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# The Compass<sup>®</sup>

**The Law Firm of Tidwell, Swaim & Associates, P.C.**

Specializing in U.S. Immigration and Nationality Law Since 1978

## Ask David

*Dear David,*

*Some of my friends and people I went to graduate school with are still having their H-1s denied because of the “specialty occupation” and “Level 1 wage” issues. I know that you won my case on those problems and have presented some information about what to do with those RFEs and denials. Can you present that information again? Ms. Lee*



**David Swaim**  
**Managing Partner**

Ms. Lee, thanks for bringing this issue up again. I have seen the same thing in consultations and questions we get from AVVO online. It is a shame companies and H-1 employees are still dealing with these very poorly thought out denials from CIS. We have reprinted an article by our Senior Associate, Alex Farquhar, which provides some overall guidance. The responses to the RFEs and denials are actually more complicated but this is a good starting place.

## H-1B Level I Wage RFEs and How to Fight Them

This year, the United States Citizenship and Immigration Services (USCIS) has begun to issue many Requests for Evidence (RFEs) for H-1B petitions involving positions which are classified at a Level I wage rate. In these RFEs, USCIS is attacking Level I positions in two ways, claiming that: (1) a Level I wage classification is not appropriate for the position offered given the complexity of the job duties described; and/or (2) the position offered is not a “specialty occupation” because the Level I wage indicates that the position is “entry-level.” Some RFEs include both claims. In order to understand the foundation for these RFE topics, we must first understand some of the many H-1B requirements, what it means

for a position to be classified at a Level I wage rate, and how to determine the “prevailing wage” for a position.

The position offered to the H-1B beneficiary must be a “specialty occupation.” Basically, this means the position requires a specific bachelor’s degree (or its equivalent) as a minimum for entry. The H-1B employer must agree to pay the H-1B employee at least the local prevailing wage or the employer’s actual wage, whichever is higher. The “employer’s actual wage” is the wage rate the employer pays to other similarly-situated employees. The “prevailing wage” is the average wage paid to workers in a particular occupation in a specific geographic location. A common method of determining the prevailing wage is to review the U.S. Department of Labor (DOL) wage data, the Standard Occupational Classification (SOC) system, and the Foreign Labor Certification Data Center to determine the appropriate SOC Occupation and wage level for the position. Within each SOC Occupation are four wage levels (Level I—Entry; Level II—Qualified; Level III—Experienced; Level IV—Fully Competent). Each of the four levels has its own prevailing wage; the higher the level, the higher the prevailing wage.

Each SOC Occupation has a corresponding O\*Net Job Zone, which describes the generally required experience, education, and job training require for a position. These range from Zone One—Little or No Preparation Needed to Zone Five—Extensive Preparation Needed. Each SOC Occupation also has a corresponding Education and Training Code. These range from Code One—First Professional Degree to Code Five—Bachelor’s Degree. Non-professional SOC Occupations do not have an Education and Training Code set. The policies and procedures used by the National Prevailing Wage and Helpdesk Center (NPWHC) when making Prevailing Wage Determinations (PWDs) can be found in the Prevailing Wage Determination Policy Guidance (PWD Guidance). The PWD Guidance provides a

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## Restaurant Review:

# Bethak Restaurant

By Alex Farquhar

My wife and I found ourselves in Carrollton recently and we were hungry. We decided we wanted some Indian and Pakistani food and found Bethak Restaurant.

When we arrived, it was a little before typical dinner hour, so the restaurant was not very crowded. The staff were very attentive. We were greeted right away, seated immediately and set up with a pitcher of water to quench our thirst.

Bethak Restaurant's menu is large and everything on it was appealing. I don't think we could have made a bad choice. We ended up ordering a wide variety of items—probably too much (did I mention that we were hungry?)—but we were able to make a second meal of the leftovers later.

We ordered regular naan bread and garlic naan bread. Both were delicious, but the garlic naan bread was my favorite. It had visible pieces of minced garlic and the flavor was vibrant. I knew immediately that I wanted to order the mutton biryani, which I would count as the highlight of my meal. The rice was flavorful in a subtle, yet somehow also powerful, way. The mutton was the perfect complement. There were several bones in the meat that we had to pick around, but it was worth it. The mutton was perfectly cooked. Overall, it was a great dish.

My wife was drawn to the chicken tikka masala, so we ordered some of that as well. The curry sauce was amazing with just the right amount of spice and the chicken was great.

Although that likely would have been enough for us, we also ordered some beef seekh kabobs. The kabobs were quite tasty, but they were probably my least favorite part of the meal (they had stiff competition). They were presented on a bed of sliced onions, which I fully appreciated.

We also wanted something without meat, though, so we decided to try the veggie samosas. They were crispy and the filling was delectable.

Overall, the meal and the experience were well worth the trip. I would suggest that you not wait until you are hungry and looking for a place to eat to try Bethak Restaurant. Make a conscious effort to go there and you will not be disappointed.

