

Litigation may be Key in Response to Rising Denials of Employment-Based Visas. What Strategies Should Employers Consider when Hiring or Retaining Noncitizen Professionals?

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by Anna Boyle

Many U.S. employers have recently experienced frustration over legal obstacles to keeping high quality foreign-national employees. These valuable employees have often been with the company since finishing a degree and sometimes even interning with the employer. Other employers experience delays in hiring foreign nationals needed for specialized positions despite the obvious qualifications of the candidate.

These employers' frustrations reflect the current climate of immigration law and policy. The standards applied by the U.S. Citizenship and Immigration Service (USCIS) in adjudicating H-1B temporary work visa petitions have been shifting, both formally and informally, to the detriment of businesses seeking to hire or retain noncitizen professionals in specialty occupations—as well as those they would seek to employ. This, along with other similar trends in how the executive branch enforces immigration laws, requires that employers and their legal advocates test new strategies on behalf of their clients. **If USCIS denies your H-1B petition and your awesome employee may have to leave the country, what options do you have?**

Immigration lawyers, who typically fight their battles within administrative agencies, are increasingly looking to federal courts for judicial review of agency actions. One recent case highlights that strategic litigation can have a powerful impact, and suggests that specialized litigators may be a vital addition to the legal toolbox for businesses that depend on international hiring. See *RELX, Inc. (d/b/a LexisNexis USA) v. Baran*, 2019 U.S. Dist. LEXIS 130286.

Subhasree Chatterjee earned her bachelor's degree in computer science and engineering in her home country of India in 2011, and her master's degree in business administration and analytics in the United States, from the University of Ohio, in 2016. She also has several years of professional experience in data analytics in both India and the United States.

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Chatterjee began working as a data analyst for LexisNexis at its Raleigh, North Carolina Center for Excellence in 2017, at which time she was authorized to work in the United States because of the Optional Practical Training (OPT) associated with her F-1 student visa. But Chatterjee's student visa and OPT was set to expire on August 3, 2019.

Lexis filed a petition for Chatterjee to remain in the United States through the H-1B nonimmigrant visa program so that she could continue in her role as data analyst supporting the company's "flagship" product, LexisAdvance. The government denied the petition on the grounds that the data analyst position was not a "specialty occupation."

By statute, a specialty occupation is "an occupation that requires theoretical and practical application of a body of highly specialized knowledge; and attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States." 8 U.S.C. § 1184(i)(1). And by regulation, the position must meet at least one of four criteria to qualify as a specialty occupation: (1) a baccalaureate or higher degree 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 the position is so unique or complex that only an individual with a degree can perform it; (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 the knowledge required to perform the duties is usually associated with attainment of a baccalaureate degree or higher. 8 C.F.R. § 214.2(h)(4)(iii)(A).

In support of the H-1B petition, Lexis and Chatterjee submitted what the court would later call a "mountain of evidence" on three out of these four regulatory grounds, any one of which would have been sufficient to qualify the data analyst position as a specialty occupation. They responded to a request for redundant evidence and, following an initial denial, pursued administrative reconsideration. These efforts were unsuccessful.

To justify its denial, the government asserted, contrary to its regulations and past practices, that a specialty occupation is one requiring a degree from a *particular* academic discipline. In other words, for example, if the position could be filled by someone with a degree in computer science *or* engineering, then it could not be a specialty occupation.

Exactly one month before Chatterjee's work authorization would expire, she and Lexis filed a lawsuit in federal district court in Washington D.C., serving USCIS, the Department of Homeland Security, and leaders of each, challenging the denial as a violation of the federal Administrative Procedure Act (APA) and seeking a preliminary injunction.

Given the extremely short timeline before Chatterjee's status would expire, the court placed the case on an expedited schedule to resolve the matter on its merits, skipping over the motion for preliminary injunction. Plaintiffs moved for summary judgment. The government spontaneously reopened the H-1B petition and then moved to dismiss the lawsuit, arguing that the reopening deprived the court of jurisdiction because plaintiffs' claims were no longer ripe.

On August 1-2 (the two days immediately preceding the expiration date of Chatterjee's work authorization), the court held a hearing on both motions. The government's motion was denied from the bench. In a subsequent memorandum, District Judge Emmet Sullivan concluded that the government's "position [was] untenable," that the "decision was not based on a consideration of the relevant factors and was a clear error of judgment," and that "USCIS acted arbitrarily, capriciously, and abused its discretion." *RELX, Inc.*, 2019 U.S. Dist. LEXIS 130286, *28, 31 (quotations omitted).

At the same time, plaintiffs' summary judgment motion for an order directing USCIS to grant Lexis's petition and place Chatterjee on H-1B status was granted—and just in time. Chatterjee was able to keep her job and remain in the United States, and Lexis continued business as usual with its data analytics team at full strength.

In the current market, employers and their legal counsel need to use all avenues available under the law to help hire and retain top talent. Litigation is not only an option, but may be a necessary addition to the overall toolbox of talent management strategies, especially when it comes to international hiring.