

New Life for H-1B Petitions: Market Research Analyst Ruling a Good Sign for H-1B Petitioners

Labor & Employment Law Update

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In December 2018, I got an unpleasant surprise: My first – and only – H-1B petition denial in my over 20+ years of practicing immigration law.

The petition was on behalf of an operations research analyst. I had done the same petition for other operations research analysts at this

company. USCIS had approved them all, some all the way to green cards.

In this case I prepped the client, submitted a thorough petition, and responded to all requests for evidence. Unfortunately, this unpleasant surprise was not a shock. USCIS's scrutiny had intensified and as many thought it was overstepping its bounds, creating a downward trend on approvals.

USCIS Scrutiny Oversteps Bounds

H-1B visas pertain to specialty occupations, jobs that by definition require a bachelor's degree. When assessing an H-1B petition, USCIS consults one of two sources to check the job requirements. The first, and most common, is the Occupation Outlook Handbook (OOH). The second is O*Net.

Job descriptions in the OOH describe bachelor's degree requirements in various ways. It will say a job "typically requires a bachelor's degree" or "normally requires a bachelor's degree" or "a bachelor's degree may be required." Until recent years, those descriptions sufficed to qualify a position as H-1B eligible. The wording of the job descriptions was understood to reflect the reality that employers look for candidates with bachelor's degrees for those positions.

During the past administration, however, USCIS resorted to a stricter interpretation of those statements. Seizing on the notion that qualifying words like “normally,” “typically,” and “may be” signify it is not always the case. Based on this interpretation USCIS began denying petitions for positions it had approved in the past.

USCIS Unlawful Denial Challenged

In particular, one position that got caught in USCIS's crosshairs was market research analyst. USCIS was arbitrarily denying H-1B market research analyst petitions for not qualifying as a “specialty occupation” based on the OOH description.

Noticing this pattern, the American Immigration Council, the American Immigration Lawyers Association (AILA), and several law firms brought a class action lawsuit. USCIS tried to get the case dismissed. When all attempts failed, instead of litigating it they reached a settlement agreement.

Settlement Agreement is a Good Sign

The settlement agreement corrects the Agency's error and stipulates that employers whose H-1B market research analyst petitions were denied between January 2019 and October 2021 may request that USCIS reopen and re-adjudicate their cases.

This result raised hopes among the immigration law community that arbitrary denials based on failing to qualify as a “specialty occupation” will cease for other positions. We view the rulings by the court and resulting settlement as setting precedent.

With these changes, it should be much easier for businesses to use H-1B petitions for their employees, and open up more options for their workforce. Additionally, it means that there is new life for any H1-B petition that was denied during the January 2019 to October 2021 time period – as the rulings and settlement indicate that there is a much better shot at those petitions being approved now if re-opened and re-adjudicated.

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