Fearlessly Challenging H-1B Visa Denials Through Litigation

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As we have blogged about extensively in the past, President Trump's "Buy American and Hire American" Executive Order No. 13788 has had the most negative impact on the H-1B visa program. Following this pattern, the recent trend by the U.S. Citizenship and Immigration Services (USCIS) heading into the Fiscal Year (FY) 2019 H-1B Cap filing season has been to rely on the Department of Labor's (DOL) Occupational Outlook Handbook (OOH) to arbitrarily deny H-1B visa petitions for Information Technology (IT) positions, such as computer systems analysts. In RFEs and denial decisions, USCIS states that they recognize the OOH as an "authoritative source on the duties and educational requirements" of a variety of occupations, and has used the OOH's general statements on such requirements to deny H-1B petitions for failing to establish that a bachelor's degree in a specific specialty is the normal minimum requirement for entry into the position, despite statements in the OOH to the contrary. In addition, USCIS recently put out a statement entitled Combatting Fraud and Abuse in the H-1B Visa Program expressing an intent to continue to target H-1B dependent employers in the IT industry who assign H-1B workers at client sites.

One should expect the same sort of H-1B carnage like last year. No matter how well one responds to the request for evidence or argues the case before the Administrative Appeals Office (AAO), the outcome could still be a preordained denial – as if Trump's wall is already up. The key issue is whether there may be a different and effective strategy for overcoming next year's H-1B cap denials, such as suing the USCIS in federal court.

USCIS has typically based these types of denials on claims that the proffered positions fail to qualify under any of the specialty occupation criteria listed in 8 CFR § 214.2(h)(4)(iii)(A). The USCIS has also challenged H-1Bs based on allegedly inappropriate wage levels, but the main concern is the USCIS entirely reading out acknowledged specialty occupations from the law.

As background, in order for a petitioner to hire a foreign worker in a specialty occupation under the H-1B visa program, the proffered position must meet the regulatory definition as one that "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." 8 CFR § 214.2(h)(4)(ii). This definition is met by satisfying at least 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 CFR § 214.2(h)(4)(iii)(A) (emphasis added).

For a petition that has a proffered position of computer systems analyst, for example, USCIS has been selective in its reading of the OOH in order to justify a denial. A denial often focuses on the following language:

A bachelor's degree in a computer or information science field is common, although not always a requirement. Some firms hire analysts with business or liberal arts degrees who have skills in information technology or computer programming.

(…)

Although many computer systems analysts have technical degrees, such a degree is not always a requirement. Many analysts have liberal arts degrees and have gained programming or technical expertise elsewhere.

Petitioners and their attorneys should closely review the OOH themselves rather than rely on the few sections USCIS provides in its denial. If attorneys do this, they will realize that USCIS chooses to leave out an important section of the educational requirements that "**[m]ost** computer systems analysts have a bachelor's degree in a computer-related field." (emphasis added). USCIS ignores this language in order to support its faulty determination that a bachelor's degree in a specific specialty, or its equivalent, is not normally the minimum requirement for the position and that the degree requirement is not common to the industry under the first and second criteria of 8 CFR §214.2(h)(4)(iii)(A). However, where the regulation uses the words "normally" and "common" it would be erroneous to determine that a proffered position is not a specialty occupation merely because not **all** employers require a bachelor's degree. If most employers require a bachelor's degree, this should be sufficient to meet the statutory definition of a specialty occupation. If a petitioner receives a denial of an H-1B petition based on this same reasoning, which is contrary to the law, mounting a challenge in federal court may be worth considering. Petitioners are gun shy about suing the government in federal court out of fear that the government may retaliate against them on other cases. That may not be necessarily so as one has anecdotally heard that the USCIS is terrified of litigation as it creates more work and could also result in a precedent that may be unfavorable for the government's position in future cases. This is not surprising, however, given the repeated failure of USCIS to appropriately interpret the law in accordance with the INA. In reality, due to the quota system on which USCIS operates, the vast majority of USCIS officials do not care and do not have time to retaliate against litigious petitioners. Indeed, USCIS may pay more attention to cases that may potentially be litigated and give the benefit of doubt to the petitioner over a close call.

