Major H-1B Victory for the IT (and Consulting) Industry Against the USCIS - ITSERVE ALLIANCE, INC. Lawsuit

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Submitted by Rajiv S. Khanna on Mar 10th 2020

On 10 March 2020, a Washington DC Federal Court overturned the USCIS highly restrictive standards applied to the consulting industry. This decision has a major positive impact on the IT industry.

Judge Rosemary M. Collyer held that the USCIS must not administer justice through random memoranda and must, if it wishes to change the regulations, do so through a formal process. In fact, the USCIS seems to have illegally targeted the IT industry (?special treatment?):

?Congress designed the H-lB visa in 1990 to permit speedy processing and temporary placement of foreign workers in specialty occupations as needed by U.S. employers. CIS has selected H-1B visa petitions from IT consulting businesses, which hire temporary foreign workers and place most of them with third parties for assignments of less than three years, for special treatment with the effect of dramatically slowing the processing of

such visa petitions and reducing the accessibility by U.S. employers to such workers. These facts are not contested. The question is whether, in so doing, CIS actions were consistent with law and/or required formal rulemaking. The Court finds that CIS has exceeded the law and was required to engage in formal rulemaking.?

The court held that:

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2. CIS 2018 Policy Memorandum (PM-602-0157) is invalid. This is the memo entitled "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" requiring employers to submit an itinerary for placements.

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2. The infamous Neufeld Memo of 2010 that created a new definition of employer-employee relationship is invalid as against the plaintiffs (in effect, anyone who sues over this requirement is likely to prevail). The regulations clearly state that the employer-employee relationship can be demonstrated by many factors, including:

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? ...that the employer "may hire, pay, fire, supervise, or otherwise control the work of [the] employee." 8 C.F.R. § 214.2(h)(4)(ii). Therefore, an employer-employee relationship is evidenced by some aspect of "control" which may be shown in various

ways, be it the ability to hire, to pay, to fire, to supervise, or to control in another fashion. The use of "or" distinctly informs regulated employers that a single listed factor can establish the requisite "control" to demonstrate an employer-employee relationship. This formulation makes evident that there are multiple ways to demonstrate employer control, that is, by hiring or paying or firing or supervising or "otherwise" showing control. In context,"otherwise" anticipates additional, not fewer, examples of employer control.

In other words, the employers should not be required to prove their control. Any one or more of these factors are enough if the employer may: hire, pay, fire, supervise, or otherwise control the work of [the] employee.

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2. If the USCIS wishes to grant H-1B approvals for periods less than 3 years (or implicitly the periods requested by petitioners), it MUST articulate specific reasons for the shorter duration. The court noted:

?The statute requires that the petitioning employer only employ those who are qualified in specialty occupations. Nothing in its definition requires specific and non-speculative qualifying day-to-day assignments for the entire time requested in the petition. While an H-1B visa holder who works in a single location in a specialty occupation is assumed by CIS to receive qualifying daily assignments, CIS requires Plaintiffs to prove, by a preponderance of the corroborated evidence, that the daily assignments of their H-1B visa holders will be in their specialty occupation. This begs a rational explanation: very few, if any, U.S. employer would be able to identify and prove daily assignments for the future three years for professionals in specialty occupations. What the law requires, and

employers can demonstrate, is the nature of the specialty occupation and the individual qualifications of foreign workers.?

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2. There are indications in this decision that the Court is not buying the USCIS restrictive definition of ?specialty occupation.? The USCIS is likely to lose many more cases on this issue.

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Clearly, the USCIS had been running amok for too long and needed to be reigned in, which the court has done in this laudable decision.

One golden take away from this case, other similar cases and from our own experience with litigation against the government is: do NOT suffer injustice. Take them to court.

Nonimmigrant Visas:
H-1 Visa [2]

Links:
[1] https://immigration.com/blogs/major-h-1b-victory-it-and-consulting-industry-against-uscis-itserve-alliance-inc-lawsuit
[2] https://immigration.com/visa/nonimmigrant-visas/h-visa/h-1-visa