IMMIGRATION IN THE WORKPLACE -

EMPLOYMENT AND IMMIGRATION

LAWYERS WORKING TOGETHER

by

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Agenda

- Hiring Issues: Pre-Screening and "Sponsorship" Policies
- Employment Visa Petitions and Contracts Of Employment
- Visa Status Issues and Employee Rights
- Employment Termination Issues

Hiring Issues

"You seem to know something about law. I like that in an attorney."

Recruiting DOs and DON'Ts - Pre-hiring Questions

- In 1998 the OSC "blessed" the following two questions as permissible in the pre-hiring process:
  - **Are you legally authorized to work in the United States?**
  - **Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?**

Additional Approved Pre-Hire Questions

- **Will you now or in the future require sponsorship for an employment visa? If you have a visa, how much time remains on your current visa?**
- **Will you now or in the future require sponsorship for an immigration-related employment benefit?**
  - For purposes of this question "sponsorship for an immigration-related employment benefit" means "an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status and 'job flexibility benefits' (also known as I-140 portability or Adjustment of Status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer." (Please ask us if you are uncertain whether you may need immigration sponsorship or desire clarification.)

Questions Not To Ask

- If hired, can you provide proof that you are legally able to work in the U.S. for at least 12 months?
- Are you prevented from lawfully becoming employed in this country because of your visa or immigration status? (Proof of citizenship will be required upon employment).
- Please specify your citizenship or immigration status.
- Do you now or at any time in the future require the filing of any application or petition with U.S. Citizenship & Immigration Services (e.g., Form I-765, application for employment authorization)?

"Sponsorship" Policies

- Sponsoring non-immigrants: Which categories and what are the criteria for hiring?
- Sponsoring for permanent residence: Who and when?
- Sponsorees depart: Who pays the visa costs?

General Best Practices

- Treat all applicants the same
- Incorporate approved questions into a standardized questionnaire
- Avoid "citizen-only" or "permanent resident/green card-only" hiring policies unless required by law, regulation or government contract
- Include hiring policies with respect to sponsorship directly in the job applications
  - "This employer will not sponsor applicants for the following work visas:_____."

Definition of "Employment" And Its Consequences Across Visa Classes

Obligations Under IRCA
(Immigration Reform Act and Control Act of 1986)

- Knowing Hire
- Verification of Authorization for Employment
- Avoiding Discrimination

IRCA makes it unlawful to hire an alien, knowing that he or she is unauthorized; OR to hire any individual without complying with IRCA's I-9 employment verification provisions. Fearing that the threat of sanctions might encourage employers to discriminate against individuals who looked or sounded foreign, Congress also added provisions prohibiting discrimination based on citizenship status or national origin.

Knowing Hire
"Knowledge" Under IRCA May Be Actual Or Constructive

IRCA currently defines "**knowing**" as:

"The term knowing includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer: …

(ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or

(iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf."

"Knowing" Exception Regulation

- 8 C.F.R. § 274a.5 Use of labor through contract
  - Any person or entity who **uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986, to obtain the labor or services of an alien** in the United States **knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment** in the United States in violation of section 274A(a)(1)(A) of the Act.
  - INA § 274A(a)(1)(A): It is unlawful for a person or other entity to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien … with respect to such employment[.]

Independent Contractor Exception

- 8 C.F.R. § 274a.1(j) Definition of Independent Contractor
  - The term *independent contractor* includes individuals or entities who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Whether an individual or entity is an independent contractor, regardless of what the individual or entity calls itself, will be determined on a case-by-case basis. Factors to be considered in that determination include, but are not limited to, whether the individual or entity:

Independent Contractor Exception (cont'd)

- 8 C.F.R. § 274a.1(j) Definition of Independent Contractor (cont'd)

  supplies the tools or materials; makes services available to the general public; works for a number of clients at the same time; has an opportunity for profit or loss as a result of labor or services provided; invests in the facilities for work; directs the order or sequence in which the work is to be done and determines the hours during which the work is to be done. The use of labor or services of an independent contractor are subject to the restrictions of 274A(a)(4) of the Act and § 274a.5 of this part [Use of Labor Through Contract].

What Is an H-1B Employer?

DHS/ CIS Regulation

- 8 C.F.R. § 214.2(h)(4)(ii)

  United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

  (1) Engages a person to work within the United States;

  (2) Has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and

  (3) Has an Internal Revenue Service Tax identification number.

What Is an H-1B Employer?

DOL Regulation

- 20 C.F.R. § 655.715.
  - *Employer* means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B, H-1B1, or E-3 nonimmigrants and/or U.S. worker(s). In the case of an H-1B nonimmigrant (not including E-3 and H-1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an E-3 and H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.

  - *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America*, 390 U.S. 254, 258 (1968).

Neufeld Jan 2010 Memo Relating to Third Party Placement

- USCIS Memorandum, D. Neufeld, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010), *published on* AILA Infonet at Doc. No. 10011363 (*posted* Jan. 13, 2010).

- Central factor: *right to control the manner and means by which the product is accomplished*." (p3, emphasis in original).

  "While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business' regular operations. The requisite control may not exist in certain instances· when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists."

- What Is L-1 Employer?
- What Is An Employer in PERM/ I-140 GC Sponsorship

"I thought it was legal—I wrote it on a legal pad."

Employment Visa Petitions and Contracts Of Employment

"At Will" Employment vs. Visa Petitions As Contracts Of Employment

- Does language in Petitioner's letter govern?
- Should Petitioner limit length of petition?

Breach of Contract Claims?

- *Kausal v. Educational Products Information Exchange Institute, d/b/a EPIE Institute*, 2013 N.Y. App. Div. LEXIS 2491 (NY Apr. 17, 2013)
  - Nikhil Kausal, a citizen of India, sued the employer for breach of contract and violation of the payment of wages requirement (Article 6) of the New York State Labor Code
  - In a departure from prior interpretations of H-1B sponsorship, a New York state court ruled an H-1B work visa application established an employment contract sufficient to support the employee's breach of contract claim

Visa Status Issues and Employee Rights

Sure-Tan and Hoffman Plastic

- Undocumented aliens and unfair labor practices
- Revelation of undocumented status
- California's approach to undocumented status

Four Key Antidiscrimination Provisions of the INA 8 U.S.C. § 1324b

1. **Citizenship or immigration status discrimination** with respect to hiring, firing, and recruitment or referral for a fee by employers with four or more employees.
2. **National origin discrimination** with respect to hiring, firing, and recruitment or referral for a fee, by employers with more than three and fewer than 15 employees.
3. **Document Abuse:** Unfair documentary practices related to verifying the employment eligibility of employees.
4. **Retaliation/Intimidation.**

Who is Protected?

