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RECENT H-1B CASE BRINGS HOPE THAT RELIANCE OF THE UMBRELLA "ALL OTHER" OCCUPATIONAL CLASSIFICATION NEED NOT BE FATAL

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As the U.S. Citizenship and Immigration Services (USCIS) continues its shameful and relentless attack on the H-1B visa program under the misguided "Buy American Hire American" Executive Order, it is important that we continue to fight back and cases like *Relx Inc. v. Baran* give us the hope that we need in order to do so.

As background, with every H-1B petition, the petitioner must file a Labor Condition Application (LCA) with the Department of Labor (DOL) listing the most appropriate occupational classification for the offered position. This classification is represented by the Standard Occupational Classification (SOC) code. Naturally, there isn't an SOC code for every single occupation. Therefore, H-1B petitioners must choose from a limited list of SOC codes. Recognizing that it could not realistically cover every single occupation, the DOL created certain umbrella categories called "All Other" which represent occupations with a wide range of characteristics that do not fit into a specific detailed SOC. USCIS will often pounce on H-1B petitions where the petitioner has chosen an SOC code representing an "All Other" classification. There are times when the employer has no choice as the occupation, especially emerging ones, fit under "All Other" only. USCIS often issues a Request for Evidence (RFE) stating that the DOL's Occupational Outlook Handbook (OOH) "does not contain descriptions for this position" and therefore it has not been established that a minimum of a Bachelor's degree in a specific field in required for entry into the occupation.

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 normallythe minimum requirement for entry into the particular position;
2. The degree requirement is commonto 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 normallyrequires 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).

We have blogged extensively, see here, here, and here, about the H-1B specialty occupation criteria and the difficulties faced by H-1B petitioners in demonstrating that an offered position is indeed a specialty occupation. Despite the fact that there is no existing regulation designating the OOH as the bible on specialty occupations and the OOH even includes its own disclaimer advising that it should not be used for any legal purpose, the USCIS nevertheless frequently issues RFEs and denials on H-1B petitions based on the fact that the OOH does not include a definitive statement that a minimum of a Bachelor's degree in a specific field in required for entry into the occupation.

In *Relx,* the plaintiffs, *RELX, Inc., d/b/a LexisNexis USA*, and a Data Analyst for Lexis Nexis in F-1 student status, alleged that USCIS; the Department of Homeland Security; and others violated the Administrative Procedure Act (APA) when they denied LexisNexis' H-1B petition on behalf of the Data Analyst concluding that the position was not a specialty occupation. The U.S. District Court for the District of Columbia granted summary judgment for plaintiffs and denied defendants' motion to dismiss. The proffered position had been classified under the occupational title of *Business Intelligence Analysts* which bears the SOC code of 15-1199.08 and falls under the more general occupational title of *"Computer Occupations, All Other"* with the SOC code of 15-1199. The USCIS is well aware that because the DOL has not amended its LCA to also accept 8 digit

SOC codes, H-1B petitioners are not able to classify their offered positions using 8 digit SOC codes and must instead utilize the more general occupational title bearing a 6-digit SOC code. Accordingly, in *Relx*, the petitioner used the SOC code for *"Computer Occupations, All Other"* but explained that the most specific classification was *Business Intelligence Analysts.* The petitioner also referenced O*NET, which contains a detailed description of the *Business Intelligence Analyst* occupation relevant to the inquiry on whether or not the position is a specialty occupation. Similar to the OOH, O*NET is a database which serves as a library for information on the working world and it includes information on the knowledge, skills, abilities, interests, preparation, contexts, and tasks associated with over 1,000 occupations.

In a typical move, USCIS disregarded all this and in its denial of the petition stated that the OOH does not contain detailed profiles for the computer occupations category and that the petitioner's reference to O*NET, standing alone, failed to establish that the occupation was a specialty occupation. The court found this conclusion to be "factually inaccurate and not supported by the record." The court pointed out that the OOH does explain that that the typical entry level education for *"Computer Occupations, All Other"* is a "Bachelor's Degree (see here) and inasmuch as the OOH did not contain a detailed profile for the computer occupations category, it contained an explicit O*NET crosswalk reference and O*NET stated that *"most of these occupations require a four-year bachelor's degree but some do not"* with further detail that more than 90% of employees in the occupation require at least a bachelor's degree.

Overall, the *Relx* case also demonstrates how determined USCIS can be in its effort to deny these H-1B petitions. Upon receipt of the denial, plaintiffs filed suit but shortly before they filed their opening motion, the government reopened the petition without providing any notification or reason and issued a second RFE. Plaintiffs then moved for summary judgment, seeking an order from the court directing USCIS to grant the H-1B petition, but the government filed a motion to dismiss in light of the fact that it had already reopened the case! Among other things, the court noted that the government's failure to set forth its reasons for a decision to reopen the denial constitutes arbitrary and capricious action, and the court must undo the agency action. The court pointed out that the government issued another RFE requesting nearly identical information as it did when it last reviewed the petition. Also, the Data Analyst's

F-1 visa was set to expire and she would have lost her job and been required to leave the United States for an extended period of time, thus causing "significant hardship." The court found the government's reopening of the case to be "highly suspect and contrary to the regulations" since no new information was requested and that the petitioner had already submitted a "mountain of evidence" that "more than meets the preponderance of the evidence standard." The court held that the USCIS "acted arbitrarily, capriciously, and abused its discretion in denying employer's petition for H-1B visa status" on behalf of the Data Analyst.

In our past blogs (for example, here), we have encouraged H-1B petitioners facing these challenges to be fearless and to go directly to federal court. Under *Darby v. Cisneros*, 509 U.S. 137 (1993) it is permissible to bypass the Administrative Appeals Office (AAO) and challenge the denial in federal court where exhaustion of administrative remedies is not required by law. Most recently, we followed our own advice and filed a complaint in federal court in a case, very similar to *Relx* in that it involved the petitioner's use of the *"Computer Occupations, All Other"* category; a foreign national in F-1 status and an arbitrary and capricious denial that, among other things, stated that where the occupation listed on the certified LCA was not listed in the OOH, the petitioner could not support its assertion that the position was a specialty occupation by reference to the O*NET. Even the expert opinion of a college professor was rejected. Despite the duties being described in a detailed manner to demonstrate their complexity, the USCIS cherry picked a few words and phrases from the job duties to erroneously conclude that they did not require the qualified person to possess a Bachelor's degree or higher in the enumerated fields. In the end, USCIS reopened the case and issued a second RFE, basically identical to the first one. Petitioner responded to the RFE in great detail, with additional expert opinions, and the case was approved.

Based on the number of denials that employers have experienced in recent times, the H-1B process can seem daunting especially when filing cases which must be classified under one of the "All Other" umbrella categories. In these cases, an RFE is expected and that may be followed by a denial. Hopefully not anymore, as we now include a discussion of the court's decision in *Relx.* But at the end of the day, these cases demonstrate that we mustn't be afraid to sue. The *Relx* decision proves that federal judges can very well have a different reaction than the typical USCIS adjudicator and may be shocked and angry at

USCIS' actions.