

2. The H-1B visa classification allows highly skilled and educated foreign workers to work for U.S. employers in “specialty occupations”—that is, positions requiring the theoretical and practical application of a body of highly specialized knowledge for which a bachelor’s or higher degree in a specific specialty is required.

3. Defendants U.S. Citizenship and Immigration Services (USCIS) and its Director L. Francis Cissna denied the H-1B petition after erroneously determining that Gate 39 Media failed to demonstrate that its Software Web Developer position fell within a specialty occupation.

4. At Gate 39 Media, the Software Web Developer brings expertise in customized web development and marketing to the complex and highly regulated financial services industry. The Software Web Developer works directly with financial industry customers to develop custom applications and create interactive websites that accurately analyze their financial data, effectively advertise their financial performance, and generate leads for new hires and new customers through web-based charts and other data displays. The Software Web Developer must be familiar with financial markets, investing practices, and the latest online marketing methods. Gate 39 Media requires that this employee have at least a bachelor’s degree in information systems or a related field, and two years of related professional experience.

5. In support of its petition, Gate 39 Media submitted a detailed job description, including specific duties and time-allocated percentages; opinion letters from experts; and examples of the Software Web Developer’s complex work product. This evidence demonstrated that the job is within a specialty occupation within the meaning of the Immigration and Nationality Act (INA).

6. Defendants' denial was arbitrary and capricious and contrary to law. Defendants disregarded substantial probative evidence detailing the job duties, their complexity, and the correlation between the duties and Gate 39 Media's requirement that its Software Web Developer hold at least a bachelor's degree in information systems or a related field.

7. Plaintiff requests that the Court vacate the denial and approve the H-1B petition.

JURISDICTION AND VENUE

8. This case arises under the INA, 8 U.S.C. § 1101 *et seq.*, and the Administrative Procedure Act (APA), 5 U.S.C. § 701 *et seq.* This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). This Court has authority to grant relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02, and the APA. The United States has waived its sovereign immunity under 5 U.S.C. § 702.

9. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(A) because this is a civil action in which the Defendants, respectively, are an agency of the United States and an officer of the United States acting in his official capacity, and they reside in this District.

FINAL AGENCY ACTION AND EXHAUSTION OF REMEDIES

10. Defendant USCIS' January 14, 2019 denial of Plaintiff Gate 39 Media's H-1B petition constitutes final agency action under the APA. *See* 5 U.S.C. §§ 551(13); 701(b)(2); 704. Neither the INA nor implementing regulations require an administrative appeal of the denial. Accordingly, Plaintiff has no administrative remedies to exhaust.

PARTIES

11. Plaintiff Gate 39 Media is a corporation headquartered in Chicago, Illinois. Since 2001, Plaintiff Gate 39 Media has served financial industry clients with web, marketing and

technology solutions designed to keep those clients competitive. Plaintiff Gate 39 Media filed the H-1B petition at issue here.

12. Defendant USCIS is a component of the Department of Homeland Security (DHS), 6 U.S.C. § 271, and an “agency” within the meaning of the APA, 5 U.S.C. § 551(1). USCIS is responsible for adjudicating immigration benefits, including nonimmigrant visa petitions. USCIS denied the H-1B petition at issue here.

13. Defendant L. Francis Cissna is, at the time of filing of this complaint, the Director of USCIS. In this role, he oversees the adjudication of immigration benefits and establishes and implements governing policies. The USCIS Director has ultimate responsibility for the adjudication of Plaintiff Gate 39 Media’s H-1B petition and is sued in his official capacity.

14. Director Cissna resigned effective June 1, 2019. His successor in the position of Director of USCIS will automatically replace him as a Defendant pursuant to Rule 25(d) of the Federal Rules of Civil Procedure.

LEGAL BACKGROUND

H-1B Petition Process

15. Section 101(a)(15)(H)(i)(b) of the INA authorizes DHS to admit into the United States temporary workers whom U.S. employers seek to employ in specialty occupations. 8 U.S.C. § 1101(a)(15)(H)(i)(b). This nonimmigrant classification is commonly referred to as “H-1B.”

16. A “specialty occupation” is one that requires the “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.” 8 U.S.C. § 1184(i).

17. Before filing an H-1B nonimmigrant visa petition with USCIS, the employer must obtain from the U.S. Department of Labor (DOL) a certification of a Labor Condition Application (LCA). 8 U.S.C. § 1182(n)(1). The employer's attestations in the LCA are intended to ensure that the employment of an H-1B worker will not have an adverse effect on the wages and working conditions of similarly situated U.S. workers. *See* 8 U.S.C. §§ 1182(n)(1)(A)-(D).

