Case No. 19-16849

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INNOVA SOLUTIONS, INC.,

Plaintiff-Appellant,

v.

KATHY A. BARAN, Director of the California Service Center, U.S. Citizenship and Immigration Services,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of California
Hon. Magistrate Judge Virginia K. DeMarchi
(Case No. 17-cv-03674-VKD)

UNNOPPOSED AMICUS CURIAE BRIEF OF AMERICAN IMMIGRATION COUNCIL IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a) and 29(a)(4)(A), amicus curiae states that it is a nonprofit organization and does not have any parent corporation. Amicus certifies that it has no publicly traded stock.

Dated: December 20, 2019

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I. INTRODUCTION AND INTEREST OF AMICUS CURIAE[1]

Amicus American Immigration Council (the Council) submits this brief in support of the position of Appellant Innova Solutions, Inc. (Innova). Amicus seeks to assist this Court by providing a framework for de novo review of Defendant-Appellee Kathy A. Baran, Director, California Service Center, U.S. Citizenship and Immigration Services' (USCIS) denial of Innova's H-1B petition. As demonstrated below, USCIS misinterpreted the authority upon which it relied when it erroneously determined that the computer programmers occupation—the occupation which the agency agreed included Innova's job—did not "normally" require a bachelor's degree in a specific specialty at the entry level. In particular, USCIS failed altogether to consider the meaning of the critical regulatory term "normally" and whether the undisputed evidence, which demonstrated that "most" computer programmers had such a bachelor's degree, satisfied this requirement. The Council explains that this misinterpretation is arbitrary and capricious and an abuse of discretion because Innova would have satisfied the first regulatory criterion for an H-1B visa classification if USCIS had not erroneously found that most computer programmers had either a bachelor's or an associate's degree.

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[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), this brief has not been authored, in whole or in part, by counsel to any party in this case. No party or counsel to any party contributed money intended to fund preparation or submission of this brief. No person, other than the amicus or their counsel contributed money that was intended to fund preparation or submission of this brief.

The Council further explains that this Court's decision will have a broader impact than just this case. USCIS, and in particular its California Service Center, which falls within the Court's jurisdiction, has denied numerous petitions for computer programmer on the same grounds as here, and will continue to do so unless this Court issues a precedent decision correcting the agency's interpretation of the plain language of the regulation.

The Council is a non-profit organization established to increase public understanding of immigration law and policy, advocate for the fair and just administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants. The Council frequently appears before federal courts on issues relating to the interpretation of the Immigration and Nationality Act.

II. STANDARD OF REVIEW

This Court reviews de novo the district court's decision on cross-motions for summary judgment. *Crawford v. Antonio B. Won Pat Int'l Airport Auth.*, 917 F.3d 1081, 1089 (9th Cir. 2019) (citing *EEOC v. BSNF Ry. Co.*, 902 F.3d 916, 921 (9th Cir. 2018). "This court also reviews de novo the district court's evaluation of an agency's actions." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 991 (9th Cir. 2014) (citing *Sierra Club v. Babbitt*, 65 F.3d 1502, 1507 (9th Cir. 1995)).

Since the district court was reviewing the legality of USCIS's action under the Administrative Procedure Act (APA), this Court's review, "like that of the district court, is based on the record and limited to whether the agency acted arbitrarily and capriciously." *Rempfer v. Sharfstein*, 583 F.3d 860, 865 (D.C. Cir. 2009) (citing 5 U.S.C. § 706); *see also Gerber v. Norton*, 294 F.3d 173, 178 (D.C. Cir. 2002) (quoting *Dr. Pepper/Seven-Up Cos. v. Fed. Trade Comm'n*, 991 F.3d 859, 862 (D.C. Cir. 1993)) (noting that de novo review of an action under the APA is "as if the agency's decision 'had been appealed to [the appellate] court directly.'"). A reviewing court may uphold the agency's decision only on the basis articulated by the agency in its decision. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983) (*MVMA*) ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."); *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] simple but fundamental rule of administrative law … [is] that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.")

III. BACKGROUND

The H-1B visa classification allows highly skilled and educated foreign workers to temporarily work for U.S. employers in "specialty occupations." 8 U.S.C. § 1101(a)(15)(H)(i)(b). 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)(1).