- **Protected Classes**
  - US Citizens
  - Most Lawful Permanent Residents
  - Asylees
  - Refugees
  - Certain Aliens Admitted for Temporary Residence
  - Exceptions when otherwise required to comply with law

What is the Office Of Special Counsel for Immigration-Related Unfair Employment Practices

- Part of Department of Justice
- The Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) enforces the anti-discrimination provision (§ 274B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324b.

How Does It Work?

- Injured parties file discrimination charges directly with OSC's Washington, D.C. office within 180 days of the alleged act of discrimination. OSC may investigate charges for up to 210 days after receipt of the charge. During the final 90-day period, OSC and/or the injured party may file an administrative complaint against the employer.
- Complaints tried before an Administrative Law Judge (ALJ)
- OSC also initiates independent investigations

Side-By-Side Comparison Between EEOC and OSC

	EEOC	OSC
TYPE OF DISCRIMINATION WITHIN THE AGENCY'S JURISDICTION	**Race, color, religion,** national origin, **sex, disability, genetic information, age** and retaliation	National origin, **citizenship status, document abuse** and retaliation
NECESSARY EMPLOYER SIZE (Number of employees that work at the company overall)	**15+ employees** (there are some limits on how number of employees are calculated)	For national origin: **4–14 employees** For citizenship status and document abuse: **4+ employees**
PROTECTED WORKERS (Those who can sue or obtain relief due to discrimination)	**All workers** (including undocumented aliens)	For national origin & document abuse: all work-authorized individuals For citizenship status: U.S. citizens, some Legal Permanent Residents, asylees, refugees.
PROHIBITED DISCRIMINATORY ACTS	Hiring, firing, recruitment/referral for a fee, **terms and conditions of employment**	Hiring, firing, recruitment/referral for a fee, **employment eligibility verification**
AVAILABLE RELIEF	Back pay, front pay, reinstatement, **compensatory/punitive damages**, injunctive relief, attorney's fees	Back pay, front pay, reinstatement, **civil penalties**, injunctive relief, attorney's fees in limited circumstances
CHARGE-FILING DEADLINE (Number of days to file a charge after discrimination occurs)	**180 days** in non-deferral states **300 days** in deferral states	**180 days** in all states
HOW TO FILE A CHARGE WITH THE AGENCY	Call the EEOC's toll-free number or file a charge with your state fair employment agency	Mail, email or fax a completed charge form. Charge forms can be downloaded from the internet or you can request them by calling OSC's toll-free hotline.
AGENCY CONTACT INFORMATION	**1-800-669-4000; www.eeoc.gov**	**1-800-255-7688 (worker hotline); www.justice.gov/crt/about/osc/**

Some Recent OSC Cases

- Justice Department Reaches Settlement to Resolve Claim of Citizenship Status Hiring Discrimination in Waterloo, Iowa
- Justice Department Settles Citizenship Status Discrimination Claim Against IBM
- Justice Department Reaches Settlement with National Retailer to Resolve Immigration-Related Unfair Employment Practices
- Justice Department Reaches Settlement with Houston Community College to Resolve Immigration-Related Unfair Employment Practices

Employment Termination Issues

Changes at Employer Can Have Immigration Implications

- **Mergers, Acquisitions, and other corporate changes**
  1. How is the deal structured?
  2. What is the timing?
  3. Will the documents of post-transaction entities survive? Form I-9?
     a. Successor in Interest
  4. H-1Bs – remain valid – Material change in location, duties
     a. Dependency
     b. Cap-exempt organization?
  5. L visas – qualifying relationship
  6. E visas – change of nationality

Special Considerations Relating To H-1B Employees

- Benching & Furloughs – reduction in hours/salary
- Wage requirements

Terminations

- **H-1B Employees**
  1. Bona Fide Termination
  2. Notification to USCIS
  3. Return Transportation Home
  4. Employment contracts

Layoffs of U.S. Workers

- Impact on processes:
  - Lawful Permanent Residence
    - Primary Displacements
  - LCA (Labor Condition Application) for H-1B
    - Primary Displacements
    - Secondary Displacements

Thank you!

AN IRCA (IMMIGRATION REFORM AND CONTROL ACT) PRIMER: EMPLOYER OBLIGATIONS

by David Grunblatt

The enclosed provides some general guidance regarding hiring and employment practices which may have consequences under U.S. immigration law. It is not intended to address all circumstances or individual fact patterns, for which it is suggested that counsel be consulted. Furthermore, although it touches on various issues arising under labor, tax or employment law, these areas are the scope of this article, the authors encourage readers to seek counsel from experts in these fields when addressing specific cases.

OVERVIEW

Prior to Congress passing the Immigration Reform and Control Act of 1986 (IRCA), amending the Immigration and Nationality Act (INA), few provisions of immigration law dictated what an employer could or could not do. The employment of an "illegal" (undocumented) worker was essentially a violation of law on the employee's part, for which he or she faced possible deportation. However, apart from a few state laws, no sanctions applied to employers who hired undocumented workers. In 1986, in response to public sentiment that the United States had lost control of its borders, Congress passed IRCA which addressed this perceived problem in three ways: 1) it created a general amnesty for foreign nationals in the United States in violation of law since January 1, 1982; 2) it made it a violation of federal law, with specific civil and criminal penalties, to employ undocumented workers; and 3) it created certain anti-discrimination safeguards to ensure that employers, fearing the new sanctions, would not simply refuse to hire anyone who appeared or sounded "foreign."

The following discussion addresses issues which arise under the sanctions and anti-discrimination provisions of IRCA. It is important to keep in mind that, in addition to IRCA, an entire panoply of federal statutes impact the law respecting employees' rights. These include Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967 (ADEA), The American with Disabilities Act of 1990 (ADA), The Equal Pay Act of 1963 (EPA), and the Civil Rights Act of 1866. Moreover, various state and local anti-discrimination laws affect the workplace, and sometimes impose more stringent requirements than federal law. For example, in New York, the New York State Human Rights Law and the New York City Human Rights Law provide additional protection for workers based on marital status or sexual orientation. In view of the foregoing, it is critically important to consult with employment law counsel when particular questions arise.

I. IRCA COVERAGE

The provisions of IRCA apply to the hiring, recruiting or referring for a fee, individuals for employment in the United States subsequent to November 6, 1986. Accordingly, the requirements discussed below will pertain only to the employment of workers by a business in the United States and *not* to employment, whether for a U.S. enterprise or a foreign affiliate, if such employment occurs abroad. IRCA sanctions also do not apply to "grandfathered" employees (hired before November 7, 1986) or when a worker is not "employed" by an entity.

Who is an Employee?

