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New USCIS Memo on Employer- Employee Relationship for H1B Applications:

*What **YOU** Need To Know*

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The Evolution of the H-1B Application Process

(1) Professional Duties/Professional Employee/
Company Legit

(2) Vendor Contracts

(3) End Client Letters

Only(1) Was Required, Then...

(1)+(2) + (3) = Inconsistent Decisions



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So What Did Employers and Attorneys Look Like in 2009?





THE MEMO

- **January 2010:** USCIS issued a memo clarifying what constitutes a **valid employer-employee relationship** to qualify for the **H-1B ‘specialty occupation’** classification.
- The memo also discusses the **types of evidence** petitioners may provide to **establish that an employer-employee relationship exists** and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.



WHO DOES THE MEMO AFFECT?

- H1B beneficiary/employee performing work at a third-party (end-client) worksite.
 - Ex: IT consulting, independent contractors, healthcare staffing, etc.



Employer – Employee Relationship

- **Master/Servant Relationship**
- **What's the Bottom Line? CONTROL**
- **What Does 'Control' Mean? SUPERVISION**
- **But What About Hiring, Firing, Benefits, Taxes, etc.?**
 - USCIS MIGHT NOT CARE!



But What Does The Regulation Say?

8 CFR 214.2(h)(4)(ii) defines the term ‘United States employer’.

- Engages a Person to Work Within the United States;
- Has 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; and
- Has an Internal Revenue Tax Identification Number

Neufeld Memo Says The Regulation “Lacks Guidance”



QUESTIONS OF “CONTROL”

- Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
- If the supervision is off-site, how does the petitioner maintain such supervision?
- Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
- Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
- Does the petitioner hire, pay, and have the ability to fire the beneficiary?
- Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?



QUESTIONS CONTINUED

- Does the petitioner claim the beneficiary for tax purposes?
- Does the petitioner provide the beneficiary any type of employee benefits?
- Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
- Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
- Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

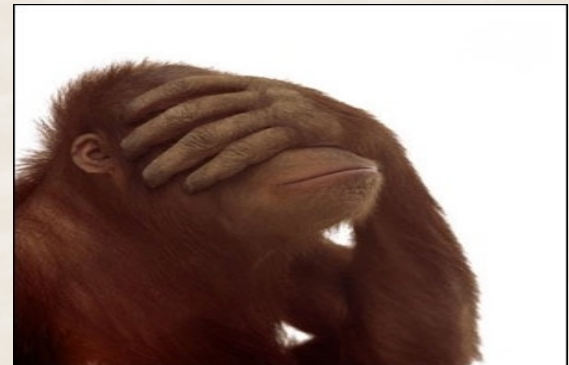


Memo Shuts Down H-1B Entrepreneurs

Owner of a Business Not Eligible for H-1B Status Even If:

- A Viable Corporation is Established
- There is No Third-Party Placement
- The Corporate Petitioner Pays The Beneficiary
- The Beneficiary Is Claimed for Tax Purposes
- The Beneficiary Produces Goods/Services Tied To Petitioner's Business

Are These Government Policies Smart During A Bad Economy?





H-1B EXTENSIONS

- Records compiled during the beneficiary's period of previously approved H-1B status;
 - Beneficiary's pay records
 - Beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary
 - Time Sheets
 - prior years' work schedules
 - Documentary examples of work product
 - Dated performance review(s); and/or
 - Employment history records



CONTROL AND APPROVAL

If We Prove That We Will Control Our Employee's Work, Will Our H-1B Application Be Approved?

- **New Memo:**
 - Too early to note trends
 - Need To See How USCIS Applies it in Practice
- **AILA Litigation:**
 - Memo vs. Regulation
- **Proceed from Position of Strength:**
 - The **More Documents** You Have to Comply with USCIS Memo , The Better!



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*The Wise Adapt Themselves to Circumstances, as Water
Moulds Itself To A Pitcher – Chinese Proverb*

What Do Employers Need To Do?

ADAPT



GLIMPSE INTO THE FUTURE

- Employers whose business model may be viewed by the USCIS as within the third-party placement are likely to face RFEs in their H1B petitions.
- **Review:**
 - **indicators of control**
 - **anticipate** the need to prove control over their employees
 - **modify** practice to incorporate the factors to establish a direct employer-employee relationship



RECOMMENDATIONS

- Consider Filing H-1B Extensions As Early As Possible To Provide A 'Cushion' In The Event of A Bad RFE
- Establish **Company Wide** Review Policy
- **Revise Contracts/Letters With Vendors and Clients**
 - You Have Right To Control Work
 - You Have Right To Get Assignments From End-Client and Reassign E'EE
- **Pay All Job-Related Expenses for E'EE**
- **Once Policy is Set, Document It!**



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QUESTIONS?

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