

INTRODUCTION

1. This suit challenges the government’s arbitrary and unlawful decision to deny an extension of an employment-based immigration status (H-1B) to a valued employee. Plaintiff Balfour Beatty Construction LLC (BBC), a major commercial construction company attempting to maintain its U.S.-based workforce, and Plaintiff Anubhav Shandilya, a BBC employee for more than 6 years who seeks to build his life in the United States with his wife and two United States citizen children, challenge Defendants’ unlawful denial of a Form I-129, Petition for Nonimmigrant Worker. BBC filed this petition on behalf of Mr. Shandilya to permit him to continue working while he waits in line for an immigrant visa number to become available so that Mr. Shandilya and his wife can apply for permanent residence (for a “green card”). To permit Mr. Shandilya to maintain his status and continue working during the multiyear wait for an immigrant visa, BBC filed the nonimmigrant petition at issue here with Defendant United States Citizenship and Immigration Services (USCIS), which included a request for extension of Mr. Shandilya’s stay in the United States in H-1B status (hereafter referred to collectively as the “2017 H-1B Extension Petition”).

2. Mr. Shandilya’s only option for employment with BBC while he waits to move forward with the permanent residence process is extension of his H-1B status. Since the denial of the 2017 H-1B Extension Petition, Mr. Shandilya can no longer work in the United States and he and his wife are faced with the decision to uproot their lives and forfeit their future and that of their U.S. citizen children to live and thrive in the United States. Similarly, due to the erroneous denial of the 2017 H-1B Extension Petition, BBC is deprived of the needed services of Mr. Shandilya.

3. An H-1B visa classification permits a foreign national to work in a position requiring a theoretical and practical application of a body of highly specialized knowledge and a bachelor's or higher degree in the specific specialty (or its equivalent) as the minimum for entry into the occupation in the United States. USCIS previously approved two petitions for an H-1B visa classification in a specialty occupation position filed (initially by Balfour Resource Group and then by Plaintiff BBC) on Mr. Shandilya's behalf in the occupational classification of Construction Managers.

4. On September 7, 2017, Plaintiff BBC filed the 2017 H-1B Extension Petition, so that Plaintiff Shandilya could begin working as an Assistant Project Manager, which was a promotion for him. Plaintiff Shandilya had to stop working when Defendant USCIS denied the 2017 H-1B Extension Petition on August 13, 2018.

5. Despite record evidence that Plaintiff BBC's Assistant Project Manager job is in a specialty occupation, Defendant USCIS erroneously denied the 2017 H-1B Extension Petition because it erroneously concluded, based on its misinterpretation of the Department of Labor's Occupational Outlook Handbook (OOH), that the Construction Managers occupation is not a specialty occupation. This denial is representative of a recent adjudicative approach in which Defendant USCIS misinterprets the OOH, elevates that misinterpretation over probative evidence establishing eligibility for H-1B classification, and ignores a petitioning employer's demonstration of H-1B eligibility pursuant to controlling regulatory criteria.

6. By ignoring Plaintiff BBC's evidence that the Assistant Project Manager job met at least one of the alternative regulatory criteria for a specialty occupation, and instead applying its misinterpretation of the OOH entry for Construction Managers to each criterion for which Plaintiff BBC offered evidence, Defendants acted in an arbitrary and capricious manner and

contrary to law. As such, the Court should order Defendants to refrain from taking any adverse action against Plaintiff Shandilya while this suit is pending, vacate the denial, approve the 2017 H-1B Extension Petition and extend the H-1B status of Plaintiff Shandilya without interruption.

JURISDICTION

7. This case arises under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* and the APA, 5 U.S.C. § 701 *et seq.* This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). This Court also has authority to grant declaratory relief under 28 U.S.C. §§ 2201-02, and injunctive relief under 5 U.S.C. § 702. There exists between the parties an actual and justiciable controversy in which Plaintiffs seek declaratory and injunctive relief to protect their legal rights. The United States has waived its sovereign immunity under 5 U.S.C. § 702.

VENUE

8. Venue in this judicial district is proper under 28 U.S.C. § 1391(e)(1)(A), because this is a civil action in which the Defendants are an agency of the United States and an officer of the United States, acting in his official capacity, and they reside in this District.

