Insight

IN-DEPTH DISCUSSION

OCTOBER 23, 2015

DOL Misclassification Guidance on Independent Contractors Could Affect Certain Nonimmigrant Visa Classifications

BY ILYSE SCHUMAN, JORGE LOPEZ AND MICHELLE WHITE

On July 15, 2015, the U.S. Department of Labor issued guidance to clarify when workers can be classified as independent contractors or employees under the Fair Labor Standards Act (FLSA). This Administrator's Interpretation (AI) concludes "most workers are employees" under the FLSA's broad definitions.[1] Although the AI is intended to explain when workers should be classified as employees under the FLSA, it may also affect certain nonimmigrant visa classifications where work as an independent contractor is permitted. The AI's effective presumption of employee status could have significant immigration implications. The following is an analysis of the nonimmigrant visa categories that sometimes utilize independent contractors.

NAFTA TN Visa – Management Consultant

The TN Visa is a nonimmigrant work visa that is part of the North American Free Trade Agreement (NAFTA), which enables Canadian and Mexican citizens to engage in work in the United States. Under the NAFTA Treaty, there are set job classifications that are eligible for a TN visa. All positions that qualify for a TN visa require employer sponsorship, except the classification of a Management Consultant. The majority of Canadians and Mexicans applying for a TN visa under the Management Consultant classification represent themselves as independent contractors. This is because only independent contractors, and not employees of U.S. companies, are eligible for the Management Consultant TN visa.[2]

The effect of the DOL's misclassification AI could place companies in a quandary because they have contracted with an individual as an independent consultant for TN visa purposes, but according to the factors in the AI, the foreign national might actually be considered an employee. In that case, the U.S. entity may be required to employ the individual directly. As a result, the individual

1 The AI outlines six factors to be considered in making the employee v. independent contractor assessment: (A) the extent to which the work performed is an integral part of the employer's business; (B) the worker's opportunity for profit or loss depending on his or her managerial skill; (C) the extent of the relative investments of the employer and the worker; (D) whether the work performed requires special skills and initiative; (E) the permanency of the relationship; and (F) the degree of control exercised or retained by the employer.

2 In limited circumstances, if the foreign nationals are employees of the U.S. company, they can only be considered management consultants if they are fulfilling a supernumerary position in the U.S.

may no longer be eligible for the TN visa as a Management Consultant. In this circumstance, there might not be another visa option available. Therefore, the employer will need to carefully consider if it can continue to contract with the foreign national as a TN Management consultant.

B-1 Visa

Business travelers may enter the United States using a B-1 "Business Visitor visa." In lieu of obtaining an actual B-1 visa stamp in their passport, individuals may also enter the U.S. for up to 90 days without a visa if their country is part of the Visa Waiver Program. A corollary process is to register through the Electronic System for Travel Authorization (ESTA). The purpose of the B-1 visa is for individuals to be able to conduct business activities in the United States that are a "necessary incident" to their business abroad. Examples of permissible B-1 activities include attending meetings, consulting with associates, engaging in negotiations, attending trainings, and researching options for opening a business in the United States.

Employers often take advantage of the B-1 visa to send individuals to the U.S. to attend meetings, participate in training and learn about U.S. operations. Sometimes these visits can last for an extended period of time, during which an argument could be made that the individual, although not employed in the U.S., could actually be considered an employee of the U.S. operation under the guidelines set forth in the AI because the U.S. company appears to be controlling their work or requiring their specific expertise.

B-1 in lieu of H-1B

The B-1 in lieu of H-1B visa is an actual B-1 visa with the annotation, "B-1 in lieu of H-1B" on the visa stamp. This visa allows the foreign company to place an employee at the U.S. location for a brief period for the purpose of performing actual job duties that would otherwise warrant an H-1B visa, i.e., the job must be a professional position in which a bachelor's degree is required. An H-1B visa is a non-immigrant visa that allows U.S. employers to employ nonimmigrants in specialty occupations (i.e., those that require a bachelor's degree) for a temporary period of time. The difference between the B-1 in lieu of H-1B and the actual H-1B visa is that the actual salary must be paid from abroad for the B-1 in lieu of H-1B.

In this situation, although the employee will be working in the United States, the intention is that it is temporary work that is paid from abroad. It is unclear if this type of work would also fall under the misclassification AI and thus require the employee to be hired by the U.S. entity and meet wage obligations set forth by the FLSA.

Considerations for Employers

Companies that frequently bring foreign employees to the U.S. for short periods of time or that contract with nonimmigrants using visa categories such as the TN Management consultant visas should be mindful of the DOL Misclassification AI on independent contractors. In cases where an individual could be potentially considered an employee rather than an independent contractor, it is recommended that the company seek not only employment law advice, but also the counsel of an immigration lawyer.