Federal Appeals Court Solidifies Straightforward View Of H-1B Specialty Occupation Definition

Insights
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A federal appeals court just confirmed an uncomplicated interpretation of the "specialty occupation" definition for H-1B visas, clearing the way for a wide variety of industries to seek these highly sought-after visas. At the same time, the 9th Circuit Court of Appeals' December 16 ruling offers employers an additional asset in their toolbox when it comes to challenging denied H-1B applications. What do you need to know about this decision and how might it work in your favor?

The Decision

On December 16, 2020, the 9th Circuit Court of Appeals issued a precedential decision in *Innova Solutions, Inc. v. Baran*, holding that the Bureau of Labor Statistics (BLS)'s Occupational Outlook Handbook (OOH) listing of computer programmer as an occupation that normally requires a bachelor's degree means that the job plainly meets the H-1B "specialty occupation" definition.

Federal regulations provide four independent means for a position to meet the H-1B specialty occupation definition. The most common one is that the occupation normally requires a bachelor's degree. To apply this requirement, the U.S. Citizenship and Immigration Services (USCIS) has traditionally relied on the OOH, which is a BLS publication with basic information such as entry requirement and job duties for many common occupations. The USCIS's utilization of the OOH, however, has not always been employer-friendly. In most situations, the USCIS argues that when the OOH says many employers typically require a bachelor's degree for a certain position while some do not, this would serve as proof that a bachelor's degree is not normally a requirement for the occupation. That's what happened in this case: the USCIS had earlier held that a computer programmer was not entitled to receive the benefit of the designation because of this alleged uncertainty, leading to a court clash over whether the programmer was entitled to H-1B status.

The employer affected by this decision, Innova Solutions, Inc., directly refuted the USCIS's logic. And the appeals court agreed, holding that the USCIS's misinterpretation of the OOH was arbitrary, and that the OOH – which the USCIS has routinely relied upon to deny cases – is key evidence that the occupation meets the H-1B requirement. The court found there is no logical space between the commonly used words such as "normally," "most," and "typically." If a bachelor's degree is "typically" required, the court held, it is the same as saying that a bachelor's degree is "normally" required.

Impact Of Ruling Rangers Far Beyond Computer Programmers

With this case, the OOH has now become a piece of favorable evidence for the employers. While the USCIS has lost many cases regarding its utilization of the OOH in the federal district courts across the country, this is the first federal circuit court decision on this issue. The significant impact in this case is that the straightforward reading of the OOH language and the regulatory definition in specialty occupation is now a firmly settled precedent – at least in the 9th Circuit and in all of the states under its jurisdiction (including California, Washington, Oregon, Arizona, Nevada, and several other western states).

The implication does not stop at the computer programmer occupation. The OOH's straightforward description can now be used for the benefit of many other occupations that regularly receive USCIS scrutiny. For example, in the past few years, the USCIS has routinely scrutinized and denied many H-1B cases for the market research analyst occupation simply because the OOH says: "market research analysts typically need a bachelor's degree in market research or a related field."

Via a FOIA request that Fisher Phillips obtained from the BLS, it became clear that the agency was aware of the impact such a ruling could have. The public records request revealed that a Supervisory Appeals Officer at the USCIS Administrative Appeals Office (AAO) reached out to the BLS in April 2012 and asked it to revise its OOH language regarding market research analyst to increase the chances of an H-1B denial, complaining that the then-current description may lead to "petitions for such occupation all be approved." The request emphasized: "As this is currently the H-1B filing season for the agency, a prompt response will be greatly appreciated." The BLS complied with the request and revised its description by inserting the word "typically."

Regardless whether it is proper for an appeals body of one agency to ask another agency to create better evidence to help deny appeals, the 9th Circuit decision in the *Innova Solutions* case has rendered this attempt futile. The court has made it clear: the regulation only requires proof that a degree is "normally" required; the OOH states a degree is "typically" required; it is then a commonsense conclusion that the OOH language meets the regulatory requirement.

What Does This Mean For Employers?

Besides the fact that employers can now use the OOH language as an offensive tool against the USCIS to prove eligibility for H-1B visas, this decision opens up another avenue for employers to challenge petition denials. An H-1B petition denied solely because of the OOH issue described above can potentially enjoy an even smoother ride in the federal district courts both in and outside the 9th Circuit thanks to this decision. Employers should consider federal court litigation as a potentially more effective remedy than administrative appeal.

When an H-1B petition is denied, employers can choose to either appeal the denial to the AAO, or directly sue the USCIS in the federal court. Because the regulatory language for an administrative appeal to the AAO is not mandatory, an employer can skip the AAO to go directly to the federal court. With the AAO's current lengthy processing time (completing less than 35% of H-1B appeals within 180 days), and its lack of impartiality, going to the federal court armed with this sweeping decision of

the 9th Circuit may be a more effective appeal strategy.

The USCIS has routinely stated that it is not bound by federal district court decisions in other H-1B cases because district court decisions are case-by-case in nature. This 9th Circuit decision, however, changes the calculus, because it is circuit-wide controlling precedent. It clarifies for both the federal district courts in the 9th Circuit's jurisdiction and the USCIS how to give the proper weight to the OOH language. While not every H-1B denial will end up in the federal court, those with the OOH issue that do go there can have better confidence in its chance to prevail.

Conclusion

We will continue to monitor further developments and provide updates on this issue, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or any attorney in our Immigration Practice Group.

This Legal Alert provides an overview of a specific federal court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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