EXHAUSTION OF REMEDIES

9. Defendant USCIS' August 13, 2018 denial of Plaintiff BBC's 2017 H-1B Extension Petition constitutes a final agency action under the APA, 5 U.S.C. § 701, *et seq.* Neither the Immigration and Nationality Act nor DHS regulations at 8 C.F.R. § 103.3(a) require an administrative appeal of the denial. Accordingly, Plaintiffs have no administrative remedies to exhaust.

PARTIES

10. Plaintiff Anubhav Shandilya, a citizen of India, earned a Master of Science degree in Construction Management from Michigan State University in 2008. He currently resides in the United States with his wife, who is dependent for her immigration status on Plaintiff Shandilya's continued lawful immigration status, and his two U.S. citizen children. He is the beneficiary of the 2017 H-1B Extension Petition. If Defendant USCIS had approved the 2017 H-1B Extension Petition for the validity period Plaintiff BBC requested, Plaintiff Shandilya would have been authorized to work for BBC in H-1B status through August 17, 2020. Instead, Plaintiff Shandilya had to end his employment with BBC when USCIS denied the Petition on August 13, 2018, and he no longer has authorization to work in the United States. At that time, Mr. Shandilya was working on a BBC project for the construction of a 25-story residential tower with commercial space on the ground floor in Dallas, Texas.

11. Plaintiff BBC, with its principal place of business located at 3100 McKinnon Street, Dallas, TX 75021, is a commercial construction company which employs approximately 2,500 employees in the United States and had gross annual revenue of \$3.8 billion for the most recent tax year. Plaintiff BBC finances, develops, builds, and maintains complex infrastructure of vital importance to the United States, such as transportation, power, and utility systems and civic and commercial buildings. Plaintiff BBC's recent projects include the National Science Foundation headquarters in Alexandria, Virginia; an expansion of an acute care hospital in Silverdale, Washington; a California water-treatment plant; a hangar project and the Wounded Warriors Headquarters at Camp Pendleton in Oceanside, California; and a Marriott Marquis-branded hotel in Houston, Texas. With its prior experience in constructing hospitals, BBC

recently was awarded a major hospital construction project in the Dallas area. Plaintiff BBC filed the 2017 H-1B Extension Petition in order to continue employing Plaintiff Shandilya.

12. Defendant USCIS is a component of the Department of Homeland Security, 6 U.S.C. § 271, and an “agency” within the meaning of the Administrative Procedure Act (APA), 5 U.S.C. § 551(1). USCIS is responsible for the adjudication of immigration benefits, including nonimmigrant visa petitions, and it denied the 2017 H-1B Extension Petition.

13. Defendant L. Francis Cissna is the Director of USCIS. In this role, he oversees the adjudication of immigration benefits and establishes and implements governing policies. He has ultimate responsibility for the adjudication of Plaintiff BBC’s Petition and is sued in his official capacity.

LEGAL BACKGROUND

H-1B Petition Process

14. Section 101(a)(15)(H)(i)(b) of the INA provides for the admission into the United States of temporary workers sought by petitioning U.S. employers to perform services in a specialty occupation. 8 U.S.C. § 1101(a)(15)(H)(i)(b). This nonimmigrant classification is commonly referred to as “H-1B.”

15. A “specialty occupation” is one that requires the “(A) theoretical and practical application of a body of highly specialized knowledge, and (B) 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).

16. In order for a foreign national to receive an H-1B classification, a U.S. employer must file a nonimmigrant visa petition on the foreign national’s behalf with USCIS. If the foreign national, like Plaintiff Shandilya, is already in the United States in H-1B status, the petitioning

employer also may designate in the petition that the foreign national is requesting an extension of stay in H-1B status. *See* Form I-129, Petition for a Nonimmigrant Worker, Part 2, #4.c.

17. Pursuant to statute, foreign nationals who were “previously issued a visa or otherwise provided [H-1B] nonimmigrant status” can begin working when the U.S. employer files an H-1B petition, rather than having to wait for petition approval, provided the petition is non-frivolous and other requirements are met. *See* 8 U.S.C. § 1184(n). The employment authorization continues until USCIS adjudicates the petition. *Id.* During this period, the foreign national is not in H-1B status, but in a “porting” status. If USCIS approves the H-1B petition with an extension of stay, the foreign national resumes his or her H-1B status. If USCIS denies the petition, the statutory “porting” employment authorization ends. *See id.*; 8 C.F.R. § 214.2(h)(2)(i)(H)(2). This “porting” provision applies to a petition filed by an employer for new H-1B employment and, as occurred here, to “a petition for new employment with the same employer, with a request to amend or extend the H-1B nonimmigrant’s stay....” *See* 8 C.F.R. § 214.2(h)(2)(i)(H)(1)(ii).

