

LAW OFFICES OF RAKESH MEHROTRA

11490 Commerce Park Drive, Ste. 300

Reston, VA 20191

Phone: 703 230 6800

Fax: 703 230 6801

E-mail: attorney@immigrationonline.com

URL: www.immigrationonline.com

USCIS MEMORANDUM ON EMPLOYER EMPLOYEE RELATIONSHIP

CHALLENGING ISSUES FOR IT CONSULTING COMPANIES

On January 8, 2010 U.S. Citizenship and Immigration Services ("USCIS") issued a memorandum ("Memorandum") that gives guidance on how USCIS will determine the existence of employer-employee relationship, particularly when employee performs work at a third-party (end client) work location. The Memorandum has great significance to all industries but particularly the IT consulting industry since most consultants are placed at third-party work locations. The Memorandum also discussed 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.

On January 13, 2010 USCIS issued an updated guidance memorandum ("Update") to adjudication officers to clarify the Memorandum. The update clarified that the **Memorandum did not change any of the requirements for an H-1 B petition** and that the H-1 B regulations have always required that a United States employer establish that it has an employer-employee relation with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. We wish to point out that in our experience USCIS has been requesting proof of valid employer employee relationship for a very long time; hence this requirement should not come as a surprise to many of you. However, the nature of proof of this relationship was not addressed by USCIS in this much detail before.

Following is our summary of the Memorandum and the Update, with special emphasis on IT consulting companies.

1. Petitioner's "right to control" the employment of beneficiary is the critical element in determining employer-employee relationship. Petitioner is not required to show "actual control" over the beneficiary's work.

USCIS will consider the following eleven factors to make a determination whether the petitioner has the "right to control" the beneficiary's employment, such as when, where and how the beneficiary performs the job (with no one factor being decisive):

- (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?

Please also note that since no one factor is decisive adjudicators will review the totality of the circumstances when making a determination as to whether the employer-employee relationship exists.

2. Petitioner may demonstrate that it has a valid employer-employee relationship with the beneficiary by submitting a combination of the following types of evidence or “similar probative” types of evidence.

A. Initial Petitions

- 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; **(This is required by the regulations)**
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- 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;
- 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;
- 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;
- 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;

- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

B. Extension Petitions

Just because it is an extension petition do not assume that employer employee relationship has been established. USCIS in fact, conducts a fresh inquiry to determine the existence of employer employee relationship. Thus petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists and that it has existed in the past. The petitioner can do so by providing the following additional evidence.

- 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;
- 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;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

As mentioned before the documents listed in the memorandum are only examples of evidence that establish the petitioner's right to control the beneficiary's employment. Unless a document is required by the regulations, i.e. an itinerary, you may provide similarly probative documents. You may submit a combination of any documents that sufficiently establish that the required relationship between you and the beneficiary exists. You should explain how the documents you are providing establish the relationship. Adjudicators will review and weigh all the evidence submitted to determine whether a qualifying employer-employee relationship has been established.

3. Placement of worker at third party site: The lack of previous guidance clearly defining what constitutes valid employer employee relationship as required by 8 CFR 212.2(h)(4)(ii) has raised problems in particular, with beneficiaries of IT consulting companies placed at third party-worksites. While some third party placement arrangements meet the employer-employee relationship criteria, there are instances

where the employer and the beneficiary do not maintain such a relationship. USCIS memo gives the following two examples for long-term placement at third party worksites:

EXAMPLE 1: RIGHT TO CONTROL SPECIFIED AND ACTUAL CONTROL IS EXERCISED. EMPLOYER EMPLOYEE RELATIONSHIP EXISTS

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.

EXAMPLE 2: THIRD-PARTY PLACEMENT/ "JOB-SHOP". PETITIONER HAS NO RIGHT TO CONTROL AND NO ACTUAL CONTROL IS EXECRCISED. EMPLOYER EMPLOYEE RELATIONSHIP DOES NOT EXIST

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at the client company, the beneficiary reports to a manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and the third-party company determines all work assignments. The petitioner does not control how the beneficiary will complete daily tasks, and the beneficiary to complete any work assignments uses no propriety information of the petitioner. The beneficiary's end product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The client company, not the petitioner, completes the beneficiary's progress reviews.

Thus where petitioner contracts with outside companies to fill their staffing needs, where positions are filled on as as-needed basis, rather than being specifically outlined between petitioner and the third party, beneficiary reports to a manager who is an employee of the third party, third party issues the work assignments and petitioner does not have a right to control the work, USCIS does not consider that there is a valid employer-employee relationship.

4. If you receive or have received an RFE requesting that you submit a particular type of evidence and do not have the exact type of document listed in the RFE you may submit other similar probative evidence that addresses the issue(s) raised in the RFE, as long as it is not a document required by the regulations e.g. an itinerary. You should explain how the documents you are providing address the deficiency(ies) raised in the RFE. Adjudicators will review and weigh all evidence based on the totality of the circumstances. Please note that you cannot submit similar evidence in place of documents required by regulation.

5. If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to a request for evidence (RFE). Your petition will be denied if you do not provide sufficiently probative evidence that the qualifying employer-employee relationship will exist for any time period.

6. If you file a petition requesting a "Continuation of previously approved employment without change" or "Change in previously approved employment" and an extension of stay for the beneficiary in H-1B classification, but did not maintain a valid employer-employee relationship with the beneficiary throughout the validity of the previous petition your extension petition will be denied. The only exception is if there is a compelling reason to approve the new petition (e.g. you are able to demonstrate that you did not meet all of the terms and conditions through no fault of your own). Such exceptions would be limited and made on a case-by-case basis.

7. If you were filing a petition requesting a "Change of Employer" and an extension of stay for the beneficiary's H-1B classification your petition would not be adjudicated under the section of the memorandum that deals with extension petitions. The section of the memorandum that covers extension petitions applies solely to petitions filed by the same employer to extend H-1 B status without a material change in the original terms of employment. All other petitions will be adjudicated in accordance with the section of the memorandum that covers initial petitions.

8. If you are a petitioner who will be employing the beneficiary to perform services in more than one work location you need to submit a complete itinerary of services or engagements in support of your petition. Furthermore, you must comply with Department of Labor regulations requiring that you file an LCA specific to each work location for the beneficiary.

Conclusion: Employers whose business models require consultants to be placed at third party location need to be extremely careful in preparing their petitions, and modify their business practices such that they can prove their right to control the employees' work. Creating a company wide performance appraisal guideline will be helpful. Adding terms the contract with third part clients that specify that you have the right to control and manage the employee will also help. Seeking the help of experienced and knowledgably immigration attorney to help you with your documentation has never been more critical and you are urged to so. We have successfully responded to hundreds of RFE related to employer employee relationship in the past. We will continue to utilize our successful strategies used earlier and incorporate the additional guidance give by the Memorandum in working with our clients specially in the IT consulting industry.