**Bethak Restaurant**  
3648 Old Denton Rd., Ste. 102  
Carrollton, TX 75007  
214-731-9570

## Welcome Rishika Reddy

Our Newest Attorney



Rishika was born in Hyderabad, India and moved to Houston with her family at the age of ten. She received her Bachelor of Science in Political Science and a second Bachelor of Science in Psychology from the University of Houston, graduating Magna Cum Laude with both degrees. Rishika continued her education at the Oklahoma City University School of Law where she received her Juris Doctor. She is officially licensed to practice law in Texas.

During law school, Rishika interned for the City of Houston's Legal Department in both the Neighborhood Services and Claims & Subrogation departments. She also interned with the Houston Area Women's Center (HAWC). HAWC works to end domestic and sexual violence and supports building safe and healthy lives through advocacy, legal support, counseling, education, and shelter.

Rishika's parents took a leap of faith and moved to the US when her mother was offered a job with an IT company here. Leaving their extended family was difficult, but Rishika's parents were determined to achieve a better future for their family. Immigrating to the United States as a child and growing up in a diverse city like Houston has helped Rishika develop a deep love for learning about different cultures. As a child, Rishika saw her parents

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### *Ask David (continued from Page 1)*

general, subjective description of positions that would fall within each of the four wage levels. For Level I wage positions, the PWD Guidance states, in part:

Level I (entry) wage rates are assigned to job offers for beginning-level employees who have only a basic understanding of the occupation. These employees perform routine tasks that require limited, if any, exercise of judgement...These employees work under close supervision and receive specific instructions on required tasks and results expected. Their work is closely monitored and reviewed for accuracy. Statements that the job offer is for a research fellow, a worker in training or an internship are indicators that a Level I wage should be considered.

However, the NPWHC does not base its wage level determinations on how well a position seems to match this general, subjective description. Instead, the PWD Guidance provides an objective, almost mathematical, 4-step test. Each position starts this process as a Level I position. In Step One, unless the employer requires more experience than that described in the SOC Occupation's Job Zone, the position remains at Level I. In Step Two, unless the employer requires more education than the general requirements of that SOC Occupation, the position remains at Level I. In Step Three, unless there are any special skills or other requirements, the position remains at Level I. In Step Four, unless the position is supervisory in nature, the position remains at Level I.

The first type of RFE claims that the offered position is incorrectly classified at a Level I wage rate because the described duties are too complex for an "entry-level" position. In making this claim, USCIS will quote the general, subjective Level I description from the PWD Guidance, list some of the duties described in the H-1B petition, and state that the duties do not appear to correspond to those of a position for beginning level employees who have only a basic understanding of the occupation. USCIS is misapplying the wage level system by focusing on this subjective description rather than the objective 4-step test. Without pointing to any actual evidence that the position is incorrectly classified, USCIS will request that the H-1B petitioning employer prove that the position is correctly classified at Level I.

The second type of RFE claims that, because the position has a Level I wage classification, the position is "entry-level;" therefore, it does not appear to be a specialty occupation; therefore, the petitioner must present additional evidence to establish that the position qualifies. On its most basic level, this claim is disingenuous at best. USCIS is apparently arguing that a specialty occupation position must always require additional experience beyond the requirement of a degree. Nothing in the statute or regulations even suggests that entry-level positions cannot be specialty occupations. As long as a position requires a bachelor's degree (or its equivalent) in a specific field of study, it is a specialty occupation, even if the position also requires zero years of experience. However, care must be taken in responding to this type of RFE because there are many important factors at play. For example, consider a case involving a Job Zone Four position. The description of a Job Zone Four position states that "[m]ost of these occupations require a four-year bachelor's degree, but some do not." If insufficient evidence has been provided to establish that the position is a specialty occupation, USCIS will likely consider the Job Zone 4 position to fall within the "some do not" category since a Level I position is relatively low within its SOC Occupation, and then decide that the H-1B petitioning employer failed to establish that the position qualifies as a specialty occupation.

This is a complicated subject with many important factors to consider. If you are planning to petition for an H-1B employee, particularly for a Level I wage position, we recommend that you retain the services of a Board-Certified Immigration Attorney, such as you can find at Tidwell, Swaim & Associates, to assist you.





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***Meet Rishika Reddy (continued from page 3)***

trying to navigate the immigration system and how long and exhausting it can be. This personal experience led her to begin building a career in immigration law, an area where Rishika could help others better understand and maneuver the system.

Rishika currently works with employers to obtain employment authorization for workers in specialty occupations, religious workers, and TN NAFTA professionals. Additionally, she assists with employer-based immigrant petitions and adjustment of status cases. One of the issues Rishika repeatedly finds is how quickly USCIS will contradict the law and request previously submitted evidence. Due to many similar systemic inefficiencies, she has found the personal drive and motivation to help guide other immigrants through the pursuit of citizenship.

Even though it has been a long journey to date, Rishika's family has found success through the years. Her mother has been an experienced Oncology and Med/Surg nurse for 10 years. Her father manages multiple properties for his

firm. Her husband is a Quality Engineer that specializes in pharmaceutical companies. Lastly, her brother is currently an accountant at a clinical research organization. Rishika enjoys spending time with her family, exploring new cultures, listening to podcasts, trying new places to eat, and traveling with her husband. She knows that despite the hardships faced over the 18 years she has been in the United States, it has all been worth it since now her family can now enjoy the fruits of their labor.



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