CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

DENIAL OF H-1B CASES: THE OCCUPATIONAL OUTLOOK HANDBOOK IS NOT THE HOLY GRAIL

Posted on October 15, 2019 by Cyrus Mehta

By Cyrus D. Mehta and Gianna Boccanfuso

The USCIS continues to strictly scrutinize H-1B petitions. According to an NFAP report, denial rates for H-1B petitions have increased significantly, rising from 6% in FY 2015 to 33% through the second quarter of FY 2019 for new H-1B petitions for initial employment. In recent times, seeking review of an H-1B denial in federal district court has led to successful outcomes such as in *Relx v. Baran*. Often times, after filing a complaint in federal court under the Administrative Procedures Act alleging that the decision was arbitrary and capricious, the USCIS reopens the denial and approves the case, or issues another Request for Evidence (RFE). Upon responding to the RFE, as has been our experience in one matter, the USCIS approved the H-1B.

While many have experienced success, there have also been a spate of H-1B decisions mostly from federal district courts in California that have gone the other way. In these denials, the courts have upheld the USCIS' interpretation of the description of the occupation in the Occupational Outlook Handbook. For example, in *Xiaotong Liu v. Baran*, 2018 U.S. Dist. LEXIS 222796, the Central District of California upheld the USCIS' denial of an H-1B petition for an Event Manager to oversee the functions of business conference coordination and event gathering for the petitioning company, Innsight. The USCIS decision concluded that:

As shown in the OOH, although a baccalaureate level training is generally required, the position of Meeting, Convention or Event Planner is an occupation that does not require a baccalaureate level of education in a specific specialty as a normal, minimum for entry into the occupation. There is no apparent standard for how one prepares for a career as a Meeting, Convention or Event

Planner and no requirement for a degree in a specific specialty. The requirements appear to vary by employer as to what a course of study might be appropriate or preferred.

As in most decisions, the District Court of the Central District of California analyzed whether the Plaintiff satisfied one of the four prongs of the following regulatory 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).

Looking at only the first and second criteria of 8 C.F.R. §214.2(h) (4) (iii) (A) the court found that the USCIS' denial of Innsight's H-1B petition was not arbitrary and capricious and therefore granted Defendant's motion for summary judgment. The court held that the government's denial was not arbitrary and capricious in regards to the first criterion, a bachelor's degree as a minimum requirement, because there was a rational basis for the conclusion that the position of Event Manager did not require a degree in a specific field or its equivalent when the OOH demonstrates a preference for prerequisite course work that does not amount to a necessity when it states that "other common fields of study include communications, business, and business management" but does not mention particular course work as essential.

The court also acknowledged that "istrict courts appear somewhat split on whether the fact that some positions do not require a bachelor's degree is enough to provide a rational connection between the OOH language and a failure to prove that a position is a specialty occupation. Compare *Ajit Healthcare Inc. v. United States Dep't of Homeland Sec.*, No. CV131133GAFJPRX,

2014 U.S. Dist. LEXIS 186258, 2014 WL 11412671, at *4 (C.D. Cal. Feb. 7, 2014) (finding "a 'rational connection' between the Handbook description of the job in question and the conclusion that a would not normally require a baccalaureate degree or higher" when the OOH provided that "lthough bachelor's and master's degrees are the most common educational pathways work in this field, some facilities may hire those with on the-job experience instead of formal education") (internal citation omitted) *with* *Next Generation Tech., Inc. v. Johnson,* 328 F. Supp. 3d 252, 267 (S.D.N.Y. 2017) ("Even affording appropriate deference to the Government's interpretation of the statutory and regulatory requirements, this Court is at a loss to see a 'rational connection' between the evidence indicating that 'most computer programmers have a bachelor's degree' and USCIS' determination that 'computer programmers are not normally required to have a bachelor's degree.'")." In *Xiaotong Liu v. Baran,* unfortunately, the court sided with the USCIS's interpretation of the OOH.