18. The maximum period of stay for a foreign national in H-1B status is generally limited to six years. 8 U.S.C. § 1184(g)(4). However, in recognition of backlogs in immigrant visa number availability,¹ Congress enacted provisions allowing for the extension of H-1B status if the foreign national meets certain requirements associated with the process for acquiring lawful permanent residence. Relevant here, a beneficiary of certain employment-based immigrant visa petitions—such as that filed by BBC on behalf of Mr. Shandilya and approved by USCIS—who is eligible for lawful permanent residence but for the fact that a visa is not yet

¹ Because Congress has set annual and per country limits on the number of visas available in each employment-based immigration visa category, *see* 8 U.S.C. §§ 1151-1153, there are too few visas available to meet the demand and a backlog exists.

available for his or her visa classification, may be granted an extension of stay for up to three-years. *See* § 104(c), American Competitiveness in the Twenty-First Century Act (AC21), Title 1, § 104(c), Pub. L. 106-313 (Oct. 17, 2000). USCIS may grant additional extensions in three-year increments until it adjudicates the foreign national's application for permanent residence. *Id.*

H-1B Requirements

19. For an H-1B classification, USCIS determines whether the petitioning employer's job qualifies as a specialty occupation and whether the foreign national on whose behalf the petition was filed, known as the beneficiary, is qualified to perform the job duties required by the specialty occupation. *See* 8 C.F.R. §§ 214.2(h)(4)(i)(A)(1), (h)(4)(iii)(B)(3).

20. The agency regulation provides:

(A) Standards for specialty occupation position. To qualify as a specialty occupation, the position must meet one of the following criteria:

- (1) A baccalaureate or higher degree or its equivalent 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, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- (3) The employer normally requires a degree or its equivalent for the position; or
- (4) The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

21. In assessing whether a position meets the first criterion, i.e., that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, USCIS adjudicators routinely consult the OOH. The OOH is a DOL reference manual, updated every two years, which provides profiles about hundreds of

occupations that provide a majority of the jobs in the United States. The occupational profiles describe, among other details, the typical education and training needed to enter the occupation.

FACTUAL ALLEGATIONS

22. Plaintiff Shandilya first began working in the United States in H-1B status in 2010. He began his employment with the entity that preceded Plaintiff BBC in June 2012. At the time BBC filed the 2017 H-1B Extension Petition, Mr. Shandilya had approval from Defendant USCIS to work for BBC as an Equipment Logistics Engineer through June 17, 2018. The position of Equipment Logistics Engineer was in the occupational classification of Construction Managers. Plaintiff BBC filed the 2017 H-1B Extension Petition so that Mr. Shandilya could be promoted to the position of Assistant Project Manager, also in the Construction Managers occupational classification. Plaintiff Shandilya's wife also filed an application to extend her status as the spouse of an H-1B worker, as her stay in the United States is dependent on his.

23. Plaintiff BBC employs Assistant Project Managers to facilitate complex financial-, procurement-, contract-, and scheduling-related work and to ensure projects involving multi-million-dollar budgets meet significant project-delivery obligations and its clients' expectations.

24. Plaintiff Shandilya was able to work for Plaintiff BBC in the Assistant Project Manager position in a "porting status" from September 7, 2017, when the 2017 H-1B Extension Petition was filed, until Defendant USCIS denied the 2017 H-1B Petition Extension on August 13, 2018. *See* 8 C.F.R. § 214.2(h)(2)(i)(H)(1)(ii) and ¶¶ 17-18, *supra*.

25. In the 2017 H-1B Petition Extension, Plaintiff BBC included a request for extension of Plaintiff Shandilya's stay in H-1B status until August 17, 2020, under the H-1B extension provision for a foreign national unable to apply for permanent residence because a visa

is not yet available due to the per country limitation applicable to him. *See* AC21, § 104(c).

Based upon his place in the visa queue, Plaintiffs anticipate that it will be several years before visas become available for Mr. Shandilya and his wife.