A prospective employer, such as Innova, files an H-1B petition with USCIS on behalf of a foreign national it seeks to employ. The H-1B petitioner must demonstrate that the position it seeks to fill qualifies as a specialty occupation. *See* 8 C.F.R. § 214.2(h)(4)(i)(A)(1). 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 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).

The first criterion, the only relevant one here, differs from the others as it requires a determination as to whether the occupation within which the position falls is a specialty occupation. When the position is within an occupation found in the U.S. Bureau of Labor Statistics, U.S. Department of Labor's (DOL) Occupational Outlook Handbook (OOH),[2] USCIS relies on the OOH to determine whether, at a minimum, a bachelor's degree in a specific specialty (or equivalent) is normally required. Denial, C.A.R. 7 (USCIS "recognizes" the OOH as "an authoritative source" for the job duties and educational requirements of the occupations the OOH includes).

[2] The OOH is a DOL reference manual, updated every two years, which provides profiles of hundreds of occupations that represent a majority of the jobs in the United States. U.S. Bureau of Labor Statistics, *Occupational Information Contained in the OOH* (Sept. 4, 2019), https://tinyurl.com/r9gwhzv. Among other data, each occupational profile describes the "typical duties performed by the occupation" and the "typical education and training needed to enter the occupation." *Id*.

IV. ARGUMENT

A. USCIS MISINTERPRETED THE OOH TO ERRONEOUSLY CONCLUDE THAT INNOVA FAILED TO MEET THE FIRST CRITERION

Without dispute, USCIS relies upon the OOH as authority for determining "the duties and educational requirements of a wide variety of occupations," including the computer programmer occupation at issue here. *Innova Sols., Inc. v. Baran*, 399 F. Supp. 3d 1004, 1012 (N.D. Cal. 2019). Where the OOH demonstrates that a bachelor's or higher degree in a specific specialty is normally the minimum requirement for entry into the occupation that includes the job the H-1B petitioner seeks to fill, that is the end of the analysis; USCIS must find the first regulatory criterion is satisfied which, in turn, demonstrates that the petition falls within a specialty occupation. *See Warren Chiropractic & Rehab, Inc. v. U.S. Citizenship & Immigration. Servs.*, No. SAVC 14-0964 AG (RNBx), 2015 WL 732428, at *4-5 (C.D. Cal. Jan. 12, 2015).

Indeed, in a clarification USCIS filed after the oral argument, the agency explained that it makes a two-step determination for the first criterion:

- Does the job fit into the occupation?
- Categorically determine whether the educational requirements of the occupation in the OOH normally requires for entry at least a bachelor's degree in a specific specialty.

Dkt. 73 at 2.

> The 2016-2017 version of the OOH stated, in relevant part:
>
> > Most computer programmers have a bachelor's degree in computer science or a related subject; however some employers hire workers with an associate's degree. ….
> >
> > Education
> >
> > Most computer programmers have a bachelor's degree; however some employers hire workers who have an associate's degree. Most programmers get a degree in computer science or a related subject. Programmers who work in specific fields, such as healthcare or accounting, may take classes in that field to supplement their degree in computer programming. In addition, employers value experience, which many students gain through internships.

Denial, C.A.R. 8.

USCIS misinterpreted this language as indicating, first, that the computer programmers "occupation allows for a wide range of educational credentials, including an associate's degree to qualify," and second, that "most" computer programmers obtain "[]either a bachelor's or an associate's degree[.]" C.A.R. 8. Relying on this misinterpretation, USCIS concluded that the OOH did not demonstrate that computer programming was a specialty occupation because the OOH did not precisely parrot the language of regulatory criterion one—that is, "the OOH d[id] not state that at least a bachelor's degree or its equivalent in a specific specialty is normally the minimum required for entry into the occupation." *Id*.; *see also* 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). USCIS also relied on the OOH's statement that employers "value computer programmers who have experience," which can be

obtained through internships, to further conclude that a bachelor's degree was not the normal requirement for entry into the computer programmer occupation. *Id*.