On the second criterion, the court found based on job postings from similar organizations submitted by the Plaintiff, that a reasonable fact finder could have concluded that job requirements vary based on employee when only two out of four listings required a bachelor's degrees in hospitality or even management therefore making the USCIS decision, that a specific degree is not required in parallel positions among similar employers, not arbitrary or capricious.

In making its determination, the court distinguished *Tapis Int'l v. I.N.S.* 94 F. Supp. 2d 172, 176 (D. Mass. 2000) and *Residential Fin. Corp. v. U.S. Citizenship & Immigration Servs.,* 839 F. Supp. 2d 985, 996 (S.D. Ohio 2012). In *Tapis* the court determined that the INS abused its discretion when it found that a Showroom Manager position at an interior design firm was not a specialty occupation even when the record indicated that the position "required a bachelor's degree from a limited number of academic fields in addition to design experience." However, the court also held that "a generalized bachelor's degree requirement, without more, is not enough to make the position a 'specialty occupation.'" *Tapis Int'l v.I.N.S.*, 94 F. Supp. 2d 172, 176 (D. Mass. 2000).The *Xiaotong Liu* court found that the reasoning in *Tapis* is not relevant or applicable since in *Tapis* no specific degree was available in the field of interior design showroom management but there is a specific degree in the field of event management. In *Residential Finance*, the court found USCIS' denial of Plaintiff's petition due to its failure to prove that the Market Research Analyst position

was a specialty occupation was arbitrary, capricious and an abuse of power. USCIS had acknowledged several errors in the denial and the record in the case indicated that "a market and survey researcher is a distinct occupation with a specialized course of study that includes multiple specialized fields." 839 F. Supp. 2d 996-97. The *Xiaotong Liu* court distinguished the finding in *Residential Finance,* finding that the OOH did not suggest that any particular course work is essential for the position of Event Manager, but rather it stated that "planners who have studied meeting and event management or hospitality management may start out with greater responsibilities than those from other academic disciplines." The court also used the First Circuit holding in *Royal Siam Corp. v Chertoff*, 484 F.3d 139 ((1st Cir 2007) against Plaintiff. In *Royal Siam*, the court rejected the argument that a restaurant manager required a degree in business administration, even though Plaintiff in *Xia0tong Liu* valiantly demonstrated that a bachelor's degree is normally required for an Event Planner under the OOH and Liu in fact had a bachelor's degree in business management with a degree in hospitality management. Additionally, the court held that while USCIS did not explicitly analyze the expert opinion letter under the complexity of the position prong, it did not abuse its discretion when finding that Innsight failed to meet its burden of proof because USCIS demonstrated review of the letter through its use of the content in its analysis of other prongs. Therefore the court found that the conclusion did not rise to the level of arbitrary and capricious. In regard to the prior use of the expert letter by USCIS, the court stated that USCIS should weigh the probative value of an expert opinion as one factor in determining whether an industry requires a degree even when it may conflict with the OOH since the OOH is also but one factor in making the determination. However, the court did find that USCIS had a rational basis for concluding that the expert letter did not explain how the expert opinion from a business professor "determined that a bachelor's degree in hospitality management or a related field is a standard requirement within the industry for parallel positions among similar organizations" when he stated that he "observed standard hiring practices as they pertain to a variety of positions in … event planning" but only indicated that he was familiar with the general related field and not practices specifically among similar employers.

Unfortunately, every argument that Plaintiff made was shot down because it could not overcome the obstacle imposed on the event planner occupation in the OOH, or at least the faulty USCIS' interpretation of it that a bachelor's

degree in a specific specialty was a normal requirement for entry into the event planning field. In that sense the court's decision was also faulty. Hotel management, which is analogous to event management, has long been considered a professional position in *Matter of Sun*, Interim Dec. 1816 (1966). The reasoning in *Matter of Sun* justifying hotel management was far more elegant in 1966 than in *Xiaotong Liu* in 2019 as there was a recognition that occupations continue to expand from the traditional professions of law, medicine and theology. This sort of commonsensical and pragmatic reasoning was conspicuously absent for the occupation of Event Planner in *Xiaotong Liu*.

