

## In This Issue:

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## Recent USCIS Memo on Employer-Employee Relationship Requirements for H-1B Visa Petitions: Regulation by Memorandum?

By Jorge Lopez, Shin-I Lowe and Neil Grindstaff

Donald Neufeld, Associate Director of Service Center Operations for the United States Citizenship and Immigration Service (USCIS) recently issued a guidance memo to its adjudication officers, *“Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third Party Site Placements”* (“Neufeld Memo” or “Memo”). The Memo clarifies what constitutes a valid employer-employee relationship, in the context of petitions for H-1B visas, which are commonly used by IT staffing agencies and consulting groups for placing skilled workers at third-party worksites.<sup>1</sup>

On February 18, the USCIS held a “Collaboration Session” in Washington, D.C., to address the growing concerns about the implications of the Neufeld Memo. Approximately 500 people (400 via teleconference) attended the two-hour session, in which USCIS officials responded to the “unintended consequences” caused by the Neufeld Memo. Several participants, including the American Immigration Lawyers Association (AILA), requested that the USCIS formally withdraw the Neufeld Memo. The USCIS representatives explained that Senator Chuck Grassley (R-IA) had contacted the USCIS directly to complain about H-1B fraud. Whether the consequences of the Neufeld Memo were intended or not, the USCIS’s hasty response to pressure from Senator Grassley has had serious repercussions for consulting companies and staffing agencies that place H-1B employees at third-party clients’ worksites. In what may turn out to be a classic case of throwing the baby out with the bathwater, the Neufeld Memo applies not only to those companies that have abused the H-1B system, but the blanket policy also applies to several highly regarded IT consulting companies and staffing agencies that have no prior record of any H-1B violations.

### The Memo’s Guidance

Pursuant to the Neufeld Memo, H-1B petitioners must clearly show that an employer-employee relationship will exist between the petitioner and the beneficiary, and establish that the H-1B petitioner will be responsible for the overall direction of the beneficiary’s work. Moreover, the petitioner must also have the right to control the employee’s work,

which includes the ability to hire, fire and supervise the beneficiary. Lastly, the H-1B petitioner should be able to establish that it will maintain control throughout the duration of the requested H-1B validity period.

The Memo ultimately concludes that although some staffing agency employment scenarios and third-party placements meet the employer-employee relationship requirement, many others do not. In the majority of those situations, the petitioner and beneficiary do not maintain the requisite employer-employee relationship for the duration of the requested H-1B visa's validity period. Furthermore, the Memo states that the lack of guidance in clearly identifying the relationship has created problems in applying the requirement to specific employment relationships, including independent contractors ("IC"), self-employed individuals (albeit the Memo does not provide any clear distinguishing features that differentiate a "self-employed individual" from an independent contractor), and beneficiaries placed at third-party worksites.<sup>2</sup> Although the latter relationship is quite common within certain industries, the Memo states that it creates particular concern as to whether a valid employer-employee relationship exists.

## The Employer-Employee Relationship

Citing the H-1B regulations, the Neufeld Memo explains that a U.S. employer that files an H-1B petition must have "an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee."<sup>3</sup> Adjudicating officers are instructed to weigh the following factors when determining whether a valid employer-employee relationship exists:

1. Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
2. If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.*, weekly calls, reporting back to main office routinely, or site visits by the petitioner?
3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
5. Does the petitioner hire, pay, and have the ability to fire the beneficiary?
6. Does the petitioner evaluate the work-product of the beneficiary, *i.e.*, progress/performance reviews?
7. Does the petitioner claim the beneficiary for tax purposes?
8. Does the petitioner provide the beneficiary any type of employee benefits?
9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The Memo emphasizes that the determination of whether an employer-employee relationship is valid should hinge on the extent to which the petitioner has the **right**<sup>4</sup> to control the beneficiary's work, *i.e.*, control over when, where, and how the beneficiary performs the job. In addition, adjudicating officers should consider the totality of the circumstances when weighing these factors, including the nature of a petitioner's business and an H-1B beneficiary's type of work.<sup>5</sup> Furthermore, the petitioner must maintain the right to control the beneficiary's work throughout the H-1B validity period in order to constitute a valid employer-employee relationship in the H-1B petition context.

## Evidence of the Employer-Employee Relationship – Initial Petition

In addition to analyzing the parameters of a valid employer-employee relationship, the Neufeld Memo specifically includes the following list of the types of evidence that an H-1B petitioner may submit with an initial petition in order to demonstrate that a valid employer-employee relationship will exist for the duration of the H-1B validity period:

1. A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
2. Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
3. Copy of an employment offer letter that clearly describes the nature of the employer employee relationship and the services to be performed by the beneficiary;
4. Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
5. Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
6. Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
7. A description of the performance review process; and/or
8. Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

## Evidence of the Employer-Employee Relationship – Extension Petitions

Petitioners seeking to extend a worker's H-1B status must demonstrate that they will continue to maintain a valid employer-employee relationship with the beneficiary by submitting any combination of the types of evidence outlined above or any similar type of probative evidence that shows that the petitioner will continue to have the right to control the beneficiary's work. The petitioner must also submit any combination of the following or similar types of evidence to demonstrate that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B validity period:

1. Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
2. Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
3. Copy of Time Sheets submitted during the period of the previously approved H-1B status;
4. Copy of prior years' work schedules;
5. Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (e.g., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, website text, news copy, photographs of prototypes);
6. Copy of dated performance review(s); and/or

7. Copy of any employment history records including, but not limited to, documentation showing date of hire, dates of job changes, e.g., promotions, demotions, transfers, layoffs, and pay changes with effective dates.

