

U.S. Immigration News

USCIS Issues Guidance That Imposes New Evidentiary Requirements on H-1B Employers

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Introduction

U.S. Citizenship and Immigration Services (USCIS) issued guidance on January 8th clarifying the requirements to establish an employer-employee relationship in the H-1B context. An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation will be required to establish, through documentary evidence, a valid employer-employee relationship throughout the petition validity period. The sweeping and controversial new guidance will change the way employers prepare, and USCIS adjudicates, most H-1B petitions.

Employer-Employee Relationship

H-1B regulations currently require that a United States employer establish that it has an employer-employee relationship with the beneficiary of the petition. The memorandum states that the lack of guidance on this issue has made it difficult for USCIS adjudicators to determine whether such a relationship exists, especially when petitions involve independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.

When determining whether an employer-employee relationship exists, USCIS will evaluate whether the petitioner has the "right to control" the beneficiary's employment, such as when, where and how the beneficiary performs the job. USCIS will consider the following, with no one factor being decisive:

- Does the petitioner supervise 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?
- 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?

According to the memorandum, the petitioner will have met the test if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist *throughout* the duration of the beneficiary's employment term with the petitioner.

Examples of Different Employment Relationships

The memorandum outlines several different employment relationships, some of which would satisfy the requirements of an employer-employee relationship and some of which would be prohibited under the new guidance.

Significantly, USCIS states that an H-1B beneficiary may be placed at third-party worksites (both for short-term and long-term assignments). However, the petitioner must establish that the petitioner will have the right to ultimate control of the beneficiary's work. In contrast, USCIS states that "job shops," where the beneficiary reports to a manager of the third-party company, the petitioner does not control how the beneficiary will perform the work assignments, and no proprietary information of the petitioner is used, are prohibited.

The memorandum also states that, for self-employed beneficiaries and independent contractors, the petitioner must establish that the petitioning entity (i.e., the corporation), and not the beneficiary, will control the work. This issue remains particularly unsettled, and we expect the memorandum will muddy the issue even further.

Documentation to Establish the Employer-Employee Relationship: Initial H-1B Petition

The petitioner must clearly show that an employer-employee relationship will exist throughout the duration of the requested H-1B validity period. The memorandum outlines examples of evidence that a petitioner may submit to establish an employer-employee relationship. USCIS was careful not to *require* any particular evidence, as only the evidentiary requirements set forth in the regulations may be required. An employer is therefore allowed to submit similar, probative evidence. Though USCIS was careful not to run afoul of the regulatory requirements, employers should expect additional scrutiny when relying on evidence that is not listed in the USCIS memorandum.

According to USCIS, a petitioner can establish the employment relationship and the right to control by providing a combination of the following or similar types of evidence:

- 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 establishments, venues, or locations where the services will be performed for the period of time requested;
- Copy of the signed employment agreement between the petitioner and the 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 contracts between the petitioner and a client that establishes that 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;
- A description of the performance review process; and/or
- Copy of the petitioner's organizational chart, demonstrating the beneficiary's supervisory chain.

Documentation to Establish the Employer-Employee Relationship: Extension of H-1B Status (Same Employer)

When applying for an extension of H-1B status (involving the same petitioner, without a material change in the terms of employment), the petitioner must submit evidence to document that it maintained a valid employer-employee relationship throughout the initial H-1B status approval period. Such evidence might include:

- Copies of the beneficiary's pay records for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or W-2 Forms for the period of the previously-approved H-1B status;
- Copy of Time Sheets for the period of the 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;
- Copy of dated performance review(s); and/or

- Copy of any employment history records.

Requests for Evidence

The memorandum seeks to address the problems relating to Requests for Evidence (RFEs) that many employers have experienced over the past few years. It is too early to know what effect, if any, the new guidance will have on that issue. The memorandum states that USCIS may issue a RFE when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought. However, such RFEs must specifically state what is at issue and be tailored to request specific illustrative types of evidence from the petitioner that refer directly to what USCIS deems as deficient.

Itineraries

When an employer will provide service in more than one location, the petition must include an itinerary with the dates and locations of the services. That requirement has existed under current regulations, but employers should expect that adjudicators will strictly apply the requirement going forwards. See 8 C.F.R. § 214.2(h)(2)(i)(B).

Shorter Petition Validity Periods?

Employers should pay particular attention to the fact that the memorandum, in multiple places, states that the petitioner must establish the requisite employer-employee relationship throughout the requested validity period of the petition. In the past, USCIS routinely approved petitions for up to three-years, even if the employer did not provide underlying documentation to support the beneficiary's activities for all three years. Going forward, employers should expect that USCIS will only approve a petition for the period of time established by the underlying documents. Many businesses may not have contracts in place for employment that will occur a year or two down the road. Those businesses may be required to file