

# RHODE ISLAND Lawyers Weekly

## Denial of H-1B visa ruled 'arbitrary and capricious'

By: Barry Bridges April 16, 2020

A federal judge has determined that the general operations manager of a multi-location restaurant business is engaged in a "specialty occupation" as defined in 8 U.S.C. §1184 for purposes of an H-1B visa, and that a contrary conclusion by the U.S. Citizenship and Immigration Services was arbitrary and capricious.

U.S. District Court Judge Mary S. McElroy ordered USCIS to issue a visa to petitioner Santosh Shanbhag and his employer, Providence-based India House. Shanbhag, who holds a degree in hospitality management, serves as general operations manager for the company's four restaurants and catering business.

"It only stands to reason that an endeavor with multiple revenue streams bringing in multi-millions of dollars, composed of five separate operations, requires financial, marketing, budgeting, and prognostication skills more profound than those needed to run, for example, a small family restaurant," McElroy wrote in concluding that Shanbhag's role meets the statutory definition of a specialty occupation.

Further, the judge was satisfied that Shanbhag holds a "specific degree" required by the field.

"Clearly, a B.S. in Hospitality Management is a specific degree, both as a matter of logic and by recourse to the curriculum it entails," she wrote. "It was awarded to Shanbhag after successful completion of a set of courses that are not useful to any profession outside food services and hospitality management."

In granting Shanbhag's motion for summary judgment, McElroy also called out the fact that the agency had previously approved H-1B visas with regard to Shanbhag's lesser job roles.

"I find the decision of the [Administrative Appeals Office] to be contrary to the evidence, too narrowly interpretive of §1184's requirements and, in its failure to demand either a disavowal or an explanation from USCIS of its previous inconsistent ruling, arbitrary and capricious," McElroy concluded.

### 'Nice to know the courts work'

Andrew C. Rodgers, who practices in the Providence office of Green & Spiegel, represented the plaintiffs, India House and Shanbhag.

He acknowledged that it was unusual for the case to be in federal court at all, as it is cost prohibitive for most employers to mount an appeal even at the agency level.

**CASE:** *India House, Inc., et al. v. McAleenan, et al.*, Lawyers Weekly No. 52-030-20 (17 pages)

**COURT:** U.S. District Court

**ISSUE:** For purposes of an H-1B visa application, is an employee whose position involves general operations of a company's several restaurants and catering business working in a "specialized occupation" for which a "specific degree" is required?

**DECISION:** Yes

“It's not often we have something so clear. It's a huge win for the hospitality industry within the 1st Circuit.”  
 — Andrew C. Rodgers, Providence



"But in our view, this decision means that an individual working as a general operations manager with a degree in hospitality management should be able to get an H-1B visa," Rodgers said. "It's not often we have something so clear. It's a huge win for the hospitality industry within the 1st Circuit."

While attorneys may be able to draw parallels to other jobs, he added, the role has to require a level of knowledge that the degree imparts.

With Shanbhag managing multiple restaurants, Rodgers said the denial by the USCIS was an "absurd result"

considering that the applicant had been approved for an H-1B visa prior to being promoted to a more specialized position.

That inconsistency seemed to be a clinching factor for McElroy, Rodgers said.

"While an agency has leeway in interpreting its regulations, it can't just slowly change the adjudication standard of an H-1B visa, and that's what the judge was struck by. She found that the agency was slowly changing the law but not through the appropriate channels," he said. "The Trump administration has been so egregious on these matters, and in this case the judge rolled back an unlawful application. It's nice to know the courts work."

Counsel for the government was Aaron Goldsmith of the U.S. Department of Justice in Washington, D.C. The DOJ did not respond to a request for comments by press time.

### **Restaurant enterprise**

The H-1B visa permits American employers to temporarily hire workers with particular skills who perform services in "specialty occupations." It allows a foreign national to work for a sponsoring employer for three years, with possible three-year extensions.