In so concluding, USCIS misread the clear language of the OOH; erroneously applied a heightened burden of proof on the Plaintiff-Appellant; and failed altogether to meaningfully address the critical language in the OOH: the twice-repeated phrase that "[m]ost computer programmers have a bachelor's degree." C.A.R. 8; *see Next Generation Tech., Inc. v. Johnson*, 328 F. Supp. 3d 252, 267 (S.D.N.Y. 2017) (*NextGen*) (finding no "rational connection" between USCIS' determination that "computer programmers *are not normally required to have* a bachelor's degree" and OOH's statement that "*[m]ost* computer programmers *have* a bachelor's degree") (emphasis in original). These errors, standing alone or in combination, demonstrate that USCIS' decision was arbitrary and capricious and must be reversed.

1. USCIS significantly misread the OOH's clear statement regarding the educational background of computer programmers. Instead of noting that the OOH stated that "[m]ost computer programmers have a bachelor's degree in computer science or a related subject," USCIS read the OOH as stating that most computer programmers have "[]*either* a bachelor's *or* an associate's degree[.]" C.A.R. 8 (emphasis added). While the district court noted the inaccuracy of USCIS' paraphrasing of the OOH, it failed to discuss the impact such a misreading had on

USCIS's conclusion. *Innova Sols.*, 399 F. Supp. at 1014. Instead, the district court glossed over this significant error, by concluding "[n]evertheless, the agency correctly observes that not all Computer Programmer positions are the same and, per the OOH, at least some Computer Programmer positions may be performed by someone with an associate's degree." *Id*.

In fact, from the face of the decision, USCIS' misreading of the OOH forms the basis for its conclusion that Petitioner did not meet the first regulatory criterion. As such, the significance of USCIS' misreading of the OOH cannot be overstated. Had the OOH actually stated that most computer programmers had either a bachelor's or an associate's degree, USCIS would have been correct in concluding that Innova's computer programmer position did not satisfy the first regulatory criterion. By the plain language of its denial, USCIS is concluding just that; because the agency found that most computer programmers had either a bachelor's or an associate's degree, it concluded that the first criterion was not met.

Given the absence of any further discussion or analysis by USCIS,[3] it is impossible to discern from the decision whether USCIS would have reached a different conclusion had it not misread the OOH. Consequently, this misreading

[3] That USCIS referenced the OOH's addition that some employers value experience gained through internships is irrelevant to determining whether a bachelor's degree in a specific specialty is the norm at the entry-level. Internships are often part of a student's experience in acquiring a degree.

must be found to have tainted the decision. *Alaska Eskimo Whaling Comm'n v. U.S. Envtl. Prot. Agency*, 791 F.3d 1088, 1092-93 (9th Cir. 2015) (granting remand on petition for review of agency action where agency admitted to factual error in its decision and court could not "properly answer the question whether the [agency's] error affected its decision"). This error alone requires reversal. *Occidental Eng'g Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985) (explaining that court is to review agency action under the APA to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.")

2. USCIS also erred in failing to analyze the significance of the OOH's critical language, that "[m]ost computer programmers have a bachelor's degree." C.A.R. 8. This is not the first time that USCIS has failed to properly address the significance of such OOH language. In *NextGen*, for example, the court rejected USCIS' disregard of the OOH's clear statement as to the education requirement for the computer programmer occupation. 328 F. Supp. 3d at 267-68. As in this case, USCIS maintained that the OOH did not state that a "U.S. bachelor's or higher degree in a specific specialty or its equivalent … [is] a normal minimum requirement … for entry into the occupation of computer programmers." *Id.* The court found that USCIS' statement "does not represent a fair reading of the [OOH]." *Id*. To the court, the operative language was the OOH's statement that

"[m]ost computer programmers have a bachelor's degree in computer science or a related subject …," which the OOH's addition that some employers hire workers with associate degrees did not change. *Id*. at 267-68.

The district court's efforts to distinguish *NextGen* are not persuasive. First, the district court referenced certain statistics submitted by the petitioner. *Innova Sols.*, 399 F. Supp. 3d at 1015. Second, the court found *NextGen* unhelpful "insofar" as it relied on an agency memo that was rescinded on March 31, 2017. *Id*. However, *NextGen* relied on neither when it rejected USCIS' improper conflation of an associate's degree which only "some" employers accept with the "normal" educational requirement for the occupation. *See NextGen*, 328 F. Supp. 3d at 267-68. *See also* § IV.B, *infra* concerning USCIS' subsequent policy memorandum.