## Employment Scenarios

The Neufeld Memo analyzes several employment scenarios and determines whether a valid employer-employee relationship would exist under the circumstances in each scenario. The following scenarios have been sorted to reflect a sampling of the USCIS' view of what types of relationships constitute acceptable types of employment relationship, with the most acceptable (*i.e.*, traditional) type of relationship listed first, and the least acceptable relationship listed last:

### **Valid Scenario 1: Traditional Employment**

*(petitioner exercises **actual** control over the H-1B beneficiary)*

#### The petitioner:

- sets the beneficiary's work schedule;
- reviews the work product of the beneficiary;
- claims the beneficiary for tax purposes; and
- provides medical benefits to the beneficiary.

#### The beneficiary:

- works at the petitioner's premises;
- reports directly to the petitioner on a daily basis; and
- uses the petitioner's tools/instrumentalities to perform the duties of his employment.

### **Valid Scenario 2: Permanent/Off-Site Employment**

*(petitioner exercises the right to control and has actual control over the H-1B beneficiary)*

#### The petitioner's contract with the client:

- provides that the petitioner will manage its employees at the client site; and
- provides the petitioner with the ultimate control over the beneficiary's work.

#### The petitioner:

- completes the beneficiary's progress reviews.

#### The beneficiary:

- is an architect required to travel to client's out-of-state building site;
- uses the petitioner's tools/instrumentalities to complete the project; and
- reports directly to the petitioner for assignments.

### **Valid Scenario 3: Long Term Placement at a Third-Party Work Site**

*(petitioner exercises the right to control and has actual control over the H-1B beneficiary)*

#### The petitioner:

- is a software company contracted to develop custom software at client site using software company's proprietary software designs; and
- pays the beneficiary's wages and provides employee benefits.

The beneficiary:

- is a software engineer who was offered employment to fulfill the petitioner's contract with the third-party client;
- performs all of his work duties at the client's facility; and
- reports to a manager employed by the petitioner on a weekly basis.

**Valid Scenario 4: Temporary/Occasional Off-Site Employment**

*(petitioner exercises the right to control the H-1B beneficiary)*

The petitioner:

- is accounting firm, beneficiary is an accountant required to travel to client-site for audits;
- provides food and lodging to beneficiary while at client-site that is outside the petitioner's geographic location; and
- provides medical benefits to the beneficiary.

The beneficiary:

- uses established firm practices to perform audits;
- reports to petitioner's centralized office when not at client-site;
- has office space at petitioner's office; and
- is paid by the petitioner.

**Invalid Scenario 1: Third-Party Placement/ "Job Shop"**

*(petitioner has no right to control and exercises no actual control)*

The petitioner:

- is a computer consulting company;
- does not control how the beneficiary completes his tasks;
- does not supply the beneficiary with any proprietary information to complete assignments; and
- does not conduct the beneficiary's performance reviews.

The beneficiary:

- is computer analyst;
- reports to a manager who works for the client; and
- produces work-product that is not related to the petitioner's line of business.

The client:

- determines the beneficiary's work assignments.

**Invalid Scenario 2: Independent Contractors**

*(petitioner has no right to control, exercises no actual control)*

The petitioner:

- does not claim the beneficiary as an employee for tax purposes;
- does not control when, where or how the beneficiary carries out his duties;

- does not set the beneficiary’s work schedule; and
- does not conduct the beneficiary’s performance reviews.

The beneficiary:

- is employed as a sales representative for the petitioner;
- sells products for other companies; and
- works on commission.

**Conclusion**

Despite growing opposition from consulting companies, staffing agencies and the AILA, the USCIS has shown unwavering support for the requirements set forth in the Memo. Therefore, it is unlikely that the USCIS will decide to formally withdraw the Neufeld Memo anytime soon. Accordingly, consulting companies and staffing agencies will probably need to revise their employment agreements to expressly state that they retain the exclusive right to control the H-1B employee’s work, rather than the third-party client company. Consequently, the recipients of the services of the employees of these client companies will also be affected. The client companies may find that the business model questioned and their use may jeopardize the future use of these services, thereby affecting their effectiveness. Consulting companies and staffing agencies, as well as the affected client companies, affected by the Neufeld Memo should immediately contact experienced legal counsel for assistance in developing compliant H-1B policies and third-party employment agreements.

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 Jorge Lopez is a Shareholder and Shin-I Lowe is an Associate in Littler Mendelson’s Miami office, and Neil Grindstaff is an Associate in Littler Mendelson’s Cleveland office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Lopez at jlopez@littler.com, Ms. Lowe at slowe@littler.com, or Mr. Grindstaff at ngrindstaff@littler.com.

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<sup>1</sup> Memorandum to Service Center Directors, “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements. Additions to Officer’s Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24),” HQ 70/6.2.8 (Donald Neufeld, Associate Director, Service Center Operations January 8, 2010).

<sup>2</sup> The term “beneficiary” refers to the nonimmigrant worker who has been offered the position for which the visa was processed.

<sup>3</sup> 8 C.F.R. § 214.2(h)(4)(ii).

<sup>4</sup> Distinct and separate from “actual” control.

<sup>5</sup> The Memo cites the following U.S. Supreme Court decisions for the factors to be evaluated when determining whether the petitioner has the right of control over the beneficiary’s employment: *NLRB v. United Ins. Co. of Am.*, 390 U.S. 254 (1992); *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992); and *Clackamas v. Gastroenterology Assoc. v. Wells*, 538 U.S. 440 (2003).