26. Without an extension of his H-1B status, Plaintiff Shandilya has no lawful status to live or work in the United States. He and his wife are faced with the terrible prospect of having to uproot the lives they have built here and move their U.S. citizen children from the only home that they have known.

27. In its initial letter in support of its 2017 H-1B Extension Petition (“original support letter”), BBC set forth information concerning company background; the complexity of the Assistant Project Manager position responsibilities; that a bachelor’s degree in construction management or a related field was a minimum requirement for entry into the position; Mr. Shandilya’s Master of Science in construction management academic program at Michigan State University, which included coursework in construction systems, advanced project scheduling, advanced cost estimation and analysis, construction project management and information systems, and supply chain management; and Mr. Shandilya’s professional experience in the construction management sector dating back to 2010.

28. Plaintiff BBC confirms in its original support letter that, among other duties, Plaintiff Shandilya would be responsible for contributing to project financial responsibilities, including determining and allocating human capital, tool, equipment, materials, and internal service resources; preparing reports related to project costs; creating and managing project budgets; preparing bid packages; comparing actual versus estimated cost figures; and managing the project closeout to settle financial obligations, demobilize resources, and ensure project transition.

29. On April 24, 2018, Defendant USCIS issued a request for evidence (“RFE”) in which it alleged the construction manager occupation does not require a minimum of a baccalaureate degree in a specific specialty according to the OOH, and it averred that the evidence submitted in BBC’s initial filing was insufficient to establish that the Assistant Project Manager was a specialty occupation.

30. In its RFE response, filed on or about July 2, 2018, Plaintiff BBC submitted evidence that the Assistant Project Manager met the following regulatory criteria for being within a specialty occupation: (1) a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; (2) the degree requirement is common to the position in parallel positions among similar organizations; and (3) the employer normally requires a degree or its equivalent for the position. *See* 8 C.F.R. § 214.2(h)(4)(iii)(A)(1), (2) (the first alternative) and (3). Any one of these, standing alone, demonstrated that the position was a specialty occupation.

31. Among other evidence, BBC submitted a second supporting letter (“RFE response letter”). The RFE response letter elaborated that the minimum educational requirement for its Assistant Project Manager job is “a Bachelor’s degree in Construction Management, Engineering or related field. Our Bachelor’s degree requirement ensures that the individual has developed the appropriate level of technical and theoretical skill and knowledge regarding the planning, coordinating, budgeting, and supervising of construction projects.”

32. The RFE response letter also provided a job description for the Assistant Project Manager position in even greater detail, including the skills and knowledge required to perform each constituent job task along with a percentage of time to be spent on each job duty.

33. The RFE response letter identified 11 job advertisements that were representative of positions similar to BBC's Assistant Project Manager at companies similar to BBC. The letter confirmed the names of the companies along with a brief description of the services they provide, the number of individuals employed by the organizations, and the minimum educational requirements for the positions, which were consistent with Plaintiff BBC's minimum requirement of a bachelor's degree in Construction Management, Engineering or a related field.

34. The RFE response letter also identified seven employees that BBC employed in Assistant Project Manager jobs. Each employee possesses a bachelor's degree in construction management, engineering, or a related field.

35. BBC supported statements made in its RFE support letter with documentary evidence of the job postings with comparable organizations and where available, background information about the organizations; a previous position announcement for the Assistant Project Manager position and June 19, 2018 printouts of two job postings in the "careers" section of BBC's website for Assistant Project Manager positions similar to Mr. Shandilya's, , which confirmed a Bachelor's degree in construction management, engineering or a related field was a minimum educational requirement; and company profiles of seven BBC employees employed as Assistant Project Managers, confirming that each employee had a Bachelor's degree in construction management, engineering or a related field, along with wage statements confirming BBC's employment of those individuals.

36. On August 13, 2018, Defendant USCIS issued a decision denying BBC's 2017 H-1B Extension Petition for allegedly failing to establish that the Assistant Project Manager is in a specialty occupation. Its decision relied heavily on a misreading of the OOH entry for construction managers. The OOH states that:

Construction managers typically must have a bachelor's degree, and learn management techniques through on-the-job training. Large construction firms increasingly prefer candidates with both construction experience and a bachelor's degree in a construction-related field.