In *Innova Sols., Inc. v. Baran,* 2019 U.S. Dist. LEXIS 134790, the District Court for the Northern District of California found that the Plaintiff's (Innova) position of Programming Analyst, falling under the OOH's Computer Programmer classification, did not satisfy the requirements of a specialty occupation when the OOH's description for Computer Programmer did not describe the normal minimum educational requirement in a categorical fashion instead stating that "most" Computer Programmers have a bachelor's degree but "some employers hire workers with an associate's degree" *Id* at 17. The court then found that USCIS' conclusion that Innova failed to show the position of Programmer Analyst normally required a bachelor's degree was not arbitrary or capricious when the Plaintiff did not challenge the decision in their motion for summary judgment nor present any evidence showing a common degree requirement in the industry in parallel positions among similar organizations. Further, the court found that evidence provided by Innova to prove the position of Programmer Analyst is so complex or unique that it can only be performed by an individual with a degree, was not probative and therefore USCIS was not arbitrary and capricious in concluding that Innova failed to present sufficient evidence. The court found that Innova submitted a letter from their attorney describing the anticipated duties and a letter from the end client which incorrectly identified the position and listed duties inconsistent with those in the attorney's letter. The end client letter also described the beneficiary as leading and directing the work of others, although this contradicted with the duties described in the attorney letter and also because the beneficiary was being paid a Level 1 entry level wage. The court also cast doubt whether an attorney could make representations on behalf of clients. The court then turned to the third criterion under 8 CFR § 214.2(h)(4)(iii)(A), whether the employer normally requires a degree or its equivalent for the position, and

found that since Innova did not challenge USCIS' decision they did not have a basis to conclude whether the decision was arbitrary or capricious or constituted an abuse of discretion. With respect to the fourth criterion, whether 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, the court found that, in their respective briefs, the parties discussed it together with the second clause of the second criterion and therefore for the same reasons the court found that Innova had not shown the USCIS' denial to be arbitrary and capricious or an abuse of discretion.

The facts were weak and contradictory in *Innova*, and thus it is hardly surprising that the court affirmed the USCIS' denial, even though the court accepted USCIS' interpretation of the OOH entry for Programmers as not always requiring a bachelor's degree. The other arguments made by Plaintiffs under the second and fourth criteria were not strong enough to overcome the OOH description for Programmers.

Finally, in *Altimetrik Corp. v. USCIS, 2019 U.S. Dist. LEXIS 141512*, the District Court for the Eastern District of Michigan, Southern Division found that USCIS' decision was not arbitrary or capricious, nor an abuse of its discretion when it determined that that Plaintiff actually sought the beneficiary as a Systems Analyst even though the position in the H-1B petition was for a Software Developer. The USCIS found that the duties matched those of a Systems Analyst, and according to the OOH entry for systems analysts, "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." The court did not seem to disagree with the USCIS's change of occupation. This tactic of switching occupations is often used by USCIS as the description for Computer Systems Analyst in the OOH, with respect to educational requirements, is not as favorable as Software Developers, thus providing more ammunition to USCIS to disagree that that it is a specialty occupation. The court also did not find that the duties were complex and unique under the second criterion or specialized and complex under the fourth criterion. With respect to the third criteria, although Plaintiff provided proof of educational and pay documents for 20 of the 70 employees whom it hired as software developers, the court agreed with the USCIS's reliance on *Defensor v. Meissner*, 201 F.3d 384 (5th Cir. 2000) that the Plaintiff did not provide proof of the client

entity's requirement of a bachelor's degree for the position. Plaintiff also failed to establish by a preponderance of the evidence that the beneficiary would be preforming actual work that would qualify his job as a specialty occupation and therefore denied the petition. The court found that USCIS was correct in determining the evidence provided did not establish that beneficiary would be preforming actual duties requiring the skills of someone with a bachelor's degree or higher when the only project the beneficiary was assigned to had ended, the description of the second project that the beneficiary would be working on did not align with the job duties listed by the Plaintiff, and that promotional material referenced by Altimetrik as proof of various projects that the company was engaged in did not indicate if the projects were ongoing, whether the specific office the beneficiary would be working in was involved or that there were positions on the projects for the beneficiary that involved qualifying specialty occupation work.