The threshold determination to be made in any case where services will be rendered in the United States is whether or not an individual worker will be employed by the entity. Immigration regulations define "employee" as an individual who provides services or labor for an employer for wages or other remuneration.[1] The

[1] 8 CFR 274a.1(f).

definition specifically excludes independent contractors and certain persons engaged in casual domestic employment.

Independent Contractors

An employee may not be called an "independent contractor" merely to circumvent the requirements of IRCA. Accordingly, whether or not an individual or an entity is an independent contractor will be determined on a case-by-case basis, regardless of what the individual or entity calls itself.

Independent contractors carry on an independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results. Some indicia of whether or not an individual, or entity, is an independent contractor are whether the worker:

- supplies the tools or materials
- makes services available to the general public
- works for a number of clients at the same time
- has an opportunity for profit or loss as a result of labor or services provided
- invests in the facilities for work
- directs the order or sequence in which the work is to be done
- determines the hours during which the work is to be done

When an entity utilizes the services of an independent contractor such entity is relieved of the requirement (further discussed *infra*) of verifying that the worker is authorized to be employed in the United States. However, federal law makes it clear that an entity may not use a contract or subcontract in order to obtain the labor or services of undocumented workers *knowing* that these workers are unauthorized with respect to performing such labor or services.[2] In as much as the Department of Homeland Security (DHS) will make a case-by-case determination of whether an individual or entity is an independent contractor, *whenever an entity engages the services of an independent contractor it is recommended that such entity have a contract and keep well documented records with respect to the factors described above which would be given consideration by the DHS*

In most instances, entities in the information technology field which function as independent contractors will require a consulting agreement. Most agreements will contain a clause that designates the independent contractor as such. It is recommended that this clause reflect the consultant/contractor's obligations with respect to tax liabilities for its employees. It may be advisable to consider including additional language in the consulting agreement which provides that: 1) the independent contractor bears responsibility for verification of the employment eligibility for its workers pursuant to INA 274A (relating to completion of Form I-9); 2) the independent contractor warrants that its workers are legally authorized to render the services described in the contract and; 3) that if a visa is required, the necessary approval and documentation will be secured by the independent contractor, covering services at the location indicated in the agreement, prior to commencement of services under the agreement.

Volunteers

A cautionary note is warranted with respect to the use of volunteers within an organization. Extensive volunteer work may be construed as unauthorized employment, if the volunteer receives perquisites for that work. Thus, volunteer work for which traditional fringe benefits (housing, medical expenses, etc.), but no salary, is received, may be deemed "employment." Further, volunteer services for a prospective employer where the noncitizen will ultimately derive a benefit may be construed as employment. In addition, in many instances, taking on a volunteer or unpaid intern, particularly, if not associated with an academic program, may be in violation of employment and labor laws.

[2] INA 274A (a)(4).

II AVOIDING DISCRIMINATORY HIRING PRACTICES

IRCA prohibits national origin or citizenship status discrimination against "protected individuals" by employers of four or more workers when they hire, fire, or recruit for a fee. It is not unlawful under IRCA to prefer a U.S. citizen worker over an equally qualified undocumented worker.

"Protected individuals" under IRCA include: U.S. citizens or nationals, noncitizens who are lawful permanent residents ("green card" holders), refugees, asylees, or temporary residents under IRCA's legalization program. However, as previously indicated above, other federal and state employment laws may offer even broader protection to workers. In fact, the Equal Employment Opportunity Commission (EEOC), which administers Title VII, the ADA, the ADEA and the EPA advises that although the Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board*, 122 S. Ct. 1275 (2002) prohibits the award of back pay to undocumented aliens the decision "in no way calls into question the settled principle that undocumented workers are covered by the federal employment discrimination statutes and that it is as illegal for employers to discriminate against them as it is to discriminate against individuals authorized to work" www.eeoc.gov/policy/docs/undoc-rescind.html, (June 28, 2002)

In view of the foregoing, employers must tread a very thin line in attempting to ensure that no unauthorized worker is hired in violation of federal law, while simultaneously steering clear of potentially discriminatory questions in ascertaining the work authorized status of a prospective new hire. *The best protection against a claim of a discriminatory employment practice is to ensure that all workers and candidates for employment are treated the same regardless of citizenship, national origin, race, color, religion, gender, age, marital status, pregnancy, disability, sexual orientation or any other unlawful basis for distinguishing workers.*

Pre-Hiring Questions

All candidates for employment should be asked the same questions in determining their eligibility to work. The Office of Special Counsel for Immigration—Related Unfair Employment Practices (OSC), part of the Civil Rights Division of the U.S. Department of Justice, has on several occasions addressed the issue of what inquiry is appropriate for an employer to make concerning an applicant's authorization to be employed. In April 1993 letter, the OSC stated that it was permissible to ask the following question:

"Are you presently legally authorized to work in the United States on a full time basis?"

The OSC recommends against asking whether an applicant is authorized for *permanent* employment since IRCA provides protection to some workers (such as refugees or asylees) whose employment authorization may not be permanent.

In June 1993, the OSC responded to an inquiry regarding permissible questions in the labor certification interview process. Applications for a foreign nation's labor certification (a preliminary step in applying for a "green card" for a worker) requires that employers recruit for U.S. workers (U.S. citizens, nationals, foreign nationals admitted for permanent residence, temporary residents under the amnesty program, refugees & asylees) before the application for the foreign national worker can be approved. In this context, an employer may wish to ask:

"Are you currently authorized to work for all employers in the United States on a full-time basis or only for your current employer?"

In August 1998, the OSC "approved" the following questions for use in employment interviews or employment applications:

"Are you legally authorized to work in the United States?"

"Will you now or in the future require sponsorship for employment visa status (*e.g.*, H-1B visa status)?"

In June 2010, the OSC advised that an employer could amplify on this question by adding "sponsorship for an immigration-related employment benefit" means "an H-1B visa petition, an O-1 visa petition, an E-3

visa petition, TN status, and 'job flexibility benefits' (also known as I-140 portability, or adjustment of status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer."

Although the OSC cautions that it cannot opine on particular cases of alleged discrimination, the foregoing inquires would appear to comport with the requirements of IRCA. Accordingly, *it is recommended that pre-hiring questions be limited to either the first or second set of "approved" questions above.*

Completing & Documenting Form I-9

As discussed at length below, IRCA requires that employers verify (and reverify when necessary) that the worker has permission to accept employment in the United States through the proper and timely completion of Form I-9. The documents which a worker may present to prove identity and work authorization are specifically enumerated in the federal regulations.