Although there are various ways to enter this occupation, it is becoming increasingly important for construction managers to have a bachelor's degree in construction science, construction management, architecture or engineering. As construction processes become more complex, employers are placing greater importance on specialized education.

37. As to the first regulatory criterion—that a baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the position—Defendant USCIS concluded that the OOH “does not indicate that a baccalaureate degree in a *specific* field of study is the minimum educational requirement for Construction Managers.” (Emphasis in original.) USCIS also said that Engineering is not a specific specialty because it includes “undifferentiated” engineering degrees.

38. As to the second regulatory criteria—that the degree requirement is common to the industry in parallel positions among similar organizations—USCIS concluded that the degree requirements in the job listings did not indicate that a degree requirement in a specific specialty is common. USCIS also again objected to an Engineering degree as undifferentiated. For the third criterion, that the employer normally requires a degree or its equivalent, USCIS again objected to an Engineering degree as undifferentiated and also questioned whether seven Assistant Project Managers was a large enough sample to demonstrate overall hiring practices.

39. Under 5 U.S.C. §§ 702 and 704, Plaintiffs have suffered a “legal wrong” and have been “adversely affected or aggrieved” by agency action for which there is no adequate remedy at law.

COUNT ONE

**Violation of the Administrative Procedure Act
5 U.S.C. § 701, et seq.**

40. Plaintiffs re-allege and incorporate herein by reference, as if fully set forth herein, the allegations in paragraphs 1-39 above.

41. A reviewing court shall “hold unlawful and set aside agency action . . . found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”
5 U.S.C. § 706(2)(A).

42. Defendants denied the 2017 H-1B Extension Petition solely on the ground that the evidence in the record was insufficient to establish that Plaintiff BBC’s Assistant Project Manager position is in a specialty occupation.

43. Plaintiff BBC submitted evidence demonstrating that the position satisfied three out of the four alternative regulatory criteria for demonstrating a specialty occupation. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1)-(4).

44. Defendants failed to properly consider all evidence, misread the OOH entry and erroneously concluded that a bachelor’s degree in a specific specialty was not normally required for the position. Defendants also erred in concluding that “engineering” was not a specific specialty because it encompassed a variety of subspecialties (such as chemical, civil, etc.). In so doing, Defendants erroneously ignored the evidence demonstrating that BBC’s requirement of an engineering degree as one alternative did not exist in a vacuum but as part of a construction-related field. Plaintiff BBC and similar companies in the industry are not considering types of engineering that do not include a body of specialized knowledge that can be theoretically and practically applied to construction.

45. Defendants acted arbitrarily, capriciously, and contrary to the law in violation of the APA by denying BBC's 2017 H-1B Extension Petition.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request that this Court:

1. Declare that Defendants' determination that evidence submitted by Plaintiff BCC in its 2017 H-1B Extension Petition was insufficient to establish that the Assistant Project Manager position is in a specialty occupation was arbitrary and capricious, and not in accordance with law, in violation of the APA. 5 U.S.C. § 706(2)(A);
2. Vacate the denial of the 2017 H-1B Extension Petition and remand this matter to Defendants with instructions to approve the Form I-129, Petition for Nonimmigrant Worker filed by Plaintiff BBC and extend Plaintiff Shandilya's stay in H-1B status until and including August 17, 2020, within ten days of the date of the Court's Order;
3. Award reasonable attorneys' fees and costs pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412(d), 5 U.S.C. § 504, or any other applicable law; and
4. Grant such other relief as the Court deems just, equitable and proper.

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Respectfully submitted,

s/ Leslie K. Dellon
Leslie K. Dellon (D.C. Bar #250316)
ldellon@immcouncil.org

Mary Kenney (#1044695)
mkenney@immcouncil.org

AMERICAN IMMIGRATION COUNCIL
1331 G Street, NW, Suite 200
Washington, DC 20005
Telephone: (202) 507-7530
Fax: (202) 742-5619

s/ Deborah J. Notkin
Deborah J. Notkin (NY0243)
dnotkin@bmkllp.com

Troy D. Palmer (NY0276)
tpalmer@bmkllp.com

BARST MUKAMAL & KLEINER LLP
2 Park Avenue, 19th Floor
New York, New York 10016
Telephone: (212) 686-3838
Fax: (212) 481-9362

Attorneys for Plaintiffs