7 firm conviction that the underlying tribunal committed a clear
8 error of judgment in the conclusion it reached. *See*
9 *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637
10 F.3d 939, 953 (9th Cir. 2011); *Valdivia v. Schwarzenegger*,
11 599 F.3d 984, 988 (9th Cir. 2010) (citing *SEC v. Coldicutt*,
12 258 F.3d 939, 941 (9th Cir. 2001)); *Harman v. Apfel*, 211
13 F.3d 1172, 1175 (9th Cir. 2000) (noting reversal under abuse
14 of discretion standard is possible only “when the appellate
15 court is convinced firmly that the reviewed decision lies
16 beyond the pale of reasonable justification under the
17 circumstances”).
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23 The abuse of discretion standard requires a reviewing
24 court to uphold any district court or agency determination that
25 falls within a broad range of permissible interpretations and
26 conclusions. *See Kode v. Carlson*, 596 F.3d 608, 612-13 (9th
27 Cir. 2010) (per curiam); *Grant v. City of Long Beach*, 315
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1 F.3d 1081, 1091 (9th Cir. 2002), *amended by* 334 F.3d 795
2 (9th Cir. 2003) (order).

3 The fact that the Court found an abuse of discretion by
4 the Defendants in this case, is therefore a definitive indication
5 that there was not substantial justification for the agency's
6 position.
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11 The Defendants' Position Was Not Substantially Justified
12 Pursuant To Its Own Regulatory Language

13 The USCIS' Denial stated that the agency denied the
14 H-1B application "specifically" because "■ failed to meet
15 the burden of proving that the proffered position met **any** of
16 the four criteria in 8 C.F.R. 214.2(h)(4)(iii)(A). (Dkt .19 p. 4,
17 emphasis added)
18

19 Plaintiff was required to show, by a preponderance of
20 the evidence, that it met only *one* of these four criteria in
21 order to qualify as a specialty occupation. *See Matter of*
22 *Chawathe*, 25 I.&N. Dec. 369 (2010).
23

24 Defendants Opposition seeks to mitigate the Court's
25 ruling by stating that "the Court agreed with the government's
26 primary argument regarding the statutory requirements of
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1 prong one.” (Dkt 27 page 3)

2 In fact the Defendants’ primary argument in support of
3 denying the H-1B application was that a bachelor’s degree
4 was not “normally” or “commonly” required for the position
5 of Market Research Analyst² – despite admitting that a
6 bachelor’s degree was the “typical” requirement. (Dkt. 19
7 page 4)

8 Although Plaintiff’s briefing raised the issue of the
9 contradictory regulatory language regarding the term
10 “specific specialty” – and a lack of a regulatory or statutory
11 definition of the term “specific specialty” – in regards to the
12 H-1B bachelor degree requirement, Plaintiff’s briefing also
13 made clear that the issue was, in effect, mooted by the fact
14 that the government’s own Occupational Outlook Handbook
15 listed the specific specialty possessed by the beneficiary – a
16 specialty in Market Research – as one of the particular
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24 2 Two of the four criteria, contained in the regulation that defines the
25 standard for H-1B approval, require a bachelor’s degree to be “normally
26 the minimum requirement for entry into the particular position” (8 C.F.R.
27 214.2(h)(4)(iii)(A)(1)) or “common to the industry in parallel positions”
28 (8 C.F.R. 214.2(h)(4)(iii)(A)(2)). Defendants’ prime argument in
29 denying H-1B status to ██████████, was that even though the U.S.
30 Government Occupational Outlook Handbook stated that a bachelor’s
degree was the typical entry level education, the word “typical” does not
equate to the words “normal” and/or “common” as found in the
regulation.

1 specialties that would qualify a candidate for a position as a
2 Market Research Analyst.

3 Based upon the fact that the beneficiary, [REDACTED],
4 clearly possessed the proper specialty degree, it is unclear
5 what substantial justification the Defendants believe existed,
6 what substantial justification the Defendants believe existed,
7 in asserting that she did not have the necessary specialized
8 education.
9

10 Defendants' illogical attempt to parse the words
11 "normally," "commonly," and "typical" – which was the core
12 of the Defendants argument against the granting of H-1B
13 status – was plainly not a substantially justified position under
14 the facts or the law.
15

16 Conclusion

17 Defendants' argument that its position was
18 substantially justified should be dismissed, and attorney fees
19 under the EAJA should be awarded to the Plaintiff.
20

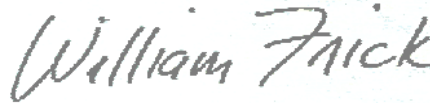
21 The revised declaration of Plaintiff's counsel is
22 attached, reflecting approximately 6 additional hours required
23 to answer Defendants' Opposition.
24

25 The total award sought is compensation for 41.82
26 hours for the work of Plaintiffs' counsel (\$7948.30) and
27

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30 Plaintiff's Response to Opposition - 6

1 \$411.30 in expenses (\$11.30 in mailing and \$400.00 in filing
2 fees). **The total amount requested is \$8359.60.**
3

4
5 Dated this on this 18th day of February 2015.