It is not unlawful to request applicants for employment to complete Form I-9 at the time of interview, so long as *all* applicants are requested to do so. However, the information provided on Form I-9 could be used to discriminate on a prohibited basis. Accordingly, in order to avoid a charge of discriminatory hiring practices**,** *it is not recommended that Form I-9 be completed prior to hire*.

As noted above, a worker's identity and eligibility to accept employment in the United States will be demonstrated by showing documentation which is specifically described in the INA or as may be further designated by the Department of Homeland Security. *An employer may not request more or different documents than those designated.* Some courts have held that a request for specific documents on the list does not constitute document abuse unless accompanied by an intent to discriminate. However, to avoid a potential claim of discriminatory hiring practices, it is recommended that the employ *not request specific documents, but accept any proof of identity and authorization to work presented by a worker, so long as it meets the requirements listed in Form I-9.*

III COMPLYING WITH IRCA REQUIREMENTS WHEN EMPLOYING WORKERS

Completion of Form I-9 upon Hire

1. Completion of Section 1 by the Worker

When services will be rendered by an "employee" (*see* discussion above) *the worker must complete Section 1 of the Form I-9 at the time of hire.* As previously noted, it is not recommended that the worker be requested to complete Form I-9 before a decision to hire the worker has been made.

In Section 1 of Form I-9, the worker provides basic information regarding name and address, and attests under penalty of perjury that he or she is a U.S. citizen, lawful permanent resident or an foreign national authorized to work in the United States for a limited duration. The services of a translator or preparer acting on behalf of the worker may be used. The worker (and translator or preparer, if applicable) must sign Part 1 of Form I-9.

2. Completion of Section 2 by the employer

Within three business day of the worker's completion of Section 1, the employer must physically examine the required documents establishing identity and permission to work in the United States, complete Section 2 of Form I-9, and sign the form.

United States Citizenship and Immigration Services (USCIS) has advised that the three business days be counted after the actual date of hire. Thus, if an individual is hired and commences work on a Monday, the third day would be Thursday.

The employer is required to examine original documents to ensure that they appear to be genuine on their face and relate to the worker who produces them. The employer is not expected to be a document expert, but must exercise the care a "reasonable person" would use in reviewing these documents.

I-9 Documents

Presently, the documents which are acceptable for Form I-9 verification are listed as part of Form I-9. That List A no longer contains certificates of U.S. citizenship and certificates of naturalization.

Since 1987, when the first version of the I-9 form was promulgated, there have been significant changes in the form and in some instances, the list of eligible documents, specifically in 1991, 2005, 2007, and 2009. (*See* attached.)

An employee may present <u>either</u> an original document establishing both employment authorization and identity (List A) <u>OR</u> an original document which establishes employment authorization <u>and</u> a separate original document which establishes identity. (List B & C). The USCIS Handbook for Employers (Document M-274, available on www.USCIS.gov) includes photographs of sample documents.

1. Form I-9 List A

The following documents establish *both* identity and work authorization:

a. United States passport (unexpired) or passport card;

b. Alien Registration Receipt Card or Permanent Resident Card (Form I-551);

c. An unexpired foreign passport with a temporary I-551 stamp;

d. An unexpired Employment Authorization Document (EAD) that contains a photograph (Form I-766) or

e. In the case of a nonimmigrant foreign national authorized to work for a specific employer incident to status, an unexpired foreign passport with Form I-94 (Arrival/Departure record) bearing the same name as on the passport and containing the endorsement of the foreign national's nonimmigrant status, as long as the endorsement has not expired and the employment is not in conflict with any restrictions or limitations identified on Form I-94.

f. Passport from the Federated States of Micronesia or the Republic of the Marshal Islands with Form I-94 or Form I-94A indicating nonimmigrant admission under the Compact of Free Association between the United States and the FSM or RMI.

2. Form I-9 List B

The following documents establish identity *only* (for individuals 16 years of age or older):

a. Driver's license or identification card issued by a state or outlying United States possession, so long as the document contains a photograph or identification information such as name, date of birth, gender, height, eye color, and address;

b. School identification card with photograph;

c. A voter's registration card;

d. United States military or draft record;

e. Identification card issued by federal, state or local government agencies or entities, so long as the card contains a photograph or information such as name, date of birth, gender, height, eye color, and address;

f. Military dependent's identification card;

g. Native American Tribal document;

h. United States Coast Guard Merchant Mariner Card;

i. A driver's license issued by the Canadian government;

j. For persons under the age of eighteen who are unable to produce one of the documents listed above:

- A school record or report card;
- A clinic doctor or hospital record; or

- A daycare or nursery school record.

For persons under the age of eighteen who can produce none of the above documents, the minor may be exempt so long as:

a. The minor's parent or legal guardian completes on the Form I-9 Section 1—in the space for the minor's signature, the words, "minor under age 18."

b. The minor's parent or legal guardian completes on the Form I-9 the "Preparer/Translator certification."

c. The employer or the recruiter or referrer for a fee writes in Section 2—in the space after the words "Document Identification #" the words, "minor under the age 18."

Individuals with handicaps, who are unable to produce one of the identity documents listed above who are being placed into employment by a nonprofit organization, association or as part of a rehabilitation program, may follow the procedures for establishing identity provided in this section for minors under the age of 18, substituting where appropriate, the term "special placement" for "minor under age 18."

3. Form I-9 List C

The following documents establish work authorization *only*:

a. United States social security card, so long as the card does not state that it is invalid for employment;

b. A Certification of Birth Abroad (Forms FS-545 or DS-1350) issued by the U.S. Department of State;

c. A birth certificate issued by a state, county, municipal authority, or outlying possession of the United States bearing an official seal;

d. A Native American tribal document;

e. A United States citizen or resident citizen Identification Card (Forms I-197 or I-179); or

f. An unexpired EAD (issued by USCIS).

4. When the Employer Must Accept "Receipts" for Documents

Unless the employment is for a period of less than three business days, *the employer must accept the following documents, which are treated as "receipts" under the regulations.*

a. Lost, Stolen or Damaged Documents

Unless the employer has actual or constructive knowledge that a worker is not authorized to work, the employer must accept a receipt for a replacement document where the individual is unable to produce the required document because it was lost, stolen or damaged, so long as the replacement document is presented within 90 days of hire or reverification.

b. Temporary evidence of permanent resident status

If the worker has indicated in Form I-9, Part 1 that he or she is a lawful permanent resident, the employer must accept a Form I-94 containing an unexpired "temporary form I-551" stamp and a photograph of the individual so long as Form I-551 is presented before the expiration date of the temporary stamp (or if it has no expiration date, within one year of the issuance date of the arrival portion of Form I-94).

c. Form I-94 indicating Refugee Status

If the worker indicates in Section 1 of Form I-9 that he or she is an foreign national authorized to work, the employer must accept Form I-94 with an unexpired refugee admission stamp if the individual presents within 90 days of hire or reverification an unexpired EAD (Form I-766 or I-688B) or an unrestricted social security account number card and proof of identity.