18. To demonstrate to DOL that it will pay the higher of the prevailing or actual wage (the required wage) for its job, the employer may obtain a prevailing wage from a DOL online wage library, using a Standard Occupational Classification (SOC) for the job, the job location and one of four wage levels depending on the employer's education and experience requirements.

19. The employer must include the DOL certification with its H-1B petition. Additionally, if the foreign national is already in the United States in a different nonimmigrant visa status—such as Ms. Hu, who was in F-1 student status—the petitioning employer may designate in the H-1B petition that the foreign national is requesting a change of status to H-1B and an extension of her stay in the United States.

H-1B Lottery

20. Congress established a cap of 65,000 regular H-1B visa numbers per fiscal year (FY). *See* 8 U.S.C. § 1184(g)(1). An additional 20,000 H-1B visa numbers are available each FY without regard to the 65,000 cap if the beneficiary has a master's or higher degree from a U.S. university. *See* 8 U.S.C. § 1184(g)(5)(C). USCIS has characterized the 20,000 additional visa numbers as the H-1B “master's exemption.”

21. A U.S. employer whose petition is subject to the annual cap may file beginning on the first business day of April for employment that begins on October 1 of that year (the first day

of the next FY). If USCIS determines that it has received more than enough petitions to meet the master's exemption and the statutory cap at any time within the first five business days of the filing period, it uses a computer-generated random selection process (lottery) to select H-1B petitions for adjudication from the petitions received during that time period.

H-1B Requirements

22. An H-1B petitioner must demonstrate that the position qualifies as a specialty occupation and that the beneficiary is qualified to perform the job duties required by the specialty occupation. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(A)(1), (h)(4)(iii)(B)(3).

23. The regulation provides that, to qualify as a specialty occupation, the position must meet one of the following criteria:

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

8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

FACTUAL ALLEGATIONS

Plaintiff Gate 39 Media

24. Established in 2001 as an Illinois corporation, with headquarters in Chicago, Plaintiff Gate 39 Media is a full-featured marketing and technology company dedicated to serving the financial industry. With customers ranging from individual brokers to exchanges and

other businesses in the financial industry, Gate 39 Media has the knowledge and expertise to serve this complex and tightly regulated industry. The company relies on its reputation, built over fifteen years, for developing effective websites and customized web applications and maintaining those sites through excellent technical support. Current clients include leading brokers, futures commission merchants, registered investment advisors, hedge funds, agricultural marketing firms, financial technology firms, financial service providers, and insurance brokers.

25. Gate 39 Media serves its financial industry customers' online marketing needs using a proven five-phase process: the research and planning phase, in which staff analyze and define the project; the design phase, in which staff determine design concepts and content for the web-based campaign; the development stage, where staff create the website, mobile applications, and social media strategy; the launch phase, in which staff review and test each recently developed program and ensure that all websites and mobile applications are set up to collect and analyze data before announcing the new campaign; and the ongoing management phase, in which staff manage the customer's ongoing marketing campaign, generate new leads, and provide technical assistance to ensure continued successful operations.

Hu's Employment with Gate 39 Media

26. Ms. Hu is a highly-educated Chinese citizen, who earned her undergraduate and advanced degrees in the United States. She received a Bachelor of Science degree in finance and accounting in December 2012, from Iowa State University of Science and Technology in Ames, Iowa. She received her Master of Science degree, with a major in information systems and a concentration in business web analysis and development, in March 2015, from DePaul University, College of Computing and Digital Media, in Chicago, Illinois.

27. Ms. Hu began working for Gate 39 Media as a Software Web Developer in May 2016, with work authorization based on her F-1 student status. Her work authorization continued through September 30, 2018, by which time she stopped full-time work for Gate 39 Media. Throughout all periods of her employment with Gate 39 Media, she complied with her F-1 status. Ms. Hu presently holds F-1 student nonimmigrant status and is enrolled in an educational program that provides for curricular practical training. Should USCIS approve Gate 39 Media's H-1B petition, Ms. Hu will return to full-time work for the company as a Software Web Developer.

Gate 39 Media's H-1B Petition

28. In April 2018, Gate 39 Media properly submitted to USCIS its H-1B petition for consideration as a "master's exemption" petition. Gate 39 Media filed the H-1B petition because it had made an investment in Ms. Hu and wanted to continue benefiting from her contributions to Gate 39 Media's operations.