6 

7
8 /s/

9 William Frick
10 Law Office of William Frick
11 719 Second Avenue
12 Millennium Tower Suite 701
13 Seattle, Washington 98104
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15 (206) 770-7215 – Fax
16 E-mail: william@fricklawfirm.info
17 Attorney for Plaintiff
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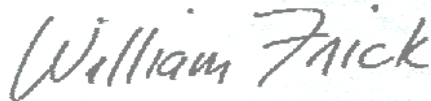
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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing with the Clerk of the Court, using the CM/ECF system, which will send notification of such filing to the attorney(s) of record for the defendant:

KRISTIN B. JOHNSON, WSBA #28189
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Fax: (206) 553-4067
Email: kristin.b.johnson@usdoj.gov
Attorney for Defendant

DATED this 18th day of February 2015.



/s/

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Supplemental Declaration of William Frick

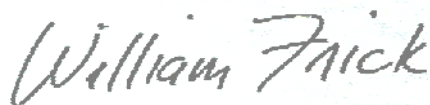
I William Frick, under penalty of perjury pursuant to the laws of the State of Washington state the following to be true to the best of my knowledge and recollection:

I performed the following work at the following times, on behalf of my client [REDACTED] [REDACTED] in its federal court case cv 14-00123 seeking adjudication of its H-1B application:

Initial meeting and evaluation of remedies- November 6, 2013 2:00pm -3:45pm	1.75hr
Review history and caselaw - December 18, 2013 - 1:15 pm – 3:30 pm	2.25hr
Preparing and filing Complaint, Summons, Affidavits of Mailing – January 24, 2014 8:15 am – 11:15 am (also filing Summons and Affidavit of Mailing with Court on February 9, 10, 15, 23, 2014)	3hr
Review and note Scheduling Order - January 28, 2014 9-9:30 am	.5 hr.
Review and note Notice of Appearance - February 27, 2014	.20 hr
Written and telephonic communications with opposing counsel - March, 2014	.52hr
Review and note Minute Order - March 12, 2014	.20 hr
Preparing and filing Joint Status Report and Discovery Plan - March 16, 2014 2-4 pm	2 hr
Reviewing Administrative Record - May 5, 2014 8:15-10:45 am	2.5 hr
Research, preparation, writing and filing Motion For Summary Judgment - May 9, 2014 1:45 – 4 pm, May 13, 2014 7:15 am – 10:00 am, May 23, 2014, 2:20 pm – 5:15 pm	7.45
Reading Defendant’s Opposition and Cross Motion for Summary Judgment - June 21, 2014 9 am -10:20 am	1.3 hr
Research on Defendant’s arguments June 22, 2014 9:00 am-11:00 am	2 hr.
Research, writing and filing Response to Defendant’s Opposition and Cross Motion - July 17, 2014 2:30 pm-5:00 pm, July 18, 2014 4:00 pm -5:00 pm	3.5 hr
Reading Defendant’s Reply - August 10, 2014 10:00 am – 10:30 am	.5 hr

Research on Defendant's arguments - August 10, 2014 4 pm – 5:30 pm	1.5 hr
Writing and Filing Surreply - August 12, 2014 1 pm-3-pm, August 13, 2015 5:00 pm 5:15 pm	2.25
Preparing and Filing Motion for EAJA Fees – January 21, 2015 10:15am-1230 pm; January 31, 2015 7-9 pm	4.25
Download and read Defendants' Opposition to Motion for Attorney Fees – February 13, 2015 5:00 pm – 5:30pm	.5 hr
Initial research re: Defendants' Opposition – February 14, 2015 3:00 pm – 3:20 pm	.3 hr
Westlaw research re: Defendants' Opposition – February 14, 2015 6:20 pm – 7:10 pm	.85 hr
Research and writing Response to Defendants' Opposition – February 17, 2015 10:30 am – 1:45 pm	3.25
Revision and filing Response to Defendants' Opposition – February 17-18, 2015 11:15 pm – 12:30am	1.25
Total hours:	41.82

Dated this 18th day of February 2015 at Seattle, Washington



/s/ _____
William Frick

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

████████████████████,

Plaintiff,

v.

