

Employers' 'Specialty Occupation' Dilemma: Why an H-1B Lottery Win Isn't a Free Pass

By Laura D. Francis

Aug. 21 — Employers and practitioners often lament the H-1B cap and the need for a lottery when U.S. Citizenship and Immigration Services receives far more petitions than it can accommodate—and even winning the lottery doesn't ensure getting the necessary foreign workers.

In fact, several immigration practitioners told Bloomberg BNA, the USCIS in recent years has narrowed its definition of “specialty occupation”—the requirement for an H-1B highly skilled guestworker visa—to the point that it can be very difficult to get such a visa for certain professions.

“I don't think you should ever assume you're going to get an H-1B petition approved,” Andrew Wizner of Leete, Kosto & Wizner in Hartford, Conn., told Bloomberg BNA Aug. 19. Each time a petition is filed, the case for an H-1B needs to be made, he said.

This is “a long and festering problem that has not gotten much media attention,” according to Angelo Paparelli, an attorney with Seyfarth Shaw in Los Angeles. “Most of the focus is on the shortage of visa numbers, but when you lift up the cover and look under the hood, that's only the beginning.”

There are a “whole host” of occupations that require a certain level of expertise, “and the agency simply hasn't kept up,” he told Bloomberg BNA Aug. 13.

'Always Been a Problem.'

New York attorney Roger Algase said getting an H-1B petition approved for certain occupations has “always been a problem,” even before the H-1B cap became an issue in recent years.

But the USCIS has become increasingly strict recently in its interpretation of the H-1B regulations, he said Aug. 12.

Under USCIS regulations at 8 C.F.R. § 214.2(h)(4)(iii)(A), there are four ways that an employer can prove a position is a “specialty occupation”:

- a bachelor's or higher degree or its equivalent normally is the minimum requirement for the position;
- the degree requirement is common to the industry, or the particular position is so complex or unique that it can be performed only by an individual with a degree;
- the employer normally requires a degree or its equivalent for the position; or
- the specific duties are so specialized and complex that knowledge required to perform them usually is associated with attainment of a bachelor's or higher degree.

'Knee-Jerk' Reliance on OOH

Although an employer need only demonstrate one of those four criteria, Paparelli said the USCIS's "knee-jerk reaction" is to rely on the Department of Labor's Occupational Outlook Handbook to determine the educational requirements of a particular position.

He added that, even though USCIS adjudicators improperly rely on the OOH to the exclusion of other evidence provided by the petitioning employer, "they don't actually read what the OOH provides" or they "mischaracterize what it says."

USCIS adjudicators "should rely on their own regulations," and the OOH doesn't appear in those regulations, Andrew Wizner said. What matters is the employer's requirements for the position—"that's the standard that should apply," he said.

For example, Paparelli said a client recently had to respond to a USCIS request for evidence stating that the screenwriter position for which it sought an H-1B doesn't require a bachelor's degree, per the OOH.

But the OOH "said the opposite," in fact stating that a degree in writing, communications or journalism is "ordinarily required" or preferred by employers, he said.

USCIS adjudicators "should rely on their own regulations," and the OOH doesn't appear in those regulations, Wizner told Bloomberg BNA. What matters is what the employer requires for the position—"that's the standard that should apply," he said.

Algase said there's nothing wrong per se with the USCIS using the OOH as a guide, considering the DOL's expertise.

But the handbook is "written primarily for the public," particularly individuals thinking about whether they want to enter a certain occupation, not from the point of view of determining whether a position qualifies for an H-1B visa, he said.

The OOH "should never be used by the USCIS to make a determination," and yet its use has been upheld repeatedly by the agency's Administrative Appeals Office, Wizner said.

He pointed out that the OOH itself even contains a disclaimer against certain uses of the handbook other than as a guide for individuals considering particular careers.

The most recent online version of the OOH states that it "is not intended, and should never be used, for any legal purpose."

"For example, the OOH should not be used as a guide for determining wages, hours of work, the right of a particular union to represent workers, appropriate bargaining units, or formal job evaluation systems," the handbook states.

'Vague Language' on Requirements

Algase's principal argument against relying too heavily on the OOH is that it contains "vague language" about what employers normally require in a particular field. In many cases, he said, the handbook says an occupation requires a bachelor's degree in a field or a "related field," listing "a dozen different related fields."