29. Pursuant to its lottery, USCIS randomly selected Gate 39 Media's petition and, on or about April 12, 2018, accepted Gate 39 Media's H-1B petition for filing.

30. Included with this petition was a request to change Ms. Hu's status from F-1 student to H-1B and to extend her stay in the United States.

31. Gate 39 Media also included with the petition DOL's certification of its LCA for the position. In the LCA, Gate 39 Media selected SOC 15-1134, which is the occupational classification for web developers. Gate 39 Media designated the position as entry level with the corresponding DOL wage level for an entry position in this field, DOL wage level 1.

32. In support of its H-1B petition, Gate 39 Media included a March 23, 2018 letter from the company's president describing in detail Gate 39 Media, the duties of the Software Web

Developer position, and Ms. Hu's qualifications. This evidence specified that the minimum education required for the Software Web Developer is a bachelor's degree in information systems or a related field.

33. On September 10, 2018, Defendant USCIS issued a request for evidence ("RFE"). USCIS erroneously claimed that Gate 39 Media had not met any of the regulatory criteria to qualify for a specialty occupation. The RFE included suggestions as to the type of evidence that Gate 39 Media could include to establish each of the regulatory criteria.

34. Gate 39 Media's timely RFE response demonstrated that the Software Web Developer position satisfied two of the independent regulatory criteria for demonstrating that a position falls within a specialty occupation. First, Gate 39 Media demonstrated that the position is so complex that it can be performed only by an individual with a bachelor's degree in information systems or a related field, thus satisfying 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (the second prong). Second, Gate 39 Media demonstrated that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree, thus satisfying 8 C.F.R. § 214.(h)(4)(iii)(A)(4).

35. As part of its RFE response, Gate 39 Media included a letter from its president, which incorporated and expanded upon the detailed description of job duties in the initial letter. Gate 39 Media also provided a detailed chart elaborating on those duties, and examples of the position's complex and specialized work product.

36. The letter details the job’s “[p]rogramming and customized back-end¹ web development” duties as follows:

- [Possess] [e]xperience[] programming and in-depth specialized knowledge in HTML, CSS and J-Query² and cross-browser compliance;
- Understand automated processes for building data applications, [and] test[], document[], and deploy[e] [those applications] at scale;
- Perform analysis of software design and development in Mac, Windows, WordPress,³ [and] LAMP (Linux, Apache, MySQL, and PHP)⁴ environment[s];
- Analyze all aspects of our data process and apply specific requirements in designing and implementing all of our computer-based processing systems;
- [Use] [] knowledge of WordPress[,] including WordPress frameworks;
- Extend and customize WordPress functionality for specific client needs;
- [Employ] [r]esponsive coding techniques and libraries;
- [Engage in] Photoshop slicing⁵;
- Design, build, and maintain web sites, using authoring or scripting languages, content creation tools, management tools, and digital media;
- Perform coding for various applications (social media, email marketing, CRM (Customer Relationship Management[])⁶;
- Write [q]uality tests for programs;
- [Have] [f]amiliarity with the financial markets and various types of investing practices specific to client needs;

37. The letter further details the job’s responsibility to provide “[i]nternal support to technical teams” as follows:

- Assist in training new developers in the processes and development techniques Gate 39 Media utilizes in the development of websites and web applications;

¹ “Back end” web development refers to the process of connecting the server, applications, and databases to create a functioning website. It is distinguished from “front end” web development, which creates the appearance of a website for users.

² HTML (Hypertext Markup Language), CSS (Cascading Style Sheet), and J-Query are website design tools.

³ WordPress is a free and open-source content management system for websites.

⁴ LAMP is an acronym for four open-source software programs for web development—the Linux operating system, the Apache server, the MySQL relational database management system, and the PHP programming language.

⁵ Image slicing is a practice used to add a large image file to a website.

⁶ Customer-relationship management (CRM) is a method for managing a business’s relationship with current and potential customers by analyzing data generated through customers’ past interactions with the company.

- [Assist] other team members in support of a larger project or collaboration on new product development

38. Finally, the letter explains that the position must provide “[d]irect client support for analysis and development” as follows:

- Support for financial performance and statistics charting and data displays;
- Speak directly with select Chinese clients in Mandarin and provide development and support for websites developed in both simplified and traditional Chinese.