U.S. CITIZENSHIP AND IMMIGRATION
SERVICES, and U.S. DEPARTMENT OF
HOMELAND SECURITY,

Defendants.

Case No. C14-123RSM

ORDER GRANTING PLAINTIFF’S
MOTION FOR ATTORNEY’S FEES

This matter comes before the Court upon Motion for Attorney’s Fees by Plaintiff ██████████

████████████████████ Dkt. # 26. Plaintiff seeks an award of \$8359.60 in fees and costs for its
counsel’s 41.82 hours of work in successfully litigating this proceeding. *See* Dkt. # 28, p. 7.

Having considered the parties’ briefs in support and opposition as well as the relevant
remainder of the record, the Court grants Plaintiff’s motion and awards the requested fees and
costs for the reasons stated herein.

BACKGROUND

This case arose out of the denial by Defendant United States Citizenship and
Immigration Services (“USCIS”) of Plaintiff’s H-1B visa application for ██████████ as a

1 “Marketing Research Analysis.” *See* Order on Cross-Motions for Summary Judgment. Dkt. #
2 25, pp. 2, 6. Plaintiff filed this action after USCIS determined that [REDACTED] had failed to
3 demonstrate that the proffered position qualifies as a “specialty occupation” under any of the
4 four criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A). *See* Dkt. # 1.

5
6 On January 14, 2015, the Court entered an Order on Cross-Motions for Summary
7 Judgment determining that USCIS committed an abuse of discretion by denying [REDACTED]’s H1-B
8 visa petition and ordering USCIS to grant the petition. Dkt. # 25. The Court therein
9 determined that the evidence in the record plainly shows that the proffered position meets the
10 first regulatory qualifying criterion in order to constitute a “specialty occupation.” *See* 8
11 C.F.R. § 214.2(h)(4)(iii)(A)(i) (defining a “specialty occupation” as “one for which a
12 baccalaureate or higher degree or its equivalent is normally the minimum requirement for
13 entry into a particular position”). In particular, the Court found that USCIS’s interpretation of
14 the evidence impermissibly narrowed the plain language of the statute, ignoring the fact that
15 the statute and regulations allow for occupations that require the attainment of the
16 “equivalent” of a specialized bachelor’s degree. Dkt. # 25 at pp. 8-9. The Court also found
17 that the position announcements offered into evidence by Plaintiff corroborate the necessity of
18 a relevant, technical bachelor degree accompanied by specific experience in market research,
19 in satisfaction of the regulatory requirement. *Id.* at p. 10.

20
21
22 Following the Court’s decision on summary judgment, Plaintiff filed the instant
23 Motion for Attorney’s Fees on January 31, 2015. Dkt. # 26. USCIS timely filed a brief in
24 opposition to the fee request, and Plaintiff filed a reply. No party has requested oral argument,
25 and the Court deems it unnecessary.
26

DISCUSSION

A. Standard for Evaluating EAJA Fee Petitions

In certain circumstances, a party that prevails against the United States in a civil action is entitled to an award of attorney’s fees and costs under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. § 2412.¹ *Flores v. Shalala*, 49 F.3d 562, 566 (9th Cir. 1995). Although the EAJA creates a presumption that fees will be awarded to a prevailing party, Congress did not intend fee shifting to be mandatory. *Id.* In addition to the requirement that a claimant be a prevailing party, eligibility for a fee award under the EAJA requires: (1) that the government’s position was not “substantially justified”; (2) that no special circumstances make an award unjust; and (3) that any fee application be submitted to the court within thirty days of final judgment and be supported by an itemized statement. *Comm’r, I.N.S. v. Jean*, 496 U.S. 154, 158 (1990). The only EAJA requirement disputed by the parties in this case is whether the position taken by USCIS was “substantially justified.”²

The government has the burden to show substantial justification. *Edwards v. McMahon*, 834 F.2d 796, 801 (9th Cir. 1987). Substantial justification means more than merely undeserving of sanctions for frivolousness. *Mester Mfg. Co. v. I.N.S.*, 900 F.2d 201, 204 (9th Cir. 1990). Rather, under the Act, the government is “substantially justified” if its position met “the traditional reasonableness standard --- that is justified in substance or in the

¹ Section 2412(d)(1)(A) provides: “Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in a civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”

² ■ is the prevailing party, having received the entirety of the relief it sought in this litigation. The fee petition was also timely filed 20 days after the Court’s entry of its order on summary judgment. Further, Defendant has not raised any special circumstances that could justify the denial of a fee award. *See* Dkt. # 27.