In such a case, "the door is left open" so that a degree in "almost any field" will qualify an individual for a

job, removing it from the definition of “specialty occupation,” Algase said.

On top of that, Algase said, there's been an effort in the OOH to “dumb down” various occupations’ requirements.

For example, previous versions of the OOH indicated that a computer systems analyst had to have a bachelor's degree in computer science or a related field, but the current OOH states that some employers “may” require a bachelor's degree, not necessarily in computer science.

The same is true for fashion designers, Algase added. In the past, the OOH “categorically” stated that a bachelor's degree in fashion design—or a closely related field—was required for the position, but now it doesn't require a degree at all.

“To me it doesn't seem to make any sense,” he said, pointing out that occupational trends seem to be heading in the opposite direction—more knowledge and education are required than before.

The OOH change “smacks more of possibly political considerations,” Algase said. He suggested that the Obama administration could be thinking “maybe this would be a good idea to protect American workers,” by making it harder for employers to hire foreign professionals.

Wizner was less cynical about the DOL's motivations for updating the educational requirements in the OOH, but he said the changes call into question the agency's methods for collecting and analyzing data and whether they are representative of the industry and otherwise reliable.

Whenever the DOL updates the OOH, “you have to study the devil out of it” because from year to year the agency “will change dramatically what it says are educational requirements” for certain occupations, he said.

H-1Bs for Nurses?

Although Algase said the health-care industry would benefit from being able to address the nursing shortage with guestworkers on H-1B visas, he admitted that the OOH “has some justification” in saying that nursing positions generally don't require a bachelor's degree.

Christopher Musillo of Musillo Unkenholt in Cincinnati agreed, telling Bloomberg BNA Aug. 18 that “registered nurses do not require a bachelor's degree,” and so “broadly speaking” those positions aren't eligible for H-1B visas.

On the other hand, Musillo said there are hospitals and health-care facilities that do require bachelor's degrees for certain nursing positions “for a variety of reasons,” such as “special certification” in order to designate the facility as a magnet hospital.

In those cases, there is “inconsistent adjudication from USCIS,” he said.

According to Musillo, some adjudicators will acknowledge that a hospital really does require bachelor's degrees for its nurses even though it isn't common in the industry. But others will fail to “look at the facts on the ground,” and instead tell a petitioning hospital that its “personal preference” for a bachelor's degree doesn't override the industry standard, and so it isn't eligible for an H-1B visa.

Musillo added that denials have gone up in recent years. Around the middle part of the last decade, a hospital's requirement for a nurse to have a bachelor's degree usually resulted in approval of an H-1B petition. But starting around 2009 or 2010, the USCIS started issuing "almost universal denials" for the same kinds of cases, he said.

Denials for nurses have gone up in recent years, according to Christopher Musillo. Around the middle of the last decade, a hospital's requirement for a nurse to have a bachelor's degree usually resulted in an H-1B petition approval, he said. But in 2009 or 2010, the USCIS started issuing "almost universal denials" in the same kinds of cases, he said.

By focusing exclusively on whether the industry requires a bachelor's degree for a nursing position, to the exclusion of the employer's evidence of its own requirements for the job, the USCIS is misreading its own regulations, Musillo said.

However, he said he believes the USCIS is trying to steer its adjudicators toward looking more at the facts presented by employers, via a recent policy memorandum on nurses and H-1B visas (141 DLR A-12, 7/23/14).

Musillo stressed that proving that the industry requires a bachelor's degree is only one way of showing that a position is a "specialty occupation." A "completely distinct path" is to show that "the employer normally requires the degree for the position," and the new memo seems to be requiring adjudicators to acknowledge that.

Federal Court Response

In the wake of these agency decisions, the USCIS has been taken to task by at least one federal court.

In *Residential Finance Corp. v. USCIS*, 839 F. Supp. 2d 985, 2012 BL 69781 (S.D. Ohio 2012), the U.S. District Court for the Southern District of Ohio accused the agency of engaging in "a litany of incompetence that presents [a] fundamental misreading of the record, relevant sources, and the point of the entire petition."

The case involved a USCIS denial of an H-1B petition for a market research analyst on the ground that the OOH didn't require a bachelor's degree in a field directly related to market research. But the court found the agency's interpretation of the educational requirement too narrow.

