

NEWS UPDATE

January 20, 2010

Subject: Fiscal Year 2011 H-1B Filing Deadline April 1, 2010

Re: USCIS imposes stricter requirements for H-1B Employee/Employer Relationship

USCIS has released a memorandum regarding the requirements to establish an employer-employee relationship for H-1B petition approval. An employer who seeks to file an H-1B Petition must establish a valid employer-employee relationship. USCIS has defined this relationship to hinge on “an employer’s right to control the means and manner in which the work is performed.”

USCIS’ memo has no impact on the traditional employer/employee relationship where an employee provides H-1B services to a company whether at the company location or at a customer site. As long as the employer controls the work performed by the employee, USCIS will continue to approve the H-1B Petition. Even where the employee performs the services at a third party site, including installation of software systems, USCIS will approve the H-1B Petition as long as the employer has the right to control the employee’s work, and in fact, exercises actual control.

Where the USCIS memo introduces significant change is the scenario where the H-1B employee is placed at a client worksite to fulfill a staffing contract and the client, not the employer, manages the employee (often referred to as a “job shop”). The Memo also raises serious issues for H-1B petitions filed for self-employed individuals, for employees with an ownership interest in the H-1B sponsor, and for independent contractors, where the necessary employer-employee relationship cannot be demonstrated. In these scenarios, USCIS will now question the underlying employer/employee relationship, and may deny the H-1B petition in the absence of clear documentation that the employer supervises, directs, and reviews the employee’s work.

USCIS may take a less strict policy when adjudicating H-1B extensions as opposed to new H-1B placements. Clearly, companies that are relying on the H-1B Program to temporarily place employees through other companies should take a close look at whether these H-1B petitions can be initiated or even extended. Third company service providers will have to make a very clear showing that the petitioning entity significantly controls the work performed by the individual.

We welcome your specific questions regarding this new guidance memo.

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