Recently, attorney Michael E. Piston, a fearless litigator, on the behalf of petitioner Delta Information Systems, bypassed the AAO and filed a complaint in the U.S. District Court for the Central District of California with this argument pursuant to §10b of the Administrative Procedure Act (APA), 5 U.S.C. § 702. In the complaint, plaintiffs Delta Information Systems, Inc. (Delta) and Srinivasa Narasimhalu allege that the Director of the California Service Center (CSC) of the USCIS erred in denying Delta's Form I-129, Petition for Nonimmigrant Worker as a temporary worker in a specialty occupation (H-1B) on behalf of Mr. Narasimhalu and in denying Mr. Narasimhalu's application to extend his H-1B nonimmigrant status in the United States. Plaintiffs ask the court to hold unlawful and set aside these decisions of the CSC Director that were arbitrary, capricious, and not in accordance with the law. Mr. Narasimhalu is a native of India who Delta lawfully employed

as a computer professional from November 1, 2011 to February 27, 2018 with the authorization of USCIS. His education and experience has been evaluated as the equivalent of a Bachelor's Degree in Computer Information Systems.

The plaintiffs first argue that USCIS erroneously determined that no employer-employee relationship existed between Delta and Mr. Narasimhalu. In fact, Mr. Narasimhalu has been an employee of Delta, with USCIS authorization, for over six years, and it is undisputed that the sole right to control Mr. Narasimhalu's work activities belongs to Delta. This ground is frequently invoked by the USCIS when the H-1B worker is placed at a third party site. In its decision, USCIS concedes that for purposes of H-1B visa classification, the terms "employer," "employed," "employment," or "employer-employee relationship" are undefined. The complaint notes that because these terms are undefined by the agency, it is necessary to look to the common law definition. Citing to *Clackamas Gastroenterology Assocs., P.C. v. Wells*, 538 U.S. 440 (2003) and *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992), the complaint explains that in determining whether one is an employee, the consideration is the hiring party's right to control. Citing to *Chin v. United States*, 57 F.3d 722, 725 (9th Cir. 1995), the complaint argues that the decision was not in accordance with the law to the extent that it was premised upon the assertion that Delta had to actually direct or control the work of Mr. Narasimhalu rather than merely having the right to control his work. In fact, USCIS in its decision observes that a "United States employer" is defined as one who "has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise **control** the work of any such employee …" (emphasis added). Consistent with *Clackamas, Darden*, and *Chin*, the fact that an employer "may" control the work of an employee, instead of "must," proves that it is only the right to control rather than the actual exercise of the right that is determinative of an employer-employee relationship. In Mr. Narasimhalu's case, his contract with Delta expressly provides that Delta has the complete right to control his work. Additionally, the entity controlling the location where Mr. Narasimhalu will perform his work, Nabco Entrances, Inc., disaffirms having any right to control Mr. Narasimhalu's work and fully corroborates that Delta has the complete right to control Mr. Narasimhalu's work and will control his work. Thus, it was arbitrary and capricious to decide that Delta lacks an employer-employee relationship with Mr. Narasimhalu.

The plaintiffs also argue that USCIS erred in concluding that the job of computer systems analyst was not a specialty occupation where it is undisputed that most computer systems analysts have a bachelor's degree in a computer related field. As a reminder, 8 C.F.R. § 214.2(h)(4)(iii)(A)(1) provides that if a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, then that position qualifies as a specialty occupation. Citing to *Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531, at *30-31 (S.D.N.Y. Sep. 29, 2017), the complaint emphasizes that if "most" computer systems analysts have a bachelor's degree in the appropriate field, as is provided in the OOH, then it follows that the degree is "normally" required for the position, and thus, the position qualifies as a specialty occupation. Furthermore, in its decision, USCIS pointed out, as a basis for its denial, that "computer system[s] analysts have degrees in a wide range of unrelated degrees including computer related degrees, business degrees and liberal arts degrees." Citing to (Redacted Decision) 2012 WL 4713226 (AAO February 08, 2012), the complaint notes that consistent with the *Next Generation Tech* reasoning, the AAO has explained in at least 2,415 unpublished decisions that "USCIS regularly approves H-1B petitions for qualified aliens who are to be employed as engineers, computer scientists, certified public accountants, college professors, and other such occupations." For computer scientists, for example, the OOH provides that "**[m]ost**