Photocopying Documents

The employer is not required to photocopy the documents that have been shown to it. However, the employer may choose to do so (and it is probably preferable). *If the employer wishes to retain copies of employee-submitted documents for its records, the employer should do so for all employees hired.*

Reverification of Employment Eligibility

Where the employee has indicated in Section 1 of Form I-9 that he or she is temporarily authorized to work in the United States, the employer must reverify eligibility for employment by the time his or her limited authorization is expiring. The employer may do so by noting the new document's identification number and expiration date on Form I-9. The revised I-9 form, when it is issued, will likely have a separate (Form I-9A) section to facilitate reverification.

It is recommended that a "tickler system" be established for the employers staff to ensure that the employer complies with the reverification requirement. The employer may also wish to establish a procedure for providing advance notice to employees whose documents will need to be reverified. As with all employment policies, employers should apply any such system uniformly to all workers who have temporary authorization. *Note that if the worker is unable to reverify employment eligibility by the time his or her temporary authorization expires, the employer is required to discharge the employee.*

Retention of Records

The employer must retain Form I-9 for each employee for a period of three years from the date of hire or one year after the services are terminated whichever is later. It is advisable to keep I-9 forms separate from other personnel files so that they are readily available in the event of an audit. Additionally, this is also advisable as the forms contain information relating to age, citizenship, place of birth, etc. which may not be considered when making personnel decisions.

I-9 forms may be retained electronically. An electronic system used for I-9 retention must be constructed so as to retain an audit trail, not for each time a Form I-9 is electronically reviewed, but rather only for when the Form I-9 is created, completed, updated, modified, altered or corrected.

Re-Hires

If an employee is rehired within three years after the completion of the original Form I-9, the employer may use the original form to reverify employment eligibility.

Certain employees will be considered to be "continuing in employment" rather than being hired or rehired, where the individual at all times had a reasonable expectation of employment. These include an individual who:

- Takes approved paid or unpaid leave on account of study, illness or disability of a family member, illness or pregnancy, maternity or paternity leave, vacation, union business, or other temporary leave approved by the employer;
- Is promoted, demoted, or gets a pay raise;
- Is temporarily laid-off for lack of work;
- Is on strike on in a labor dispute;
- Is reinstated after a disciplinary suspension for wrongful termination found unjustified by any court, arbitrator, or administrative body, or otherwise resolved through reinstatement or settlement;
- Transfers from one distinct unit of an employer to another distinct unit of the same employer (the employer may transfer to the receiving unit the records and Forms I-9 relating to the worker);
- Is engaged in seasonal employment; or
- Continues employment with a related, successor or reorganized employer, provided that the employer obtains and maintains from the previous employer the records and Forms I-9 relating to the worker. (Any

employer which encounters this should consult legal counsel regarding specific requirements pertaining to "successor-in-interest".)

Whether or not the employee's expectation of resumption of employment was reasonable will be assessed on a case-by-case basis, considering factors such as the employer's past history and financial condition, whether the worker had been employed on a regular and substantial basis, has acted in accordance with employer's established policy regarding absences, has taken action or sought benefits which are inconsistent with resumption of employment (such as severance or retirement pay) and various other factors.

Prohibition Against "Knowingly" Hiring an Unauthorized Foreign National

Even if the worker provided a facially valid work authorization document when Form I-9 was completed, if the employer acquires "knowledge"—either actual or constructive—that the worker lacks authorization to be employed in the United States, the employer is required to terminate the employment. Under the regulations the employer may be charged with "constructive" knowledge if it fails to or improperly completes Form I-9, has information available to it that would indicate that the worker is unauthorized (such as Labor Certification or Application for Prospective Employer), or if the employer acts with reckless and wanton disregard in allowing another individual to introduce an unauthorized worker into the workforce.

Penalties

There are civil monetary penalties for violations pertaining to failure to correctly or timely complete Form I-9, ranging from $110 to $1,100 per worker. Where there has been a good faith attempt to comply with the requirements, violations which are purely "procedural or technical" may be forgiven, unless the employer has failed to correct a violation within 10 days after being notified of the violation by USCIS or another enforcement agency, or where the employer has engaged in a "pattern or practice" of hiring unauthorized workers.

There are civil monetary fines, for knowingly hiring or continuing to employ a worker not authorized to be employed in the United States as follows: for a 1st offense, $375-$3,200 per worker; for a 2nd offense, $3,200-$6,500 per worker; for a 3rd offense, $4,300- 16,000 per worker. All fines indicated are for offenses occurring after September 29, 1999, when the penalties were increased to adjust for inflation.)

Penalties may also include issuance of a cease and desist order and, for certain employers who engage in a practice of hiring unlawful workers or who knowingly hire 10 or more unauthorized workers, criminal sanctions. Criminal penalties under 8 USC 1324a(f) include fines for each worker or imprisonment for up to six months, or both. Criminal penalties under 8 USC 1324(a)(3) include fines assessed under Title 18 of the U.S. Code, or imprisonment of up to five years, or both.

Finally, federal contractors who knowingly hire unauthorized workers may be barred from federal contracts for one year pursuant to Executive Order 12989 (February 13, 1996).

Employer Rights in an DHS Visit to Inspect Records

DHS, the U.S. Department of Labor (DOL) and the Special Counsel for Immigration—Related Unfair Employment Practices (OSC) may conduct inspections of the employer's I-9 forms. These agencies are required to provide the employer with at least three days notice of an inspection. Neither a subpoena nor a warrant is required for an I-9 inspection.

In the event of an unannounced work site visit by the DHS seeking to question the employer's employees, the employer has the right to deny entry in the absence of a warrant, although frequently cooperation is to the employer's advantage.

In a proceeding to assess administrative penalties, the DHS issues a Notice of Intent to Fine. The respondent has 30 days from service of the Notice of Intent to request a hearing before an Administrative Law Judge.

I-9's and the E-Verify Program

E-Verify is an electronic Internet-based system operated by USCIS that verifies employment eligibility based upon information provided by the employee on his or her I-9 form. The information provided is

checked against records of DHS, the Social Security Administration and other available databases to confirm that the identified individual is in fact authorized to work in the United States.

It is largely a volunteer program, but certain federal contractors are obligated to participate in E-Verify and several states have mandated that certain employers and contractors within their states participate.