In a parallel situation, another district court rejected USCIS' efforts to bypass the OOH's identification of the "typical" education for entry into the Medical and Health Services Managers occupation. *Warren Chiropractic*, 2015 WL 732428, at *4. As to the education requirement, the OOH stated:

> Medical and health services managers typically need at least a bachelor's degree to enter the occupation. However, master's degrees in health services, longterm care administration, public health, public administration, or business administration also are common.
>
> Prospective medical and health services managers have a bachelor's degree in health administration.

Id. USCIS concluded that the OOH "indicates that employers normally require a bachelor's degree or even a master's degree" but "does not identify a specific educational background." *Id*. Ignoring the OOH's statement that "[p]rospective medical and health services managers," i.e., workers seeking to enter this occupation, "have a bachelor's degree in health administration," USCIS concentrated instead on the OOH's identification of different master's degrees the OOH said were "common." *Id*. From this leap, USCIS concluded that "a wide range of educational fields … is suitable for the position." *Id*. (omission in original).

The court rejected USCIS' interpretation as a flat contradiction of the OOH's statement as to the bachelor's degree requirement: "[W]hile true that medical and health service managers may have master's degrees in a wide variety of fields, the [OOH] description is clear that their bachelor's degrees are typically in health administration." *Id*.; *see also Chung Song Ja Corp. v. U.S. Citizenship & Imm. Servs.*, 96 F. Supp. 3d 1191, 1198-99 (W.D. Wash. 2015) (citing *Warren Chiropractic* and concluding that USCIS impermissibly narrowed the statutory definition of specialty occupation by misinterpreting the first criterion as restricting qualifying occupations to a "single, specifically tailored and titled degree program").

In both cases, the courts determined that the OOH's use of words such as "most" or "typically" demonstrated the "normal" educational requirement for the occupation. This is in accord with the plain meaning of these terms. It is axiomatic that the starting place of any regulatory interpretation is the plain meaning of the words used. *Webb v. Smart Document Sols., LLC*, 499 F.3d 1078, 1084 (9th Cir. 2007) ("As a general interpretive principle, the plain meaning of a regulation governs.") (Quotation omitted)

The adverb "normally" is defined, as "usually or regularly." Cambridge Dictionary, Cambridge University Press (2019), https://tinyurl.com/uruxpu8. In turn, "usually" is defined as "in the way that most often happens." *Id.* at https://tinyurl.com/yx6bllbf. Thus, the regulatory term "normally" comes full circle back to the term at issue here, "most." This latter is defined as "the biggest number or amount (of); more than anything or anyone else." *Id*. at https://tinyurl.com/vbmkvw3.[4] Given that "normally" means "usually," and

[4] USCIS argued in its Memorandum of Points and Authorities in Support of Cross-Motion for Summary Judgment that "'most' encompasses only 51% of computer programmer/analysts who have a bachelor's degree …" Dkt. 62 at 21. Because normally means usually or most often, it is immaterial whether the percentage is 51 or 99—both would demonstrate the normal educational requirement. Just as the district court correctly decided against resolving the case on this basis, this Court should too. *Innova Sols.*, 399 F. Supp. 3d at 1015. Post-hoc rationalizations by government counsel to support agency action, such as this, are not an agency interpretation and receive no deference. *See Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012).

"usually" means "most often," the fact that "most" computer programmers have a bachelor's degree in computer science or a related subject, *see* OOH, supra, means that such a degree is "normally" required for the computer programmer occupation. USCIS erred in disregarding the meaning of these terms.

In contrast to these cases, *Ajit Healthcare Inc. v. U.S. Dep't of Homeland Sec.*, No. CV 13-1133 GAF (JPRx), 2014 WL 11412671, at *4 (C.D. Cal. Feb. 7, 2014), erroneously relied upon by the district court, found that USCIS reasonably concluded that the position at issue did not satisfy the first criterion because the OOH stated that "some" employers hire workers with on-the-job experience instead of formal education. Just as the district court in *Ajit* failed to address the significance of the OOH's statement that "[p]rospective medical and health services managers have a bachelor's degree in bachelor's degree in health administration," both USCIS and the district court in this case failed to address the significance of the OOH's statement that "most computer programmers have a bachelor's degree in computer science or a related subject."