In *Altimetrik Corp*, it was problematic that the court agreed with the USICS's characterization of the position being akin to that of a systems analyst even though the Plaintiff had designated it as a software developer. Also problematic was that the court relied on *Defensor v. Meissner* in shooting down Plaintiff's contention that it has hired other employees with the similar educational qualifications because it was not able to prove the educational requirements of the client that would ultimately employ the beneficiary. *Defensor v. Meissner* involved a nurse staffing agency where the nurses were always assigned to hospitals that were clients of the staffing agency, and the Fifth Circuit considered the hospitals as the actual employers of the nurses. Unfortunately, *Defensor v. Meissner* is used broadly to nix claims by employers that they hire others with the same educational credentials even where they can show they are the actual employers who control the employment. Indeed, in all H-1B petitions, it is the petitioner that must demonstrate an employer-employee relationship with the H-1B worker, and this has been affirmed by the Neufeld Memo. If the client is the actual employer and not the petitioner, then the H-1B petition can never be filed by the petitioning entity ever. *Defensor v. Meissner* is thus a contradiction as it considered the client as the employer rather than the petitioner, which is now liberally used by USCIS, and also affirmed by courts, to deny H-1B petitions even where the petitioner is the actual employer. Of course, the facts in *Altimetrik* regarding its inability to show continuing employment were less than ideal, and this was not the appropriate case to

overcome objections under *Defensor v. Meissner*, leave alone challenge the USCIS's reliance on the OOH with respect to systems analysts.

Though *Xiaotong Liu, Innova and Altimetrik* may paint a bleak picture for challenges to H-1B denials in federal court, with petitioners being defeated by the deference given to USCIS' determinations, there have been recent cases which provide guidance and hope. In *Next Generation Tech. Inc. v. Johnson* the U.S. District Court for the Southern District of New York found that USCIS disregarded or failed to explain why it discounted substantial evidence in the record that could have supported a determination that petitioner had met the requirements for an H-1B visa and therefore its decision to revoke the initial petition and denial of petitioner's second amended petition were arbitrary and capricious. Starting with the first criterion, the position's requirement of theoretical and practical application of a body of specialized knowledge, the court found that USCIS failed to give adequate reasons as to why the position description did not require theoretical and practical application of a body of highly specialized knowledge by failing to articulate why the enumerated duties were incompatible with a specialty occupation when petitioner provided a bulleted list of duties and subsequently a project description that described the roles and responsibilities for each position needed for the project, specifically stating that beneficiary's role would be that of " Sr. Programmer/Programmer" and would include "technical program coding; developing the functional program; algorithm development; and debugging the existing programs." *Id* at 26. Turning to the second criterion, the position requirement of attainment of a bachelor's or higher degree in the specific specialty, the court found that USCIS' determination was arbitrary and capricious when the USCIS disregarded pertinent evidence in the record and failed to articulate a satisfactory explanation for its action when determining that the programmer position being offered was not a specialty occupation. The court stated that there was no rational connection between evidence from the OOH stating that "*most* computer programmers have a bachelor's degree" and USCIS determining that computer programmers are not normally required to have a bachelor's degree. Additionally, the court noted that USCIS acted in direct contradiction to an internal USCIS memorandum which stated that USCIS will "generally consider the position of programmer to qualify as a specialty occupation." The court additionally evaluated USCIS' determination that petitioner and beneficiary would not be in a valid employer-employee relationship. In doing so, the court

went through all eleven factors in the Neufeld Memo to find that based on evidence provided by Next Generation Tech, many if not all of the factors weighed in their favor and USCIS seemingly did not gather all the evidence or consider all the relevant factors in analyzing it. The decision in *Next Generation* helps to combat the decision in *Innova* specifically in regard to USCIS' use of the OOH. While it is advisable to build a case on the other prongs of the statutory requirement and not simply on the OOH, the decision in *Next Generation* displays a common sense approach to the language used in OOH listings by recognizing the use of *most* when speaking to those who have bachelor's degrees in a position can rationally constitute a normal requirement.