There are certain additional obligations when completing an I-9 form for participants in the E-Verify program. They must obtain a social security number (voluntary for non-E-Verify participants); they may only accept documents from List B that have a photograph; and even if it is not their policy to maintain copies of the documents, they must take copies of U.S. passport, U.S. passport cards, Form I-551 or Form I-766 if presented, as these documents will be compared (the photographs) to records on file with DHS as part of the E-Verify process.

CONCLUSION—WHAT DOES THE FUTURE HOLD?

It is hard to predict what additional obligations will be imposed on employers in the future, but the trend clearly will be to focus on enhancing compliance. It can be anticipated that there will be a significant push to expand use of the E-Verify program and the possibility to make it mandatory for all employers. To counter the problem of identity theft, additional security as to documents such as social security cards and drivers' licenses may be mandated. One thing that can safely be predicted is that the burden on employers will increase.

EXHIBIT I—SUPPLEMENTAL MATERIALS

ENROLLMENT IN THE USCIS E-VERIFY PROGRAM—AN EXECUTIVE SUMMARY

OVERVIEW

The E-Verify program is an electronic internet-based system of employment verification operated by United States Citizenship and Immigration Services (USCIS) in partnership with the Social Security Administration (SSA). Participating employers record all relevant information of a new employee by completing the I-9 form and enter the data into the Internet-based E-Verify system for verification by the Department of Homeland Security (DHS) and the SSA.

The system responds, in most cases, nearly instantaneously indicating either that:

- Employment is authorized;
- SSA Tentative Non-Confirmation (the SSA cannot immediately confirm employment authorization)
- DHS verification in process (application pending)
- DHS Tentative Non-Confirmation (DHS cannot confirm employment authorization)

The E-Verify program provides a procedure so that the new hire can contest a non-confirmation with the appropriate agency, while continuing to work, on payroll until resolution.

Registration

To participate in the E-Verify program, an employer registers online and signs a Memorandum of Understanding with DHS and the SSA. Designated employees or agents of the company are then obligated to read a user manual and complete an online tutorial using the system.

An employer can choose to register for E-Verify at one or more sites of employment and can terminate participation in the E-Verify program at any time, with 30 days notice.

Obligations

An employer participant in E-Verify must verify employment eligibility of new employees only. It must post notices of the employer's participation in E-Verify and an anti-discrimination notice issued by the Office of Special Counsel for Immigration—Related Unfair Employment Practices. It cannot use the program to verify current employees (except for certain federal contractors) and the system cannot be used to pre-screen employment applicants.

E-Verify Advantages

The system may effectively screen out undocumented workers at the time of hire. It may result in better treatment if the company is subject to investigation. In addition, some states have already made E-Verify mandatory and E-Verify for certain federal contractors is obligatory, effective September 8, 2009, per regulation. In addition, some prognosticate that E-Verify in one form or another will eventually become mandatory for all employers across the country.

E-Verify Disadvantages

Employers under this program must establish and maintain a process and system for maintaining records, following up and monitoring resolution of "tentative non-confirmations." It must commit resources to the system. It must be willing to permit DHS and the SSA to make visits on-site to review E-Verify records, and it is

going "on the record" by using the E-Verify system as it inputs its I-9 information for new hires into the E-Verify database.

SYNOPSIS OFTHE E-VERIFY PROGRAM FOR EMPLOYMENT VERIFICATION—MEMORANDUM OF UNDERSTANDING

The Memorandum of Understanding, which must be executed in order to participate in the E-Verify program, outlines the duties, responsibilities and obligations of each of the participating parties, which are the SSA, DHS (USCIS, which administers the program is a division within DHS) and the employer. Additional, and to some extent different, terms are provided for those employers who are federal contractors which are not applicable to employers generally.

The Memorandum states that the SSA and DHS will undertake to verify the records of potential hires and describes the procedural obligations of the employer.

The Memorandum of Understanding (and Manual) provide for certain amendments to the "normal" I-9 process. It provides that an employer participating in E-Verify, can only accept a List B Document which contains a photo. It also obligates the employer to collect and list the individual's social security number and delay running an E-Verify query for an employee who has not yet been issued a social security number until such time as the number is actually issued. It further obligates the employer to allow for onsite visits to inspect E-Verify records.

E-VERIFY—VOLUNTARY OR NOT

Although the basic E-Verify program is, at this point in time, a voluntary program, there are certain situations under which it could be obligatory to an employer. Specifically, a company which enters into qualifying contracts, or amends certain contracts after September 8, 2009 to provide goods and services to the federal government, might be obligated.

In addition, a company that contracts with states which have imposed their own obligations, there are currently 13 of them, or hires in the three states which require use of E-Verify for employees hired within the state may find themselves under the obligation, to at least, in a limited way, register in the E-Verify program.

Federal Contractors

Not all federal contracts are subject to the E-Verify mandate. Solicitations issued and contracts awarded after September 8, 2009 and existing indefinite-delivery/indefinite-quantity contracts that are substantial and extend at least six months beyond September 8, 2009, are potentially subject.

New prime contracts valued above the simplified acquisition threshold of $100,000 with a period of performance longer than 120 days are subject. However, the commitment to participate in this program is not initiated by the contractor, but rather, the contracting officer for the federal government entity is responsible to include an E-Verify clause in any qualifying new contract.

Subcontracts that flow from the prime contracts that are for services or for construction with a value over $3,000 are also subject to mandatory E-Verify, and the primary contractor is required to include clauses in its contracts mandating E-Verify participation.

Within 30 days from the contract award, the employer is required to enroll in E-Verify, take the tutorial and prepare for actual implementation. Within 90 days after enrollment, the company must commence use of E-Verify for new hires and current employees assigned to the contract. If the company chooses to E-Verify all

of its current employees rather than just those assigned to the contract, it has 180 days from enrollment to do so.

One of the most difficult and perhaps most important determinations that a company must make is whether any of the contracts it anticipates engaging in are in fact subject to the Federal Acquisition Regulation (FAR). As the FAR is the government-wide regulation that prescribes regulations for federal government entities acquiring goods and services, the first principle is that the FAR is only applicable to contracts where a federal government entity is *acquiring* goods or services from a private contractor.

An "acquisition" is defined as "the acquiring by contract with appropriated funds of supply or services including construction by and for use of the federal government for purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated or evaluated."

E-VERIFY IN THE STATES

As noted by the National Conference of State Legislatures, seventeen states currently require the use of E-Verify for public and/or private employers (fifteen through legislation and two, Florida and Idaho, through Executive Orders). Minnesota and Rhode Island previously enacted Executive Orders requiring state agencies and contractors to use E-Verify, but those orders were rescinded. States currently requiring E-Verify are: Alabama, Arizona, Colorado, Florida, Georgia, Idaho, Indiana, Louisana, Mississippi, Missouri, Nebraska, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, and Virginia. Alabama, Arizona, Georgia, Mississippi, South Carolina, and Utah, currently require the use of E-Verify for all employers in their states. Louisiana does not make it obligatory, but use of E-Verify is a safe harbor. North Carolina will make it oligatory on all employers with more than 500 employees, as of October 1.