The visa is issued in the name of a particular individual but really "travels with the job" and the employer, not the person filling the position.

Shanbhag is an Indian national who holds a bachelor's in hospitality management from Johnson & Wales. In 2013, he was granted an H-1B visa to work as a restaurant manager for India House, a corporation based in Providence that operates restaurants in Providence, East Greenwich, Cranston and Pawtucket, along with a catering business that provides over 5,000 meals a week to area schools.

In 2016, Shanbhag's visa was extended for three years. However, in the next renewal cycle, the USCIS denied another extension, notwithstanding his promotion to general operations manager overseeing the entire India House enterprise.

The agency's Administrative Appeals Unit upheld the denial, and India House and Shanbhag took the matter to court.

### **'Specialty occupation'**

In reviewing the decision of the AAU, McElroy explained that showing a "specialty occupation" requires an employer petitioning on behalf of a prospective employee to demonstrate that the field at issue is one of highly specialized knowledge that requires a bachelor's or higher degree.



Chaska in Cranston is one of several eateries operated by plaintiff India House.

The judge immediately distinguished the leading 1st Circuit decision upholding the denial of an H-1B visa, 2007's *Royal Siam Corp. v. Chertoff*.

"In *Royal Siam*, the court upheld as reasonable the USCIS characterization of a position as a 'food service manager,' and its resultant determination that, so described, it was not a 'specialty occupation,'" McElroy wrote. "The India House position under scrutiny here is much broader and requires a concomitantly expanded base of knowledge."

The judge said Shanbhag's job appears to be akin to the chief operating officer of the multi-faceted restaurant group.

"Rather than simply managing a single restaurant's supplies and employees, this position requires deep knowledge of food and Indian cuisine, technology related to sales and marketing, knowledge of equipment and maintenance methods, as well as a financial component of projecting costs and equipment needs, developing waste-saving methodology and strategies, and developing revenue-producing and marketing strategies," she observed.

Moreover, the position encompasses personnel responsibilities typically common to higher positioned managers, such as interviewing, hiring and training employees, supervising and termination.

And with the size of a business relevant to the question of whether a position is a specialty occupation, she pointed out that India House is a \$5 million business employing 60 employees, 35 of whom are full time.

McElroy concluded that the AAO failed to take into account the "broader and more knowledge-based duties" of the position, as compared to those of a food services manager.

### **'Specific degree'**

McElroy also said Shanbhag’s situation differs from one of the primary holdings in *Royal Siam* — that a business administration degree is a “general purpose” degree, not a “specific” one as required for a visa.

“The plaintiffs demonstrated that this position required at a minimum a bachelor’s degree in hospitality management or a directly related field,” the judge wrote. “The AAO failed to recognize that hospitality management is a specific degree, unlike business administration.”

McElroy explained that a business degree can be applied to a “myriad of endeavors,” such as in any kind of institutional management or retail or wholesale business. On the other hand, a hospitality management degree, as evidenced by the Johnson & Wales curriculum, is specific to management in the particular industry of food service and hotels.

Also telling, she continued, is that while the government is not bound by its granting of an H-1B visa in the past, Shanbhag had twice been previously approved under the same laws. In those instances, his lesser position as a restaurant manager was considered a “specialty occupation” and his B.S. considered a “specific degree.”

“While inconsistency itself by the agency does not itself necessarily invalidate or cast doubt on the ultimate decision, it lends credence to the assertion that the denial of the visa now is at odds with the evidence submitted,” McElroy wrote. “The government here offers no reason to explain how a hospitality management degree can be a ‘specific degree’ one day, and not a ‘specific degree’ the next.”

In the absence of such a justification, and because it “appeared plain” that Shanbhag’s degree is specific to the duties that one with specialized knowledge in the restaurant business would have, McElroy deemed the agency’s denial as arbitrary and capricious and granted summary judgment in favor of the plaintiffs, ordering that an H-1B visa be issued.

Edit

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