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LABOR & EMPLOYMENT DEPARTMENT

ALERT

Do You Control Your H-1B Workers? USCIS Wants To Know

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U.S. Citizenship and Immigration Services (USCIS) has announced a radical change in H-1B petition processing. On January 8, 2010, USCIS issued the "Neufeld Memo" concerning the employer-employee relationship required for approval of an H-1B petition. Some relationships that once had supported H-1B visas no longer will.

The Neufeld Memo has created quite a stir. It may be subject to litigation or retraction, but at this writing it is guidance that will be implemented in adjudicating H-1B petitions. The memo directs consideration of the totality of various factors in determining whether there is a qualifying employer/employee relationship, but focuses on an employer's "right of control" over the employee. While the right to control may not be a significant issue with traditional employment relationships, there are many employer-employee relationships for which it will be an issue.

The H-1B temporary worker classification is the principal non-immigrant visa permitting professional employment in the United States. Employers' use of this visa category is so widespread that the annual supply is typically exhausted long before the fiscal year ends, and sometimes before it begins. The classification has been the subject of recent scrutiny in part because of the high rate of U.S. unemployment and in part because of fraud allegedly perpetrated by a few petitioners.

Until the issuance of the Neufeld Memo, USCIS had problems defining what constitutes a valid employer-employee relationship for H-1B purposes, especially with regard to independent contractors, self-employed beneficiaries and beneficiaries placed at third-party worksites. The memo requires that new H-1B filings and extensions provide evidence of the employer's continuing "right to control" the H-1B beneficiary.

USCIS relies upon court decisions arising in the labor and employment context to define the employer-employee relationship and to fashion the new requirements and prohibitions.

Before the memo, it was commonplace for alien entrepreneurs, physicians and others to form and capitalize corporations that petitioned for their services. They may no longer do so, unless there is a separation between the H-1B beneficiary and the employing entity as well as some independent right to control the H-1B worker. Self-employed beneficiaries may not be eligible for H-1B visas. Similarly, independent contractors whose petitioners have no right to control may not be eligible for H-1B status.

The memo may have been aimed at "job shops" but hits many additional targets. In an example given in the Neufeld Memo, the petitioning computer consulting business contracts to fulfill specific staffing needs of numerous outside companies. The positions are not specified in the petition because staffing is on an as-needed basis. The beneficiary computer analyst is assigned to work at an outside company to maintain the third-party company's payroll. There, the beneficiary

receives work assignments, reviews and oversight from the outside company. The beneficiary has no propriety information from the petitioner and his end product has nothing to do with the petitioner's line of business, computer consulting. This is an example of lack of control and lack of exercise of control that will no longer support H-1B status.

USCIS states that cases are to be decided on a case-by-case, industry-by-industry basis. So, let's say the beneficiary is a physician working in a state that prohibits hospitals from employing physicians. The physician works in the hospital, receives direction and work assignments from the hospital department, but is paid by a corporation set up to comply with state law, acting as a payroll company. Will this arrangement pass H-1B muster?

The Neufeld Memo now requires the petitioner to prove the right to control the activities of the beneficiary during the entire course of his/her H-1B employment.

Most H-1B petitioners request H-1B status for a period of three years. Initial petitions now must address the right to control for the entirety of the H-1B period. Among the many considerations are:

(1) Does the petitioner supervise the beneficiary and is that supervision on- or off-site?

(2) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis, if such control is required?

(3) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

That's not all. The memo now requires that petitions for H-1B extensions be accompanied with evidence that a valid employer-employee relationship was maintained during the course of the expiring H-1B. Evidence such as pay records, time sheets and performance reviews may be submitted. And if USCIS is not satisfied that the newly defined employer-employee relationship was maintained, "the extension petition may be denied, unless there is a compelling reason to approve the new petition (e.g, the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own)..."

The memo has raised new issues for H-1B petitioners, encompassing not only immigration law but employment-law concepts. Fortunately, Fox Rothschild's Labor and Employment Department works closely with our immigration professionals to address these matters.

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