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H-1B Work Visa Application Established Employee Contract, New York Court Rules

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In a departure from prior interpretations of H-1B sponsorship, a New York state court ruled an H-1B work visa application established an employment contract sufficient to support the employee's breach of contract claim. *Kausal v. Educational Products Information Exchange Institute, d/b/a EPIE Institute*, 2013 N.Y. App. Div. LEXIS 2491 (NY Apr. 17, 2013).

Nikhil Kausal, a citizen of India, sued the employer for breach of contract and violation of the payment of wages requirement (Article 6) of the New York State Labor Code. The trial court rejected the plaintiff's contention that the H-1B visa petition submitted by the employer to the Immigration and Naturalization Services is sufficient evidence of the formation of a contract between the plaintiff and the employer. The plaintiff appealed.

The appellate court, finding an enforceable contract, reversed the judgment. The appeals court said, "The plaintiff established the existence of an enforceable written employment agreement between himself and the defendant through the visa application executed by [the employer's project manager], on behalf of the defendant, under oath." The appeals court then found the plaintiff established the required elements of a cause of action to recover damages for breach of contract.

It is noteworthy that the contract violations found against EPIE also were violations of the Department of Labor wage requirements under the H-1B program since EPIE failed to pay the wages stated on the Labor Condition Application. This factor may have steered the court to its decision, which is inconsistent with prior rulings throughout the county. Unless the decision is challenged, employers in New York State who sponsor H-1B workers should be cautious about the terms stated on the H-1B petition.

Employers also are reminded that when an H-1B visa holder is being terminated, the employer must send a letter notifying USCIS of the termination and request the withdrawal of the petition. The terminated worker must be notified of the termination in writing and provided with a return ticket to the home country or its cash equivalent. The employer may also withdraw the certified labor condition application submitted on behalf of the terminated worker. The employer should keep evidence of bona fide termination and notifications sent to USCIS and the employee in the employee's file.

Trial court decision

http://www.courts.state.ny.us/Reporter/pdfs/2011/2011_31001.pdf

Appellate court decision

<http://www.courts.state.ny.us/courts/ad2/calendar/webcal/decisions/2013/D37982.pdf>

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