In *Raj & Co. v. United States Citizenship & Immigration Servs.*, 85 F. Supp. 3d 1241, the court came down with another positive decision. The court in *Raj* found that USCIS had abused its discretion when it impermissibly narrowed the plain language of the statute by requiring a single specifically tailored and titled degree and therefore reading plain language out of the statue when determining, "although a baccalaureate level of training is typical, the position of a Market Research Analyst is an occupation that does not require a baccalaureate level of education is a specific specialty as a normal, minimum for entry into the occupation," The court went on to say that there was evidence in the record which showed that the proffered position required a specialized degree in "market research" or an equivalent technical degree accompanied by relevant coursework in "statistics, research methods, and marketing" as a minimum for entry. Furthermore, the court noted that "While judicial review of agency decisions is highly deferential, it is not without teeth. Agency action cannot survive judicial review where the agency fails to 'articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.'" Another positive outcome for H-1B petitioners came in *Relx v. Baran*, Case No. 19-cv-1993. In *Relx* the court found that USCIS was arbitrary and capricious in its determination that the offered position of Data Analyst under the occupational title of Business Intelligence Analysts was not a specialty occupation solely on the fact that the OOH did not contain a detailed profile for the position and the use of O*NET, therefore standing alone, failed to establish the occupation as a specialty occupation. The court pointed out that the OOH did in fact provide the information needed to classify the position as a specialty occupation, and contained the O*NET cross reference, therefore holding that USCIS' conclusion to be "factually inaccurate

and not supported by the record." Furthermore, in response to USCIS' claim that the position of Data Analyst would never be specialized because multiple fields of education appear to be acceptable for entry into the position, the court stated that, "there is no requirement in the statute that only one type of degree be accepted for a position to be specialized." Both cases provide reassuring reminders on the limits of deference especially following the decisions in *Xiaotong Liu, Innova and Altimetrik.*

In conclusion, it is inappropriate for the USCIS to blindly defer to the OOH as a basis to deny an H-1B petition. We have blogged about this particular behavior previously, here, calling attention to the fact that there is no existing regulation designating the OOH as sole authority for classifying specialty occupations and that the OOH itself includes a disclaimer stating that, "the OOH, therefore, is not intended to, and should never, be used for any legal purpose." Our previous post on the matter also details the way in which the OOH is a cumbersome tool. With the DOL having not amended its LCA to accept 8 digit SOC codes, it therefore forces petitioners to rely on more general occupational titles with 6 digit SOC codes, such as *Computer Occupations, All Other* , which results in inappropriate denials from USCIS, as we saw in *Relx.* Even the authors of the OOH, which is the DOL, did not intend for USCIS to use the OOH in this manner. A DOL FOIA response found at AILA Doc # 19101011 states: "In response to your request for 'guidance,' the BLS OOH program provides staff who receive inquires on this topic with the following guidance: *we have known for several years that the U.S. Customs and Immigration Service (USCIS) occasionally uses education and training information in the OOH to establish strict education requirements for H-1B eligibility. This is an incorrect use of the OOH information and we discourage this practice."* Additionally, in correspondence provided in the FOIA, BLS employees include the OOH disclaimer linked above in their responses to inquiries about OOH and even explicitly state that, "making legal decisions about whether a position qualifies as a specialty occupation is an erroneous use of the OOH. The purpose of the OOH is for use by students and adult jobseekers in the United States for career planning." It is unfortunately clear that USCIS' reliance on the OOH as a basis to deny H-1B petitions, though inappropriate and contrary to the purpose of the OOH, will continue. While there are some cases which have correctly overturned USCIS due to this practice, it would be beneficial for more petitioners to challenge these denials in court - of course bring cases only with strong facts - in hopes of obtaining

more positive holdings overturning USCIS decisions that uphold its slavish reliance on the OOH.

Gianna Boccanfuso is a JD student at Brooklyn Law School and is currently an Extern at Cyrus D. Mehta & Partners PLLC