39. In addition, Gate 39 Media submitted the expert opinion of Roshanak Roshandel, Ph.D., Associate Professor and Chair of the Computer Science Department at Seattle University College of Science and Engineering. As the basis for this expert opinion, Professor Roshandel engaged in her own independent research and reviewed the Software Web Developer duties, the role she plays in the company’s business, examples of her work, and various professional resources. Additionally, Professor Roshandel interviewed the President of Gate 39 Media regarding the company and complex duties of the position to learn first-hand about both.

40. In her expert letter, Professor Roshandel observed that the depth and breadth of responsibility assigned to web developers varies depending on the nature of the company and its projects, which in turn determine the educational requirements for the position. The professor outlined why the Gate 39 Media Software Web Developer position is complex, “requiring knowledge and skills in programming, scripting, design, database and database connectivity modules, testing and analysis, continuous development platforms, and technical communication skills.” Professor Roshandel further explained that website design and development for the financial domain is particularly complex, because the industry is highly regulated with significant security concerns. For these reasons, she concluded that Gate 39 Media’s Software Web Developer position requires a bachelor’s degree in information systems or a related field.

41. Professor Roshandel also explained that, while the Software Web Developer position went beyond simpler tasks sometimes assigned to web developers, it was properly labeled an entry level position because it does not require project or people management.

USCIS' Denial of Gate 39 Media's H-1B Petition

42. On January 14, 2019, Defendant USCIS denied Gate 39 Media's H-1B petition. *See* Exh. A.⁷ The decision makes fundamental factual errors by ignoring ample record evidence and is based upon clear errors of law.

43. USCIS misstated the law in concluding that, while a showing that at least one of the requirements in 8 C.F.R. § 214.2(h)(4)(iii)(A) is necessary to establish that the job falls within a specialty occupation, such a showing is not sufficient to satisfy the statutory definition. This interpretation contravenes the plain language of the regulation. Additionally, in stating that the regulatory criteria are "supplemental" to the statutory definition, the decision impermissibly imposed evidentiary requirements beyond those required by Congress. By satisfying two of the regulatory criteria, Gate 39 Media demonstrated that its job is in a specialty occupation.

44. In finding that Gate 39 Media did not satisfy the second regulatory criterion, second prong (8 C.F.R. § 214.2(h)(4)(iii)(A)(2)), USCIS incorrectly concluded that Gate 39 Media's detailed description of the Software Web Developer's duties did not establish that the position was so complex as to require a bachelor's degree in the specialized field. USCIS ignored the substantial supporting evidence explaining the complex nature of the job, including two expert letters, when it stated that Gate 39 Media failed to provide any further evidence of the nature of the job.

⁷ This document contains redactions of personally identifiable information.

45. USCIS also erroneously imposed a nonexistent requirement, i.e., that Gate 39 Media demonstrate that its job is more complex or unique than similar positions in the same industry. Exh. A at 5. All that the second prong of the second criterion requires, however, is a showing that the “particular position is so complex or unique that it can be performed only by a person with a degree.” 8 C.F.R. § 214.2(h)(4)(iii)(A)(2). The record evidence, ignored by USCIS, demonstrates this. Moreover, the record amply demonstrates that the Software Web Developer position is dissimilar to those web development positions that involve only simple web design tasks which can be performed by a person without a bachelor’s degree.

46. As to the fourth regulatory criterion, USCIS erred as a matter of law by imposing a requirement not found in the regulation, namely, that Gate 39 Media was required to prove “that the duties of the proffered position are more specialized and complex” than duties normally performed by similar workers. Exh. A at 7. The regulation requires only that Gate 39 Media establish that the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attaining a bachelor’s or higher degree. 8 C.F.R. § 214.2(h)(4)(iii)(A)(4). Gate 39 Media has established that, unlike web developer positions with narrow responsibilities or simple tasks, its position is so specialized and complex that the knowledge associated with a bachelor’s degree in information systems or a related field is necessary to perform the job duties.

47. Additionally, USCIS mischaracterized Professor Roshandel’s expert opinion as being without sufficient factual basis and failing to “relate the professor’s conclusion to specific, concrete aspects of [Gate 39 Media’s] business operations.” This ignored the fact that Professor Roshandel’s factually detailed and substantiated letter explained how Gate 39 Media’s business providing financial industry clients with specialized and customized websites, mobile sites, and

web applications based on analytical data related to its requirement that the Software Web Developer have a bachelor's degree in information systems or a related field. Furthermore, as stated in her letter, Professor Roshandel investigated these facts by speaking directly with Gate 39 Media's President, who has first-hand knowledge of the company he created and the complex nature of the position.

