

US court sets aside plea, IT service companies will need to file more evidence when hiring H-1Bs

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(Representative image)

MUMBAI: A group of companies engaged in the information technology (IT) services space were unable to convince a US district court that requirements for submitting detailed evidence for H-1B applications, where employees are placed at third-party client sites, has caused them irreparable harm.

On February 22, 2018, the US Citizenship and Immigration Services (USCIS), had placed a greater burden on those companies which placed their H-1B employees at third party client sites – this is a typical business model of IT services and consulting companies.

A plethora of evidence, which includes detailed itineraries of the H-1B workers both about the duration and location of the client sites, corroborated with client contracts is required to be submitted with the H-1B visa applications. As was expected, after issue of this memo, the rate of denial of H-1B applications by IT service companies was significantly higher.

With nearly 70% of H-1B visas (out of the annual quota of 85,000) being allotted to Indians especially those in the tech sector, the higher denials dampened the dreams of many who aspired to work in the US. In fact, as the requirements also applied for H-1B extensions, it also impacted those already working in the US.

The petition pointed out that of the top ten H-1B filers for the fiscal year 2018, seven were IT consulting companies, whereas the other three used onsite workers only. TOI analysis, which was published on February 26, 2019 + also corroborates that companies such as Google, Amazon, and Microsoft saw an approval rate of 98-99%, whereas for IT consulting companies, including India's leading companies the approval rate was much lower (In other words, denial of H-1B application was on the higher side). For this fiscal, Wipro and TCS had an approval rate of 82% and Infosys 74%.

The plaintiffs, comprising of Kollasoft Inc a US headquartered company, which provides IT solution services, and ten other companies having a similar business model, in their petition stated that the February 2018 policy memo promulgated two new substantive rules. They termed these rules as 'Special Work Assignment Rule' and 'Actual Control Rule'. This policy memo was introduced without undertaking a proper notice-and-comment procedure. This procedure calls for publication of a proposed rule, inviting public comments (generally the window is open for up to 180 days) and examination of the comments.

The denials of 27 unique H-1B visa applications were based on the illegal or ultra vires policy memorandum, they submitted. However, their plea for a preliminary injunction to keep these visa applications open, was dismissed by the Arizona district court.

"At this stage, the February 2018 memo still stands and USCIS can be guided by it when employers file H-1B petitions on behalf of workers assigned to third- party client sites," Cyrus Mehta, founder of an immigration law firm based in New York, told TOI.

In a reply to the Rajya Sabha last November, external affairs minister, S Jaishankar had referred to the " ... More complex H-1B application process, due to recent administrative changes that have increased documentation requirements ... " He has also publicly reiterated that US should not obstruct the flow of talent from India, as it an important part of the economic co-operation and acts as a strategic bridge between the two countries.

Arlington based, Rajiv S. Khanna, managing attorney at Immigration.com views that the policy memo threatens not just a few H-1B cases but the very existence of several IT service and consulting companies, because of the atmosphere of high uncertainty of approval of H-1B applications.

"The February 2018 memo appears to be based more on perception than reality. USCIS is under the impression that all H-1B applications when they involve third-site placements are unreliable. The degree of evidence required has been illegally elevated to a standard that is not provided for in the regulations," states Khanna.

Mehta adds, "The memo gives additional ammunition to the USCIS to question and deny H-1B cases filed on behalf of workers assigned to client companies, even as this business model is legitimate. The USCIS can ask for harassing details from the end-client regarding the

nature and duration of the assignment, at times clients may be reluctant to co-operate resulting in denial of the H-1B application. Or the visa is approved, but for a very short duration, if the work order does not have a longer end date, this results in seeking extensions. The February 2018 has caused havoc in the lives of H-1B workers when they apply for extensions.”