Judges Slap Down USCIS Again On H-1B Visas

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The Authority of Law statue sitting outside the U.S. Supreme Court.
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In three new court cases, federal judges have decided that U.S. Citizenship and Immigration Services (USCIS) unlawfully denied H-1B petitions for foreign-born professionals. The decisions, which all involve USCIS improperly limiting the definition of a specialty occupation, may bring greater certainty to employers and potential visa holders during uncertain economic times.

Under the Trump administration, a major reason denial rates for H-1B petitions have skyrocketed is USCIS instructed adjudicators via memo to adopt a new, narrow interpretation of what qualifies as an H-1B "specialty occupation." The USCIS memo said, in effect, unless the Department of Labor (DOL) Occupational Outlook Handbook states that everyone who holds a particular job has a bachelor's degree, perhaps even a bachelor's degree in a specific specialty, USCIS adjudicators should deny the H-1B petition on the grounds the position does not qualify as a specialty occupation.

Jonathan Wasden, a partner with Wasden Banias, LLC, believes that under the law and regulation, if a degree is normal for U.S. workers in the position, then it qualifies as a specialty occupation.

Today In: Leadership Strategy
We know USCIS changed its interpretation because, on September 18, 2019, the American Immigration Lawyers Association (AILA) made government documents public after settling a Freedom of Information Act (FOIA) lawsuit. A previously-unreleased USCIS memo told adjudicators that since the Department of Labor Occupational Outlook Handbook states that ". . . some employers hire workers with an associate's degree . . . it suggests that entry level computer programmer positions *do not necessarily require a bachelor's degree and would not generally qualify as a position in a specialty occupation*." (Emphasis added.) The USCIS memo said this analysis could be used on any position.

Fast forward to March 31, 2020, and the opinion by U.S. District Judge Rudolph Contreras in *Taylor Made Software v. Kenneth T. Cuccinelli.* Judge Contreras concluded USCIS was wrong to declare that since "many computer systems analysts have liberal arts degrees and gained experience elsewhere . . . the proffered position cannot be" a specialty occupation.

In ruling against USCIS, the judge noted the DOL Occupational Outlook Handbook states that a bachelor's degree in computer or information science is "common, although not always a requirement." He wrote that "common" should be interpreted as "normally," adding that even if "'some firms, hire analysts with general business or liberal arts degrees does not prove – or even suggest – that a specialty degree is not 'normally' required." He added, "Again, the regulatory criterion is not whether such a degree is *always* required, or whether *some* employers do not require it," as USCIS claimed.

On March 31, 2020, Judge Contreras also ruled against USCIS in a similar case – *Info Labs v. USCIS*. As in the Taylor Made Software case, USCIS denied an employer's H-1B petition for a computer systems analyst "on the grounds that Info Labs failed to establish that the position qualified as a 'specialty occupation.'"

Judge Contreras wrote, "From the Court's perspective, the Handbook's statement that a bachelor's degree in computer or information science is 'common, although not always a requirement' supports, rather than disproves, the proposition that a specialized degree or its equivalent is *normally* the minimum requirement. The fact that such a degree is not 'always' required – or that 'some firms' hire analysts with general business or liberal arts degrees – does not suggest a specialty degree is not 'normally' required."

The judge cited the March 6, 2020, decision in *3Q Digital, Inc. v. USCIS:* "[The regulation] does not say that a degree must always be required, yet the agency appears to have substituted the word 'always' for the word 'normally.' This is a misinterpretation and misapplication of the law."

In *India House v. Kevin McAleenan*(March 26, 2020), U.S. District Judge Mary S. McElroy ruled that the USCIS Administrative Appeals Office (AAO) decision to uphold a denial of an H-1B petition for a restaurant manager with a B.S. in Hospitality Management was “arbitrary and capricious.” The Administrative Appeals Office said the position for Santosh Shanbhag, whose H-1B petition was denied, was not a specialty occupation because a “specific” degree wasn’t required. The reason? USCIS said according to the DOL Occupational Outlook Handbook, “many [persons in this occupational category] possess a bachelor’s degree in business administration.”

In her opinion, Judge McElroy cited a *Forbes* article I wrote, based on National Foundation for American Policy research, showing H-1B “denial rates have jumped dramatically since 2015.” She noted, “During that period, neither the law nor the guidelines have changed.”

The judge noted that as recently as 4 years ago not only had USCIS considered a restaurant manager a specialty occupation but had twice previously approved Santosh Shanbhag’s H-1B petition as a manager for India House.

In support of the view that the position is a specialty occupation, Judge McElroy wrote, “Clearly, a B.S. in Hospitality Management is a specific degree, both as a matter of logic and by recourse to the curriculum it entails. It was awarded to Shanbhag after successful completion of a set of courses that are not useful to any profession outside food services and hospitality management. . . . [T]he very fact that there is a bachelor’s level curriculum dedicated to hospitality management, focused on food services, is indicative of it being a specialty occupation. It is ‘a body of highly specialized knowledge’ and the degree program is the embodiment of ‘[its] theoretical and practical application.’”

Jonathan Wasden, whose firm represented Taylor Made Software, believes the decisions in the three cases will bring more order to the H-1B process. “What this means going forward is that the first step of specialty occupation adjudication should be streamlined,” said Wasden in an interview. “If the DOL Occupational Outlook Handbook shows the majority of U.S. workers in the field have a degree in the specific specialty, then the position will qualify. Then the agency moves on to the second step and determines beneficiary qualifications. Historically, the agency has denied H-1Bs on the degree requirement and rarely looks at beneficiary qualifications. The latest decisions could change that.”

Despite the current uncertainty, companies in the technology sector have been less damaged by recent events and may look to a time when the economy returns to normal. These recent judicial decisions should bring greater certainty that USCIS adjudicators will follow the law when deciding on H-1B petitions.

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I am the executive director of the National Foundation for American Policy, a non-partisan public policy research organization focusing on trade, immigration and related issues based in Arlington, Virginia. From August 2001 to January 2003, I served as Executive Associate Commissioner for Policy and Planning and Counselor to the Commissioner at the Immigration and Naturalization Service. Before that I spent four and a half years on Capitol Hill on the Senate Immigration Subcommittee, first for Senator Spencer Abraham and then as Staff Director of the subcommittee for Senator Sam Brownback. I have published articles in the Wall Street Journal, New York Times, and other publications. I am the author of a non-fiction book called Immigration.