USCIS' failure to recognize the significance of the fact that most computer programmers have a bachelor's degree in a specific specialty was arbitrary and capricious and its decision should be reversed on this basis.

3. USCIS erroneously applied a heightened burden of proof on the Plaintiff-Appellant when it found that the computer programmers occupation is not a specialty occupation because "the OOH does not state that at least a bachelor's degree or its equivalent in the specific specialty is normally the minimum required for entry into the occupation." C.A.R. 8. The first regulatory criterion requires only that a petitioner provide evidence demonstrating that a bachelor's degree or equivalent in a specific specialty is normally the minimum requirement for entry into an occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1). It does not impose any requirements on the nature of this evidence and certainly does not demand that the evidence will repeat, word for word, the regulatory standard.

The OOH will never use the language of the statutory definition of a specialty occupation. The OOH is a DOL publication that generally lists the common duties and educational requirements for a wide variety of occupations. *See* n. 2, supra. The OOH does not have to use any particular language to demonstrate that a bachelor's degree in a specific specialty is required. USCIS' indication to the contrary was arbitrary and capricious.

B. NO DEFERENCE IS DUE TO USCIS' 2017 POLICY THAT MISREADS THE OOH AND CONFLICTS WITH LONGSTANDING PRACTICE

USCIS' position that Innova Solutions did not meet the first criterion is a position the agency first expressed in a Policy Memorandum issued less than a year

prior to its decision in this case. *Rescission of the December 22, 2000 "Guidance memo on H1B computer related positions,"* PM-602-0142 (March 31, 2017) (hereafter 2017 PM), available at https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf. USCIS did not rely on this memorandum in its decision, and thus this Court also should not consider it. *MVMA*, 463 U.S. at 50; *Chenery*, 332 U.S. at 196. Even were the Court to consider it, however, it is entitled to no deference for several reasons.

First, the 2017 PM misreads the OOH in the same manner as the USCIS decision here. It asserts that because some computer programmer jobs require only an associate's degree at the entry level, "a petitioner may not rely solely on the [OOH] to meets its burden when seeking to sponsor a beneficiary for a computer programmer position. Instead, a petitioner must provide other evidence to establish that the particular position is one in a specialty occupation." 2017 PM at 3.

Like the USCIS decision here, the 2017 PM fails altogether to address the relevant OOH language in the context of the first regulatory criterion. In fact, it does not mention this criterion at all. Thus, for the same reasons that that the USCIS decision must be found to be arbitrary and capricious, *see* § A.1-3, above, the same is true of this memorandum. In declining to defer to a similar type of agency guidance from USCIS' predecessor, this Court explained that, even a long

history of consistency in an agency position "is strongly outweighed by a pervasive lack of thorough and valid reasoning, as the [agency guidance] often state[s] a conclusory answer without taking into account the various statutory and other considerations at play. *Ramirez v. Brown*, 852 F. 3d 954, 959 (9th Cir. 2017) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)).

Second, this policy memo, unlike that at issue in *Ramirez*, does not represent a long-held agency position. To the contrary, it rescinds a long-standing agency guidance and in doing so reverses course with respect to the agency's practice for adjudicating H-1B petitions involving computer programmers. 2017 PM at 1 (rescinding a December 22, 2000 memorandum). Moreover, there was internal agency concern over the position taken in the 2017 PM and confusion over its meaning existed within the agency as late as a month prior to the USCIS decision here. Shortly after USCIS issued the 2017 PM, the Branch Chief for employment-based immigration services within USCIS' headquarters office sent an email to representatives of the California Service Center, the office which issued the USCIS decision at issue here, along with two others. In an extraordinary admission, the Branch Chief stated:

> We understand that as written this [2017 PM] includes language and interpretations that may conflict with current practice at the centers. …. We will be meeting with our H-1B working group early next week to discuss in detail the intent of this memo. We intend to issue clarifying guidance thereafter. In the interim we invite each center to submit their questions …"

April 6, 2017 email from Stephanie M. Doumani, Branch Chief, Service Center Operations (SCOPS), Business Employment Services Team, produced in *American Immigration Lawyers Ass'n v. U.S. Citizenship & Immigration Servs.*, No. 1:18-cv-01383-RC, Specialty Occupation, Full Document Production 1 of 5, at 122 (AILA Doc. No. 191601, posted Sept. 18, 2019), available at https://www.aila.org/File/Related/19091601al.pdf (accessed Dec. 19, 2019).