computer and information research scientists need a master's degree in computer science or a related subject, such as computer engineering." (emphasis added). This illustrates that, provided the specialties are closely related, a minimum of a bachelor's degree or higher in more than one specialty satisfies the "degree in the specific specialty" requirement of INA § 214(i)(1)(8). In reversing the CSC's denial of a petition, a U.S. District Court said that the "premise that the title of a field of study controls ignores the realities of the statutory language involved and the obvious intent behind them. The knowledge and not the title of the degree is what is important. Diplomas rarely come bearing occupation-specific majors." *Residential Fin. Corp. v. United States Citizenship & Immigration Servs.*, 839 F. Supp. 2d 985, 996 (S.D. Ohio 2012). The complaint makes clear that both USCIS and the courts have repeatedly held that where most employers in an occupation require a bachelor's degree in a narrow range of majors, or a related major, or its equivalent, it is a specialty occupation. Since it is undisputed that most computer systems analysts hold degrees in a computer related area, USCIS did not act in accordance with the law in deciding the position not to be a specialty occupation.

Attorneys who also face this obstacle should similarly challenge an H-1B denial directly in federal court in order to avoid wasting any time. Under *Darby v. Cisneros*, 509 U.S. 137 (1993) it is permissible to bypass the AAO and challenge the denial in federal court where exhaustion of administrative remedies is not required by law. Some examples of recent successful litigation include *Next Generation Tech., Inc. v. Johnson*, No. 15 cv 5663 (DF), 2017 U.S. Dist. LEXIS 165531 (S.D.N.Y. Sep. 29, 2017) and *Raj & Co. v. U.S. Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1241 (2015). In *Next Generation Tech.*, the court failed to see a rational connection between the evidence in the OOH stating that "*most* computer programmers have a bachelor's degree" and USCIS's conclusion that "computer programmers *are not normally required to have* a bachelor's degree." 2017 U.S. Dist. LEXIS 165531 at *20-21.The Court found that USCIS did not present a fair reading of the OOH and failed to satisfactorily explain its determination that a computer programmer was not a specialty occupation. *Id*. at *21-22. In *Raj & Co.*, the Court found that USCIS abused its discretion in determining that a position for a market research analyst did not come within the first criterion of the regulation of a specialty occupation. 85 F. Supp. 3d at 1246. The Court reasoned that USCIS impermissibly narrowed the plain language of the statute when it concluded that a bachelor's degree being typical did not require the degree as a minimum for entry into the occupation. *Id*. at 1247. Even if the USCIS invokes the lack of an employer-employee relationship as a ground for denial when an H-1B worker is assigned to a client site, one should point out that the goal of USCIS's latest policy memo concerning third party relationships is to exercise more scrutiny on contractual arrangements with third parties rather than deny the legitimacy of such an arrangement. The USCIS in its policy memo acknowledges that such arrangements may be a legitimate and frequently used business model under the H-1B visa program. These cases show that it is unjustified to deny highly qualified foreigners the opportunity to work in specialty occupations in the United States based on a narrowed reading of the OOH. Hopefully, with continued pushback, the federal courts will put an end to such arbitrary denials.

Another reason to sue is that advocacy is no longer effective with the Trump administration. Although there are good policy arguments to approve legitimate H-1B visa petitions in a full employment economy as it makes U.S. employers more competitive, resulting in further jobs, they make no difference if high level immigration officials are driven by another agenda based on white nationalism and xenophobia. The same officials who spend their time conjuring up restrictive policies for purposes of denying H-1B petitions will need to focus their efforts in defending litigation within an agency with a finite budget. Moreover, challenging a denial under the APA is not as time consuming as it seems as there is generally no discovery, depositions, or interrogatories, although

there may be some exceptions. It requires drafting a complaint, researching and writing a motion for summary judgment, reviewing and opposing the government's motion for summary judgment and drafting a reply brief. Business immigration lawyers and their clients have generally refrained from suing. This is understandable as litigation is time consuming and a federal court may still give deference to the government's reasoning behind a denial. We can try to overcome denials by responding to RFEs and appealing to the AAO. But after that, if you still want to show that you are right and the government has gotten it completely wrong, then it may be time to sue the government. Federal judges may have a different reaction than the typical USCIS adjudicator. They may be shocked and viscerally angry at the way the USCIS is interpreting the law and may just about reverse the denial!

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