"The knowledge and not the title of the degree is what is important," it said. "Diplomas rarely come bearing occupation-specific majors. What is required is an occupation that requires highly specialized knowledge and a prospective employee who has attained the credentialing indicating possession of that knowledge."

But Algase said he doesn't think the *Residential Finance* decision had any impact on USCIS adjudicators because it went against the current agency ideology. And it is "the ideological bent in this administration that is the basic problem," he said.

Musillo agrees that the decision has had little impact, but he thinks that's because the case had "really bad facts for USCIS" and a host of "really bad decision-making."

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sources, and the point of the entire petition.”
“That's what really happened there,” he said.

Musillo surmised that most federal courts would approve USCIS denials of H-1B petitions because of the agency's broad discretion. As long as the USCIS uses “magic language” in its denial notifications, there is little chance the decision will be overturned, he said.

At the same time, Musillo said “we're better today than we were a year ago,” and that his colleagues are reporting that the USCIS is “not as narrow-minded in this area” as it used to be, perhaps because the economy is improving.

“I do think you can get these cases approved,” he said. They “just have to be framed properly.”

Wizner added that the key to getting H-1B petitions approved is to understand which occupations are going to have an easier time in the process and which ones are going to be “trouble.”

Currently, market research analysts, marketing managers and information technology jobs appear to trigger the most RFEs and denials, he said.

At the same time, Wizner said colleagues have reported an increase in RFEs in the past six months that question whether physicians are specialty occupations. Physicians “always” have been specialty occupations, he said.

H-1B Process ‘Out of Control.’

Paparelli said these are examples of how the H-1B adjudication process “has gotten out of control” at the USCIS.

He cited other problems, including USCIS guidance under which smaller companies are “automatically treated as suspect” and more heavily scrutinized for fraud.

The USCIS's treatment of corporations and shareholders as a single entity—thereby preventing a company's owner from obtaining an H-1B visa—also is problematic, as is the agency's scrutiny of H-1B workers who are placed at third-party sites, Paparelli said.

Wizner expressed similar concern, pointing out that, in general, smaller employers have a harder time getting their H-1B petitions approved than larger, more established entities. “Context is everything,” he said.

He also said he believes the heightened scrutiny of H-1B petitions in IT largely relates to concern over consulting companies placing H-1B workers at third-party client sites and the petitioning employer having control over those workers.

Paparelli told Bloomberg BNA he doesn't have high hopes that any of these issues will be addressed in the near future, even with new USCIS Director Leon Rodriguez on board as of July 9. “With all of the many problems that the agency has and the failure of Congress to enact immigration reform,” changes to the H-1B visa program won't be high on Rodriguez's agenda, he said.

Nor has Congress held a “serious oversight hearing” on how the USCIS adjudicates H-1B visa petitions,

Paparelli said.

'High-Stakes Problem.'

Paparelli said RFEs and denials are “frustrating” for employers because they need the jobs filled now. Technically they can file a motion to reconsider or appeal to the AAO, but neither process is treated “with any reasonable speed” that would allow the employer and prospective worker to begin employment, he said.

He added that “it’s a very high-stakes problem” for foreign workers who, depending on their current immigration status, may have to depart the country before their cases are resolved, or else start clocking “unlawful presence time,” even if their bids for H-1B positions are legitimate.

Under the Illegal Immigration Reform and Immigrant Responsibility Act, six months of unlawful presence subjects an immigrant to either a three- or a 10-year waiting period outside the U.S.—depending on length of time in that status—before he or she can re-enter the country.

Algase agreed, adding that even the AAO’s decisions can be sufficiently narrow as to require an employer to go to federal court to resolve the issue. And “not everyone has the patience or the resources to go through that,” he said.

Therefore, if an H-1B petition is denied on the merits, the employer and worker are “back to square one” because reapplication isn’t possible with the H-1B cap having already been reached for the fiscal year, Algase said.

That means they have to reapply the following fiscal year, and there’s no guarantee the petition will be selected in the lottery the next time around, he said.

The USCIS received 124,000 petitions for the total 85,000 visas in 2013 (67 DLR A-10, 4/8/13) and 172,500 petitions for 85,000 visas in 2014 (66 DLR A-9, 4/7/14), prompting a lottery in both years. With next year likely to bring even more petitions for the same number of visas, losing the H-1B lottery will become an even more distinct possibility for petitioners.