Explain H-1B delays & denials, US court orders immigration agency

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May 15, 2019

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(Representative image)

MUMBAI: A US district court judge has recently ordered the United States Citizenship and Immigration Services (USCIS) to provide explanations for the massive delays and denials in H-1B adjudications. USCIS will also have to provide explanations regarding the change in its rule that has adversely impacted IT service companies. Explanations from the USCIS are due in two weeks.

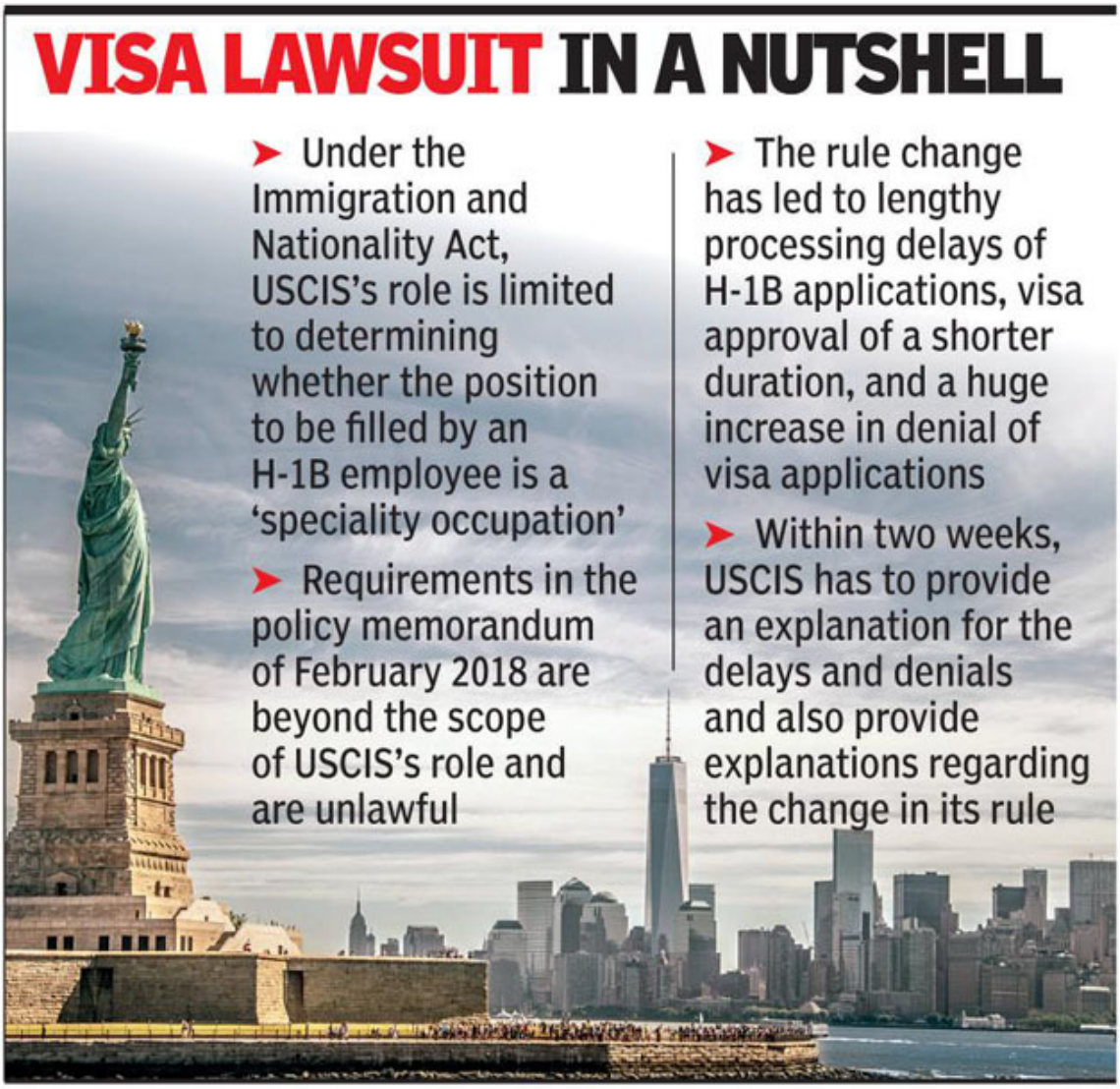
The matter pertained to a consolidated hearing for lawsuits filed by ITServe Alliance, a large coalition of IT service companies in the US, and several of its member companies, that had petitioned against the rule change.
TOI in its edition of February 26 had analysed the top 30 employers, which had sponsored H-1B visas and had found that the H-1B visa denial rates for IT service (consulting) companies for the fiscal year ended September 30, 2018 were on the higher side, ranging from 20 to 80%. For non-service companies, the denial rates were around 1%.

USCIS sought additional info for 60% H-1B applications last quarter

The genesis of this lawsuit pertains to a policy memorandum issued by USCIS in February 2018, which imposed numerous new requirements on IT service companies which place their H-1B employees at third party client sites.

These companies while applying for new H1-B visas or even when renewing H-1B visas of existing employees had to prove 'guaranteed specific and non-speculative work assignments' for the entire three-year visa duration. A host of evidence in the form of detailed customer contracts and itineraries of employees had to be provided. The sponsoring employer also had to demonstrate that the 'employer-employee relationship' would be maintained even if the employee was working at a client-site.

These changes led to lengthy processing delays of H-1B applications, approval of H-1B visas for a shorter duration - ranging from a few days to a few months as opposed to the permissible three-year period and a huge increase in denials of H-1B visa applications.



This fall-out led to the lawsuits being filed. The petitions by ITServe Alliance and its member companies pointed out that USCIS evaded proper administrative rule-making procedures, including a public notice and comment period.

Vinod Babu Uppu, president of ITServe Alliance told TOI: "USCIS's policies under the current administration are clearly undermining the H-1B program as it was intended in the legislation. This is creating unexpected levels of uncertainties for both US employees and employers, especially in the IT service sector."

Judge Rosemary M. Collyer, who heard the matter has called the policy change 'very troubling', states Berry Appleman & Leiden, an immigration law firm, in its client-newsletter. "The judge expressed skepticism of the government agency's argument that the change merely re-interpreted existing policy," it adds.

A statement issued by ITServe Alliance, says that the district court judge did not seem persuaded by the arguments of USCIS regarding the legality of the current application of the 'employer-employee relationship' test, as well as the requirement to prove 'guaranteed work assignments'.

The judge noted that the regulation defining a US employer appears to include any 'employer' who hires, fires, pays, 'or' otherwise controls the beneficiary (which is the H-1B visa holder). The judge told the government agency that they have replaced the plain language of the regulation with a new rule that demands proof of all of the factors.

As regards the need to prove 'guaranteed specific and non-speculative work assignment' for the entire three year duration of the H-1B visa, the district court pressed upon the government agency for an explanation.

The judge observed that both the labour condition application form and the employer letter submitted with the H-1B application prove there is a guaranteed job, which satisfies the statutory requirement. The court noted that it is unreasonable to demand proof of guaranteed work assignments for a three year period of time.

"The law permits H-1B visa holders to be non-productive as long as they are paid. It is important to note that employers cannot bench employees without payment of their full salaries," explains Rajiv S. Khanna, managing attorney at Immigration.com

While the judge has explicitly criticised the arguments put forth by USCIS, it is too early to predict a decision, states Berry, Appleman & Leiden. "Our fight is to safeguard the business interests of small-medium IT consulting and services organizations and we are hopeful that this step will give positive results", says Uppu.