48. As to both the second and fourth regulatory requirements, USCIS erred when it determined that, because the LCA certification indicated that the Software Web Developer is an entry position (as reflected in the wage level 1 designation), it was not complex or specialized in nature. This ignores the fact that an entry level position in a specialty occupation is still a position within a specialty occupation for purposes of the H-1B visa classification. Moreover, a contrary interpretation would ignore the plain terms of the statute, which defines specialty occupation as one that "requires . . . attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum *for entry* into the occupation" 8 U.S.C. 1184(i)(1) (emphasis added). It also ignores the evidence showing that, while an entry level position because it involves no project or personnel management, the duties of the position are complex, unique and specialized.

49. Under 5 U.S.C. §§ 702 and 704, Gate 39 Media has suffered a "legal wrong" and has been "adversely affected or aggrieved" by agency action for which there is no adequate remedy of law.

50. Plaintiff Gate 39 Media has been deprived of Ms. Hu's practical application of the theoretical knowledge she acquired in her course of study culminating in her master's degree with a major in information systems and a concentration in business web analysis and development and her relevant work experience. In addition, Gate 39 has been deprived of their

investment in Ms. Hu's professional talent and knowledge of the company's business gained from working there for over three years with the company.

COUNT ONE

**Violation of the Administrative Procedure Act, 5 U.S.C. § 701, et seq.,
the Immigration and Nationality Act and its Implementing Regulations**

51. Plaintiff re-alleges and incorporates by reference, as if fully set forth herein, the allegations in paragraphs 1-50 above.

52. Plaintiff is entitled to review by this Court pursuant to 5 U.S.C. §§ 701-706.

53. A reviewing court shall "hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

54. Defendants denied PS Gate 39 Media's H-1B petition solely on the ground that the evidence in the record was insufficient to establish that Plaintiff Gate 39 Media's Software Web Developer position is a specialty occupation.

55. Plaintiff Gate 39 Media submitted evidence demonstrating that the position satisfied the statutory definition of a specialty occupation. 8 U.S.C. § 1184(i)(1)(A)-(B).

56. Plaintiff Gate 39 Media's evidence demonstrated that the position satisfied at least two of the regulatory criteria for demonstrating a specialty occupation where the plain language of the regulation requires only one to be met. 8 C.F.R. § 214.2(h)(4)(iii)(A)(2) (second prong); (A)(4).

57. Defendants failed to properly consider all record evidence; reached factual conclusions as to these two regulatory criteria unsupported by any evidence in the record; misconstrued the applicable regulations; impermissibly imposed evidentiary requirements

beyond those required by Congress; and erroneously concluded that Plaintiff Gate 39 Media had not demonstrated that the Software Web Developer position fell within a specialty occupation.

58. Defendants' errors, singly and in combination, were arbitrary, capricious and in violation of the law. Consequently, Defendants acted arbitrarily, capriciously, and contrary to the law in violation of the APA, the INA, and the immigration regulations by denying Plaintiff Gate 39 Media's H-1B petition.

REQUEST FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendants' determination that evidence submitted by Plaintiff Gate 39 Media was insufficient to establish that the Software Web Developer position is in a specialty occupation was arbitrary and capricious, and not in accordance with law, in violation of the APA, 5 U.S.C. § 706(2)(A), the INA and the regulations;
2. Vacate the denial of Gate 39 Media's H-1B petition and remand this matter to Defendants with instructions that, within ten days of the date of the Court's Order, they: approve the Form I-129, Petition for Nonimmigrant Worker filed by Plaintiff Gate 39 Media; change the beneficiary's immigration status from that of a student in the F-1 classification to the H-1B classification; and extend the beneficiary's stay in H-1B status until and including September 7, 2021;
3. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and
4. Grant such other relief as the Court deems just, equitable and proper.

Dated: May 29, 2019

Respectfully submitted,

/s/ Mary Kenney
Mary Kenney (D.C. Bar #1044695)
AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7512
Fax: (202) 742-5619
Email: mkenney@immcouncil.org

Emma Winger
Moving for *pro hac vice* admission

AMERICAN IMMIGRATION COUNCIL
1318 Beacon Street, Suite 18
Brookline, MA 02446
Telephone: (617) 505-5375
Email: ewinger@immcouncil.org

Maria de las Mercedes Badia-Tavas
Moving for *pro hac vice* admission

BARNES & THORNBURG, LLP
One North Wacker Drive
Suite 4400
Chicago, IL 60606
Telephone: (312) 214-8313
Fax: (312) 759-5646
Email: mbadiatavas@btlaw.com

Attorneys for Plaintiff Gate 39 Media