1 main, or to a degree that could satisfy a reasonable person.” *Lewis v. Barnhart*, 281 F.3d
2 1081, 1083 (9th Cir. 2002) (internal quotations and citations omitted). The government must
3 demonstrate that its position had a reasonable basis in both law and fact. *Flores*, 49 F.3d at
4 569-70. The government must make this showing as to both the underlying agency conduct
5 and in its litigation position. *Gutierrez v. Barnhart*, 274 F.3d 1255, 1259 (9th Cir. 2001). The
6 government’s failure to prevail on the underlying issue does not raise a presumption that its
7 position lacked substantial justification. *Edwards*, 834 F.2d at 802. However, a finding that
8 the agency’s decision was unsupported by substantial evidence provides a “strong indication”
9 that the government’s position was not substantially justified. *Thangaraja v. Gonzales*, 428
10 F.3d 870, 874 (9th Cir. 2005).

12 **B. Substantial Justification**

13 USCIS argues that its underlying position was substantially justified in that it
14 articulated separate reasons, each supported by substantial evidence, for ██████’s failure to meet
15 its burden of proof that the proffered position qualifies as a “specialty occupation” under any
16 of the four criteria in 8 C.F.R. § 214.2(h)(4)(iii)(A). USCIS further asserts that its litigation
17 position was substantially justified in that the Court disagreed with USCIS’s interpretation of
18 the evidence rather than finding a lack of substantial evidence supporting its decision.
19

20 According to USCIS, the absence of appellate decisions on the precise issue before this Court
21 made it reasonable for the agency to advance the position that it did.
22

23 The Court disagrees that USCIS has met its burden to show that either its underlying
24 position or that advanced in this litigation were substantially justified. In its Order on
25 summary judgment, the Court found USCIS’s position lacking support in both the law and the
26 facts. First, it determined that USCIS’s reading of the statute to eliminate the allowance for an

1 “equivalent” to a specifically specialized bachelor’s degree was clearly improper according to
2 well-established canons of construction. *See, e.g., Bennett v. Spear*, 520 U.S. 154, 173 (“It is
3 the cardinal principle of statutory construction that it is our duty to give effect, if possible, to
4 every clause and word of a statute rather than to emasculate an entire section.”). Thus while
5 the precise question – whether a market research analyst position satisfies the specialty
6 occupation criteria – may have been novel, the legal underpinnings of the Court’s decision
7 certainly were not.

9 Second, the Court expressly found that evidence in the record which the agency was to
10 consider in rendering its decision undercut its determination. Substantial evidence therefore
11 did not support USCIS’s underlying decision or its litigation position. As USCIS has been
12 unable to overcome the “strong indication” of unreasonableness that flows from this lack of
13 substantial evidence, *see Thangaraja*, 428 F.3d at 874, it has failed to meet its burden to
14 overcome the otherwise mandatory shifting of fees.

16 **C. Fee Calculation**

17 USCIS has raised no opposition to the amount of fees requested by Plaintiff, and the
18 Court finds the fee request to be proper. The Declarations of Plaintiff’s counsel provide the
19 requisite documentation for the 41.82 hours of work expended throughout this litigation, *see*
20 Dkt. ## 26-2 & 28-1, and the Court finds the hours invested by counsel reasonable and non-
21 duplicative. The Court further finds counsel’s hourly rate of \$190.06 reasonable and in accord
22 with statutory requirements. Finally, the Court finds the requested \$411.30 in costs and
23 expenses (\$11.30 in mailing and \$400.00 in filing fees) to be compensable under 28 U.S.C. §
24 1920. Accordingly, the Court shall award the full amount of requested fees and costs of
25 \$8359.60.
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CONCLUSION

For the above-stated reasons, the Court hereby ORDERS that Plaintiff's Motion for Attorney's Fees (Dkt. # 26) is GRANTED. The Court awards Plaintiff \$7948.30 in fees and \$411.30 in costs. Defendant shall pay the total amount of \$8359.60 to Plaintiff's counsel within sixty (60) days of the entry of this Order.

Dated this 10th day of April 2015.



RICARDO S. MARTINEZ
UNITED STATES DISTRICT JUDGE