As these state laws require use of the original, voluntary version of the E-Verify program, only E-verification of *new* hires is mandated by these laws.

CONCLUSION

In conclusion, if the employer receives a new federal contract or is asked to amend one, the government agent will notify the employer and advise if the federal government is of the opinion that registration in the E-Verify program is necessary. In addition, if the employer is doing business in any of the seventeen states listed above, it may need to contact legal counsel to investigate whether it must, in fact, make use of the E-Verify program.

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Employment and Immigration Law

Recruiting Do's and Don'ts for Job Applicants Requiring Visas

Hallie A. Cohen and David Grunblatt

04-12-2011

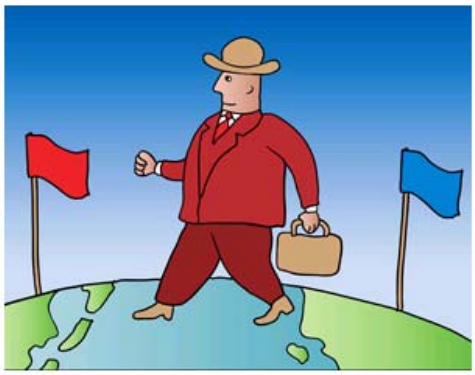

Image: iStockphoto.com

Related Items

- Employment & Immigration Law

Employers often have legitimate business reasons for not wanting to hire employees who will require some kind of visa sponsorship. However, the current law makes it difficult to screen out these potential employees in the hiring process. Until recently the following two questions, sanctioned by the Office of Special Counsel for Immigration-Related Unfair Employment Practices, Civil Rights Division, U.S. Department of Justice (hereinafter OSC), were the only real accepted means for prehire screening: (1) Are you authorized to work in the U.S.? and (2) Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?

While these questions ensure the employer is not in violation of the antidiscrimination provisions of the Immigration and Nationality Act (INA), they often fail to uncover all the situations that would potentially require the employer's involvement to ensure the employee's continued work authorization. OSC has indicated employers should now be able to go beyond these two questions in the course of recruitment to implement a more robust screening process while still adhering to the law. In fact, they have set forth additional permissible screening practices that employers should feel comfortable incorporating into their standard hiring process.

Verification Required Under the Immigration and Nationality Act

After the Immigration Reform and Control Act (IRCA) of 1986 became effective, employers must verify that their new hires are authorized to work in the U.S. by complying with what is commonly known as the I-9 process. This requires the employer and the employee to attest that the employee is authorized to work in the U.S. on Form I-9. In order to make this attestation, the employer must first review one or more of the approved documents furnished by the employee that establish the employee's identity and work authorization. Such documents include a U.S. passport, permanent residence card (green card), Social Security card or driver's license. The employer must retain the Form I-9 for inspection and update it as necessary. Noncompliance can lead to an investigation and costly penalties. As evidence of the government's continued commitment to the program, on Feb. 18, Immigration and Customs Enforcement (ICE) stated that it will be significantly expanding audits of these records.

While employers are required to verify that their employees are authorized workers, they are not permitted to discriminate. Specifically, employers cannot discriminate on the basis of national origin or the

citizenship of protected persons, which include U.S. citizens, recent lawful permanent residents, those who apply for naturalization within six months of eligibility, refugees and asylees. Employers are also prohibited from engaging in document discrimination during the verification process when done with discriminatory intent. Thus, employers are not permitted to ask for more documents than required on Form I-9, request specific documents or refuse documents that appear valid on their face. Discriminatory hiring practices can also result in investigations and penalties.

Can Employers Screen Out Individuals Who Will Require Visa Sponsorship?

Employers may have many legitimate and legal reasons for not wanting to hire employees who will require visa sponsorship or are in a pending visa process and, consequently, want to screen out such individuals during the hiring process.

Some of these reasons include: the cost of attorney and government filing fees, the chance that employment might be cut short by a denied petition, the potential waste of training costs if an employee's renewal or work permission is refused, the employer's lack of access to an application of the employee, the desire to avoid export control issues that arise when controlled technology or technical data is provided to certain foreign nationals, and because the employer prefers to hire American citizens and other U.S. workers.

The law allows employers to screen out those individuals who are not U.S. citizens, recent lawful permanent residents and those that apply for naturalization within six months of eligibility, refugees and asylees. However employers still must not discriminate on the basis of national origin. So what questions can an employer ask to effectively weed out undesired applicants while not engaging in discrimination?

The Reverence for Two Questions

It was in 1998 that OSC blessed two questions that employers could pose to screen potential hires for issues surrounding work authorization:

- Are you legally authorized to work in the United States?
- Will you now or in the future require sponsorship for employment visa status (e.g., H-1B visa status)?

Employers now routinely ask these two questions in the hiring process. However, these questions do not identify every instance that would require the employer's own action to ensure the potential hire's continued lawful employment, so employers have persisted in their a desire to gather additional information.

Moving Beyond the Two Questions

It is possible to move beyond the two questions to screen out additional applicants and still comply with the INA. In response to inquiries from various practitioners, the OSC has approved the following additional questions that may provide employers with more useful information about potential hires:

Will you now or in the future require sponsorship for an employment visa? If you have a visa, how much time remains on your current visa?

Will you now or in the future require sponsorship for an immigration-related employment benefit? For purposes of this question “sponsorship for an immigration-related employment benefit” means “an H-1B visa petition, an O-1 visa petition, an E-3 visa petition, TN status and ‘job flexibility benefits’ (also known as I-140 portability or Adjustment of Status portability) for long-delayed adjustment of status applications that have been pending for 180 days or longer.” (Please ask us if you are uncertain whether you may need immigration sponsorship or desire clarification.)

The OSC has also suggested that employers state their hiring policies directly on a job application. For example, “This employer will not sponsor applicants for the following work visas:_____.” However, the employer must not ask applicants to indicate their status or choose their status from a list of specific visa statuses.

The OSC’s additional suggestions are permissible because none implicate national origin discrimination, nor do they refer to protected individuals with respect to citizenship status. Moreover, they are useful because they are explicit about time constraints, force applicants to think about sponsorship more broadly and provide an opportunity for the employer to state his hiring policy at the outset.