The Vermont Service Center questioned the 2017 PM as conflicting with prior USCIS policy. "[T]his thinking doesn't seem to align with our historical interpretation of [the first regulatory criterion]. To qualify as a specialty occupation by [the first regulatory criterion], 'a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position." April 10, 2017 email from Lynn A. Boudreau, Vermont Service Center, *id*. at 120.[5] The Vermont Service Center then asked what definitions were to be used for "particular position" and "normally" in [the first regulatory criterion] and for "most" in the OOH.

> Historically, [the Vermont Service Center] has taken this as "the position generally" as described in the OOH. The way the new memo addresses this prong seems to muddy the waters further between [the first regulatory

[5] Branch Chief Doumani's email requested the Service Centers to submit their questions by April 10. Ms. Boudreau forwarded questions the Vermont Service Center had already submitted to SCOPS. *See id*. at 120, 122.

> criterion and the other criteria]. Moreover, this may constitute a change in practice, at least at [the Vermont Service Center].

Id. The California Service Center similarly expressed concern about consistency in adjudication under the 2017 PM "since decisions could vary on very similarly filed petitions/petitioners for computer related positions due to differing opinions.[I]ndividual differences in interpretation of the criteria of what meets the definition of specialty occupation may vary." April 10, 2017 email from Joseph Fierro, Assoc. Center Director, Employment Branch 2, California Service Center, *id*. at 121.

By email dated May 1, 2017, USCIS headquarters circulated to the three Service Centers what it described as "final guidance" on the 2017 PM. However, this "guidance," included in the email, merely parroted the PM. May 1, 2017 email from Nicole C. Nicklaw, Adjudications Officer, Service Center Operations, Business Employment Services Team, *id*. at 104-05. Subsequently, slightly over three months after issuing the "final guidance," an adjudications officer from the USCIS headquarters office stated: "[T]he [Service] centers have expressed a great deal of concern about the implementation of the rescission memo [the 2017 PM]." August 2, 2018 email from Nicole C. Nicklaw, Adjudications Officer, Service Center Operations, Business Employment Services Team, *id*. at 104. Roughly eight months after USCIS issued the 2017 PM, and only weeks before the decision in this case, USCIS was still attempting to explain this change to the Service Centers:

"We … are confident that we are well on our way to establishing a road map for the policy set forth in this memo [the 2017 PM]." November 21, 2017 email from Stephanie M. Doumani, Branch Chief, Service Center Operations, Business Employment Services Team *id*. at 133.

C. THIS COURT'S DECISION WILL EXTEND BEYOND THIS CASE AS USCIS IS DENYING NUMEROUS H-1B PETITIONS FOR COMPUTER PROGRAMMERS BASED UPON ITS MISINTERPRETATION OF THE FIRST REGULATORY PRONG

Innova and *NextGen*. are far from the only cases in which USCIS is misinterpreting the meaning of "normally" in the regulation's first criterion and denying H-1B petitions for computer programmers. Over the last two years, USCIS' administrative appellate body, the Administrative Appeals Office (AAO), issued at least a dozen unpublished decisions in which it found that the OOH entry for computer programmers did not establish that this occupation satisfied the first regulatory criterion because it stated that "some" computer programmers could be hired with only an associate's degree. Many of these decisions use boilerplate language such as:

> The subchapter of the Handbook titled "How to Become a Computer Programmer" states, in relevant part, that "[m]ost computer programmers have a bachelor's degree in computer science or a related subject; however, some employers hire workers with an associate's degree . . . [and] some employers hire workers who have other degrees or experience in specific programming languages." Thus, the Handbook does not support the

> Petitioner's assertion that a bachelor's degree is required for entry into this occupation.

