

Advisory

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WIGGIN AND DANA

Counsellors at Law

USCIS Issues Guidance Memo on H-1B Visa Petitions

The U.S. Citizenship & Immigration Services (USCIS) recently issued a Guidance Memorandum regarding H-1B visa status. This Memorandum is of particular significance to staffing companies and to those client companies who contract for their services, such as in the IT consulting industry. The Memorandum is intended to provide guidance in the context of H-1B petitions on the requirement that a petitioning employer establish that an employer-employee relationship exists with the foreign worker beneficiary, especially where the employee's work is performed off-site or the petitioning employer is a staffing company providing third party placements.

By way of background, an H-1B visa authorizes a U.S. employer to employ a foreign worker in the United States in a specialty occupation, which is a position that requires, at a minimum, a Bachelor's degree. Initially, an H-1B visa may be granted for a three year period up to a total period of stay of six (6) years via extensions. The petitioning employer must also satisfy the requirement that a valid employer-employee relationship exists between the U.S. petitioning employer and the foreign worker beneficiary. The USCIS issued the recent Memorandum to address what it described as a lack of clear guidance defining what constitutes a valid employer-employee relationship in the context of the H-1B visa program.

EMPLOYER'S RIGHT TO CONTROL REQUIRED

When determining whether an employer-employee relationship exists, the dispositive issue is the petitioning employer's right to control over the beneficiary. The petitioner does not need to show actual control over the beneficiary's work, but rather the

petitioner must provide evidence that it has the right to exert such control. The Memorandum makes it clear that it is insufficient to engage the individual to work and then pay the wage.

With no one factor being decisive, the Memorandum sets forth eleven criteria that the USCIS will consider when determining if the employer has shown the requisite right to control over the beneficiary to satisfy the employer-employee requirement:

- (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, e.g., 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, e.g., 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?

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- (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?

A petitioner has met the employer-employee relationship test if, in the totality of the circumstances, the petitioner is able to present evidence to establish its right to control the beneficiary's employment.

EXAMPLES OF VALID EMPLOYER-EMPLOYEE RELATIONSHIP

The Memorandum provides examples of what constitutes an employer-employee relationship.

A. Traditional employment

The beneficiary works at the petitioner's office location and reports directly to the petitioner on a daily basis. The petitioner sets the beneficiary's work schedule, provides the tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the beneficiary's work product. The petitioner claims the beneficiary for tax purposes and provides medical benefits.

B. Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. When not performing audits for clients, the beneficiary reports to a

centralized office and has assigned office space. The petitioner pays the beneficiary and provides employee benefits.

C. Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a third-party client to build a structure at a location out-of-state from the petitioner's main offices. While the project is being completed, the petitioner will place its architects and other staff at the off-site location. The contract, however, requires that the petitioner manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project and the beneficiary reports directly to the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.

D. Long-Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated third party client company to develop an in-house computer program to track its merchandise using the petitioner's proprietary software and expertise. To complete this project, the 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 company. The beneficiary performs the duties at the client company's facility. While the beneficiary is at the client's facility, however, the

beneficiary reports weekly to a manager who is employed by the petitioner. The petitioner pays the beneficiary and provides employee benefits.

EXAMPLES THAT DO NOT PRESENT A VALID EMPLOYER-EMPLOYEE RELATIONSHIP ACCORDING TO THE USCIS

A. Self-employed beneficiaries

If the beneficiary is the sole operator, manager and employee of the petitioning company then it is likely that the petitioner will not be able to provide evidence that the corporation, not the beneficiary, will be controlling the work. The beneficiary cannot be fired by the petitioner. In other words, the H-1B visa petition will likely be denied due to the fact that (a) there is no separation between the individual and the employing entity; (b) no independent control is exercised by the petitioner; and (c) no right to control exists.

B. Independent contractors

If the beneficiary is an independent contractor, then the H-1B visa criteria of an employer-employee relationship does not exist. For instance, the USCIS cites the example of an independent sales representative, who is not claimed by the petitioner as an employee for tax purposes and who is not subject to any controls as to where, when or how the beneficiary sells its products.

C. Third-party Placement/"Job-Shop"

The most relevant example for the IT consulting industry is the example given in the Memorandum of a third-party placement or "job-shop" arrangement. The petitioner is a computer consulting company. The petitioner has contracts with numerous

outside client companies, and it supplies these companies with employees to fulfill specific staffing needs. The positions are filled on an as-needed basis, rather than as specifically outlined in the contract between the petitioner and the third-party company. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party client company 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 all work assignments are determined by the third-party client company. The petitioner does not control how the beneficiary will complete daily tasks and none of the petitioner's proprietary information/tools are used by the beneficiary to complete any work assignments. The work product, the payroll, is not in anyway related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner. According to the USCIS, this example tends to illustrate a petitioner that has no right to control and no exercise of control within the meaning of the employer-employee relationship of the H-1B visa program.

DOCUMENTATION TO ESTABLISH THE EMPLOYER-EMPLOYEE RELATIONSHIP

Importantly, the Memorandum lists evidence that typically establishes the employer-employee relationship. Such evidence can include: an itinerary of services or engagements; employment agreements, if any, between the petitioner and beneficiary; offer of employment letter; copies of relevant contract provisions between the petitioner and a client

company establishing that while the petitioner's employees are placed at the third party client company, the petitioner will continue to have the right to control its employees; copies of work orders; and position descriptions that describe the skills required to perform the job offered, the instrumentalities and tools used to perform the job and the product or services to be provided.

In light of this Memorandum, employers need to take steps in advance of future H-1B visa applications or extension applications to document an employer-employee relationship. In particular, employers whose business may be viewed by the USCIS as involving third-party placements are likely to face heightened scrutiny of their H-1B applications including visa extension requests. In order to provide documentary proof that the employer-employee requirements as currently interpreted have been satisfied, some companies may need to refine or augment their existing procedures with respect to off-site employees, and further document their itinerary of services provided as well as the supervision of the H-1B visa beneficiary. For example, it is advisable to review and formalize procedures of supervision, e.g., weekly calls, reporting back to the main office routinely or site visits by the petitioner documented in writing including dates of contact. For those companies that already require weekly call-ins or have routine reporting systems, they may wish to improve such systems for documenting contact requirements such as keeping written track of the dates of the calls, content of the calls and any follow-up or outcome.

WIGGIN AND DANA

Counsellors at Law

EMPLOYMENT DEPARTMENT CONTACTS

JOHN G. ZANDY, Chair
203.498.4330, jzandy@wiggins.com

KAREN L. CLUTE
203.498.4349, kclute@wiggins.com

SHERRY L. DOMINICK
203.498.4331, sdominick@wiggins.com

MARY A. GAMBARDELLA
203.363.7662, mgambardella@wiggins.com

PETER J. LEFEBER
203.498.4329, plefeber@wiggins.com

LAWRENCE PEIKES
203.363.7609, lpeikes@wiggins.com

JOAN ALLEN ROWE
203.498.4548, jrowe@wiggins.com

RACHEL B. ARNETT
203.498.4397, rarnett@wiggins.com

JONATHAN M. BARDAVID
203.363.7638, jbardavid@wiggins.com

GREGORY A. BROWN
203.498.4401, gbrown@wiggins.com

MEGHAN D. BURNS
203.498.4382, mburns@wiggins.com

BRYAN S. WATSON
203.498.4442, bwatson@wiggins.com

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