Questions NOT To Ask

Through its advisory letters, the OSC has stated that the following questions are impermissible as indicative of discriminatory hiring practices:

- If hired, can you provide proof that you are legally able to work in the U.S. for at least 12 months?
- Are you prevented from lawfully becoming employed in this country because of your visa or immigration status? (Proof of citizenship will be required upon employment.)
- Please specify your citizenship or immigration status.
- Do you now or at any time in the future require the filing of any application or petition with U.S. Citizenship & Immigration Services (e.g., Form I-765, application for employment authorization)?

Now that employers are required to make an attestation with regard to export control directly on Form I-129 for foreign nationals in H, L or O status, they are reminded that they may need to seek export licenses to employ these foreign nationals. As such, issues regarding national origin and citizenship status may be essential in the hiring process. It is not entirely clear under what circumstances an employer can ask a question, as part of prehire screening, to determine the potential need for an export license.

General Practices

As a general rule, employers should treat all people the same when announcing a job, taking applications and interviewing applicants. Also, employers should give out the same job information over the telephone

to all callers, and use the same application form for all applicants. By making the process as uniform as possible, employers can protect themselves from claims of national origin and citizen status discrimination.

Furthermore, employers should always avoid “citizen-only” or “permanent resident/green card-only” hiring policies unless required by law, regulation or government contract. In most cases, it is illegal to require applicants to be U.S. citizens or have a particular immigration status.

Employers should keep in mind that U.S. citizenship, or nationality, belongs not only to persons born in the U.S., but also to all individuals born to a U.S. citizen, and those born in Puerto Rico, Guam, the Virgin Islands, the Commonwealth of Northern Mariana Islands, American Samoa and Swains Island. Furthermore, the U.S. government grants citizenship to legal immigrants after they complete the naturalization process. Therefore, employers should avoid job advertisements that say “only U.S. citizens,” “citizen requirement,” “only U.S. citizens or green card holders” and any other similar language unless U.S. citizenship is required by law, regulation, executive order or government contract.

Although an employer has the legal right to choose not to hire an applicant that would require visa sponsorship, employers must still be careful not to engage in national origin discrimination. The best way to remain compliant with the INA, yet still screen out applicants that potentially require employer involvement to maintain the applicant’s work authorization, is for an employer to implement the questions suggested above into a standard job application form that all employees must complete. In addition, an employer must ensure that it does not ask its job applicants any of the “illegal” questions (or their equivalents) discussed above. By making the hiring process as uniform as possible, the employer can lawfully screen out nonimmigrant applicants prior to performing the required employment authorization verification.

Grunblatt is head of the immigration and nationality group in the labor and employment law department, and Cohen is an associate in the labor and employment department at Proskauer Rose. Both are resident in the global law firm’s Newark office.

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations Directorate
Washington, DC 20529-2060

U.S. Citizenship and Immigration Services

JAN 0 8 2010

HQ 70/6.2.8
AD 10-24

Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director, Service Center Operations

SUBJECT: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)

I. Purpose

This memorandum is intended to provide guidance, in the context of H-1B petitions, on the requirement that a petitioner 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.

II. Background

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services...in a specialty occupation described in section 1184(i)(1)..., who meets the requirements of the occupation specified in section 1184(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under 1182(n)(1).

The Code of Federal Regulations (C.F.R.) provides that a "United States employer" shall file an [H-1B] petition. 8 C.F.R. 214.2(h)(2)(i)(A).

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

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United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
(1) Engages a person to work within the United States;
(2) Has an **employer-employee relationship** with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
(3) Has an Internal Revenue Service Tax identification number.

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the U.S. employer and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles[1] and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.[2]

The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The placement of the beneficiary/employee at a work site that is not operated by the petitioner/employer (third-party placement), which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist.

While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business's regular operations. The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists.

Furthermore, USCIS must ensure that the employer is in compliance with the Department of Labor regulations requiring that a petitioner file an LCA specific to each location where the

[1] USCIS has also relied on the Department of Labor definition found at 20 C.F.R. 655.715 which states: *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968).

[2] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter Darden) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) (hereinafter Clackamas).

beneficiary will be working.[3] In some situations, the location of the petitioner's business may not be located in the same LCA jurisdiction as the place the beneficiary will be working.

III. Field Guidance

A. The Employer-Employee Relationship

An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the "conventional master-servant relationship as understood by common-law agency doctrine."[4] The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The Supreme Court has stated:

> *we consider the hiring party's **right to control the manner and means by which the product is accomplished**. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.*[5]

Therefore, USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[6] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (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?

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[3] See 20 C.F.R. 655.730(c)(4)(v), 20 C.F.R. 655.730(c)(5) and 20 C.F.R. 655.730(d)(1)(ii)
[4] See Darden at 322-323.
[5] See Darden at 323-324 (Emphasis added.)
[6] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(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?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship 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. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. 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.

Valid employer-employee relationship would exist in the following scenarios:[7]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to

[7] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

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 client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

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.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[8]

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee

[8] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[9] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[10]

[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.

[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

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

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[9] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[10] In the past, the Administrative Appeals Office (AAO) has issued a limited number of unpublished decisions that addressed whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 decision in *Matter of Allan Gee, Inc.*, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 17 I&N Dec. 296 (Reg. Comm. 1979). While it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Starting in 2007, the AAO has utilized the criteria discussed in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to reach this pivotal analysis.

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 company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. 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 beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[11]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[12] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the

[11] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers.** However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

[12] See 8 C.F.R. 214.2(h)(9)(i).

employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[13] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship 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 establishment, venues, or locations where the services will be performed for the period of time requested;
- 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

[13] See 8 C.F.R. 214.2(h)(4)(ii).

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.

2. Extension Petitions[14]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- 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.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

[14] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit 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. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

IV. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable

at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

V. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to the Business Employment Services Team in the Service Center Operations Directorate.

AFM UPDATES

Accordingly, the *AFM* is revised as follows:

1. Section (g)(15) of Chapter 31.3 of the *Officer's Field Manual* is added to read as follows:

31.3 H-1B Classification and Documentary Requirements

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(g) Adjudicative Issues

(15) Evidence of Employer-Employee Relationship

USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[1] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (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?

[1] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(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?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship 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. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. 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.

Valid employer-employee relationship would exist in the following scenarios:[2]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic

[2] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

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 client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

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.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[3]

Self-Employed Beneficiaries

[3] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[4] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[5]
[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.
[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

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

[4] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[5] The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

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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 company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. 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 beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[6]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[7] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the

[6] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers.** However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.
[7] 8 C.F.R. 214.2(h)(9)(i)

employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[8] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship 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 establishment, venues, or locations where the services will be performed for the period of time requested;
- 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

[8] See 8 C.F.R. 214.2(h)(4)(ii).

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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.

2. Extension Petitions[9]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- 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

[9] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

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- 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.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit 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. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.