Matter of 8-, Inc., 2019 WL 1469846 (DHS Feb. 26, 2019). In many of them, the initial decisions were issued by USCIS' California Service Center, which is within this Court's jurisdiction.[6]

Because not all employers whose petitions are denied appeal to the AAO, these cases likely reflect a small portion of all denials. This is reflected by USCIS' own data reflecting the number of denied H-1B petitions in all occupations. This data demonstrates that the denial rate has increased significantly in the past few years. The National Foundation for American Policy (NFAP) analyzed data that USCIS made public through its H-1B Employer Data Hub. NFAP Policy Brief, *H-1B Denial Rates: Past and Present* (April 2019), available at https://nfap.com/wp-content/uploads/2019/04/H-1B-Denial-Rates-Past-and-Present.NFAP-Policy-

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[6] *See, e.g.*, *Matter of B-M-S-, Inc.*, 2019 WL 2465251*4 (DHS May 16, 2019); *Matter of D-S-S-*, 2018 WL 6985751 (DHS Dec. 17, 2018); *Matter of S-S-*, 2018 WL 6922867 (DHS Nov. 30, 2018); *Matter of P-T-L-C-, LP*, 2018 WL 6333889 *3 (DHS Nov. 11, 2018); *Matter of S-S-S-*, 2018 WL 6075472 (DHS Oct. 31, 2018); *Matter of E-S-*, Inc., 2018 WL 5906392 *3 (DHS Oct. 22, 2018); *Matter of D-R-, Inc.*, 2018 WL 5617716 *4 (DHS Oct. 11, 2018); *Matter of P-A-, LLC*, 2018 WL 5298698 *5 (DHS Oct. 5, 2018); *Matter of D-R-, Inc.*,2018 WL 5222382 *4 (DHS Oct. 4, 2018); *Matter of MII-, Inc.*, 2019 WL 6134103 *4 (DHS Aug. 23, 2018). The AAO would be bound by the 2017 PM as "[t]he AAO applies USCIS policy and legal decisions to its determinations." AAO Policy Manual, § 3.4 n.52 https://www.uscis.gov/tools/practice-manual/chapter-3-appeals#FN52 (accessed Dec. 20, 2019).

Brief.April-2019.pdf. Innova's petition fits into NFAP's analysis of data for H-1B petitions for "initial (new) employment.

USCIS denied Innova's H-1B petition on December 8, 2017, which is within the first quarter of Fiscal Year (FY) 2018. In FY 2018, USCIS' denial rate for initial H-1B petitions was 24% as compared with an FY 2017 denial rate of 13%. NFAP Policy Brief, *H-1B Denial Rates Past* at 1, 4. "[T]he denial rate for initial H-1B petitions has risen from 6% in FY2015 to 24% in FY 2018 …. Between FY2010 and FY 2015, the denial rate for initial H-1B petitions never exceeded 8% …" *Id*. at 4. The high rate of denials continues in FY 2019. In October, NFAP reported a denial rate of 24% for initial H-1B petitions through the first three quarters (*i.e.*, through June 30) of FY 2019. NFAP Policy Brief, *H-1B Denial Rates: Analysis of H-1B Data for First Three Quarters of FY 2019* at 7 (Oct. 2019), available at https://nfap.com/wp-content/uploads/2019/10/H-1B-Denial-Rates-Analysis-of-FY-2019-Numbers.NFAP-Policy-Brief.October-2019.pdf.

Reportedly, there has been a corresponding increase in federal court suits challenging H-1B petition denials. *See* Sinduja Rangarajan, *Trump Has Built a Wall of Bureaucracy to Keep Out the Very Immigrants He Says He Wants*, Mother Jones (Dec. 2, 2019) (reporting that nearly 100 suits challenging H-1B petition denials were filed between 2017 and 2019 "as compared with a handful per year over the previous decade."), available at

https://www.motherjones.com/politics/2019/12/trump-h1b-visa-immigration-restrictions/.

V. CONCLUSION

Amicus urges this Court to reverse the decision in this case in a published decision that specifically addresses USCIS' flawed analysis regarding the interplay of the first regulatory criterion and the OOH.

Dated: December 20, 2019

Respectfully submitted,

s/ Mary Kenney

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CERTIFICATION OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and 29(a)(5) and Circuit Rule 32-1(a), because it contains 5,642 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Office Pro Plus, is proportionately spaced, and has a typeface of 14 point.

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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