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FEDERAL COURT REVERSES UNREASONABLE H-1B DENIAL FOR MARKET RESEARCH ANALYST

Posted on March 27, 2012 by Cyrus Mehta

Employers who file perfectly bonafide H-1B petitions for certain occupations face unreasonable denials from the USCIS. One H-1B occupation that is especially vulnerable to a denial is Market Research Analyst. The USCIS's rationale for the denial is that the occupation must require a degree in the actual position and not in closely related fields. Thus, even if it is acknowledged that a Market Research Analyst requires a degree in closely related fields such as business, marketing, economics, sociology or psychology, but not specifically in market research analysis, that can provide a basis for the USCIS to arbitrarily deny the H-1B petition. There is clearly no requirement that the specialized degree for entry into the occupation needs to be in a single academic discipline. This may be true for occupations such as law or medicine, but if the USCIS applies such narrow criteria, a lot of occupations will not qualify for the H-1B visa.

In *Tapis Int'l v. INS,* 94 F Supp. 2d 172 (D. Mass 2000), the beneficiary was sponsored for H-1B classification as a showroom manager The petition was denied because the employer could not demonstrate that the position required a degree in showroom management, although the position required a degree in business administration, marketing or related field as well as additional training or experience in the field of interior design. In that case, the court reversed the denial on the ground that such a narrow agency interpretation would preclude any position from satisfying the "specialty occupation" requirements where a specific degree is not available in that field.

Yet, the USCIS continues to use this faulty interpretation in denying H-1B petitions. This is precisely what recently happened to an employer who sought H-1B visa classification for a foreign national in the specialty occupation of

Market Research Analyst who had a degree in marketing and finance. In *Residential Finance Corporation v. USCIS*, 2012 U.S. Dist. LEXIS 32220, decided on March 12, 2012, Judge Gregory L. Frost of the U.S. District Court for the Southern District of Ohio (Eastern Division) chided U.S. Citizenship and Immigration Services (USCIS) for denying an H-1B petition to a market research analyst with a bachelor's degree in closely related fields.

The issue before the court in *Residential Finance Corporation* was whether USCIS was incorrect in concluding that there was not a"specialty occupation" involved. The court noted that a specialty occupation is 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 in the United States. A related definition provides that a specialty occupation requires theoretical and practical application of highly specialized knowledge.

Among other things, USCIS argued that although the Department of Labor's *Occupational Outlook Handbook (OOH)* recognizes a baccalaureate degree as the minimum educational requirement for many market and survey research jobs, the *OOH* does not indicate that such a degree need be in a specific specialty directly related to market research.

In this case, the beneficiary had obtained a bachelor of science degree in marketing and finance. The record indicated that a minimum requirement for entry into the position of market research analyst is the specialized course of study in which the beneficiary had engaged.

"Perhaps most bewildering is that Defendant rejected the evidence that would actually be performing these job duties if hired, despite no evidence to the contrary and no other apparent reason for failing to credit the evidence on this record," the judge said.

Judge Frost continued: "Defendant continues to reject this record in favor of supporting a flawed denial. What Defendant overlooks is that the illogical leaps about which Plaintiff complains in its thorough briefing cannot be separated from the process in which Defendant engaged in its decision making. Stated simply, Defendant did a poor job of keeping the record straight and its focus on the actual inquiry involved."

The judge pointed out that USCIS expressly admitted "inexplicable errors" in its briefing, such as references to the wrong sections of the *OOH*, and that the

agency's decision appeared to identify the proffered position incorrectly as a marketing manager rather than a marketing analyst.

Judge Frost said that these errors were not the essentially inconsequential lapses that USCIS suggested. Instead, he said, they constituted "a litany of incompetence that presents fundamental misreading of the record, relevant sources, and the point of the entire petition." If USCIS wants to deny a petition that will send the beneficiary to another country after 21 years of living in the United States, the judge said, "it should afford Plaintiff and a bare minimum level of professionalism, diligence, and reasoning." Noting that the record indicated that a market and survey researcher is a distinct occupation with a specialized course of study that includes multiple specialized fields, that the beneficiary had completed such specialized study in the relevant fields of marketing and finance, and that Residential Finance Corporation had sought to employ him in such a position, Judge Frost said that USCIS had 'ignore 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."

Judge Frost concluded that USCIS failed to meet the "fundamental threshold for rational decision making and has instead engaged in conduct that cannot be separated from the taint of the foregoing errors." He thus found that the denial of the petition was arbitrary, capricious, and an abuse of discretion, and ordered that USCIS grant the petition and change the beneficiary's status to H-1B nonimmigrant.

Employers and their attorneys should use these decisions to advocate for their clients in case the USCIS absurdly asserts that the position does not require a degree in a single academic discipline. INA § 214(i) defines a specialized occupation as requiring "(A) theoretical and practical application of a body of 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." While it is true that INA § 214(i) requires a bachelor's degree in a specific specialty for the position to qualify under the H-1B visa classification, it should be argued that this section does not restrict it to a degree in a single specialty. For instance, a position for a computer programmer analyst could require a bachelor's degree in specialties such as computer science, management information systems, mathematics, engineering or closely related fields. All of these specialties could qualify a

person for this specialty occupation. Congress could not have intended that INA § 214(i) be restricted to a single specialty, namely, computer science, and preclude the demonstration of other specialties, such as mathematics or engineering disciplines, that could also qualify a nonimmigrant for the specialty occupation of computer programmer analyst.

If your case is denied, do not lose hope. You can always litigate a good case in federal court and try to get the same favorable outcome as in *Residential Finance Corporation* and *Tapis International*.