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PRACTICE AREAS

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Sponsoring Foreign Workers: The Employee Test

Posted: July 24th, 2010

Employers can once again file H-1B applications to sponsor foreign nationals for work visas as of April 1, 2010, but this time there may be a few added wrinkles.

The United States Citizenship and Immigration Service (the "USCIS") has issued an interpretive memorandum setting forth the factors that must be considered to establish an employer-employee relationship for purposes of any H-1B application. The memo provides guidance beyond the interpretation of muddy common law principles and U.S. Supreme Court cases associated with them regarding the establishment of the employer-employee relationship.

The memo is intended to clarify the measures of control over the beneficiary of an H-1B work visa application necessary to support an employee status, especially when the worker is placed into another employer's business or in another employer's operations for any period of time.

Employing a person to work in the U.S. is much more than paying the requisite wage or placing that person on the payroll, the memo emphasizes. The petitioner for any H-1B application must establish that it has the right to control when, where, and how the beneficiary of the work visa application performs the job.

USCIS officers will be looking at the following factors in particular:

1. Does the petitioner supervise the beneficiary?
2. If the supervision is "off-site," how is it done?
3. Does the petitioner have the right to control the beneficiary's day to day work?
4. Does the petitioner provide the beneficiary with the tools to perform the work?



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5. Does the petitioner hire the beneficiary and have the ability to fire them?
6. Does the petitioner evaluate the work product of the beneficiary?
7. Does the petitioner claim the beneficiary for tax purposes?
8. Does the petitioner provide pertinent employee benefits to the beneficiary?
9. Does the beneficiary use proprietary information in order to perform duties?
10. Does the beneficiary produce an end product linked to the petitioner's business?
11. Does the petitioner have control over the manner and means of doing the work?

See your legal adviser for further counsel on these issues, and check out [our website](#) for more information on work visas for foreign nationals.