CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

NEW USCIS MEMO ON EMPLOYER-EMPLOYEE RELATIONSHIP FOR H-1B PETITIONS: IS IT A WAY TO KEEP CERTAIN WORKERS OUT?

Posted on January 16, 2010 by Cyrus Mehta

The Requests For Evidence hurled against IT consulting firms after they filed H-1B visa, then the raves and rants of Senator Grassley against allegedly abusive IT firms, followed by the BusinessWeek article on job shops giving prime time to the rabidly anti-immigrant Programmers Guild, along with attacks on the H-1B program by even our own allies at labor organizations, where even sophisticated IT firms are pejoratively called "body shops," have all been code for keeping the Indians out. See H-1B BIGOTRY, http://tiny.cc/KN180 .

And now the latest USCIS Memo by Donald Neufeld dated January 8, 2010 (Neufeld Memo), http://tiny.cc/z3ZU8 , which in one sudden swoop, and in violation of the public notice and comment procedures of the Administrative Procedure Act, guts the ability of IT consulting firms to file H-1B visas, is again a thinly veiled attempt to kill a successful Indian business model that American businesses have so readily embraced.

It is then no surprise that the outrageous singling out of Indians since the New Year waiting in the line at Newark and other airports by CBP officials is the result of the Neufeld Memo that may have filtered through CBP officialdom but not the public until January 13, 2010. On one fateful day, January 11, 2010, when Continental Airlines Flight 49 landed in Newark from Mumbai, India, we know that CBP officer Matt McGirr and his colleagues, hunted through the lines for Indian H-1B workers even before they showed up for primary inspection. Their minds were made up. No detailed questions were asked. The moment they found Indian H-1B workers who uttered that they were working at a client site in the IT field, their fates were sealed. They were subjected to expedited removal orders and sent back to India. Some were luckier and escaped the ER

order, but still had to withdraw their applications for admission to the U.S. Nevertheless, they were all coerced into making statements under threat of being detained. CBP officials also made remarks as to why the H-1B workers, singled out for deportation, earned more than U.S. workers and should not be paid so much. The consequence of expedited removal is a 5 year bar from entering the U.S. It is hoped that higher and saner officials within CBP will realize that these ER orders were unwarranted and trampled upon the civil rights of Indian workers, erase them and allow them to continue to contribute their skills and expertise, which in turn benefit U.S. corporations.

But the damage will continue through this Neufeld Memo, which takes aim at mainly Indian H-1B IT workers at third-party client worksites. Essentially, the Neufeld Memo insists that there must be an employer-employee relationship at all times throughout the requested period of H-1B employment. The employer, according to the Neufeld Memo, must be able to establish the right to control over when, where, and how the H-1B worker performs the job, and the USCIS will consider the following in determining whether there is an employer-employee relationship, notwithstanding the fact that the IT consulting firm hired the individual and is on its payroll:

1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
2) If the supervision is off-site, how does the petitioner maintain such supervision, i.e. weekly calls, reporting back to main office routinely, or site visits by the petitioner?
3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?
4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
7) Does the petitioner claim the beneficiary for tax purposes?
8) Does the petitioner provide the beneficiary any 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?

Under these criteria, an IT consulting firm, which does not have its own proprietary software, and which the H-1B worker will implement for a client under supervsion from the IT firm, will most likely be doomed when it files an H-1B visa. Indeed, the Neufeld Memo cites the example of a third party placement where "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 proprietary information of the petitioner is used by the beneficiary to complete any work assignments." Such an H-1B will fail since the petitioner, according to the Memo, has no right of control over the beneficiary. And even when such an IT company can demonstrate a right of control over its employee (even if the day to day assignments are overseen by the client), the USCIS will rely on the Neufeld Memo, which will give it sufficient leeway to deny the H-1B petition. In the recent past, it was necessary to show a link between the petitioner and the client company. Now the Neufeld Memo wants more – this esoteric right of control, and this will be impossible in the context of an IT consulting firm, which may not have its own proprietary product or methodology.

The USCIS cannot make law through a memo, which CBP officials have also started relying upon at airports to deport Indian H-1B workers in the IT industry. Clearly, the free market economy, which the U.S. hopefully still espouses, has recognized the value that these Indian IT consulting firms bring to U.S. business, and in turn, to the U.S. consumer. There is already a vigorous process in place that scrutinizes H-1B requests, and a de facto re-adjudication procedure when the worker requests an H-1B visa at a U.S. consulate in India. We do not need another restrictive memo, which will kill the spirit of innovation and entrepreneurship, which also brings with it expertise, that the U.S. so vitally needs. Indeed, there is a lot more in the Neufeld Memo that is troubling, such as the inability of a petitioning entity that is owned by the beneficiary to sponsor him or her. This aspect of the Memo also contravenes long established principles that a corporate entity is a separate legal entity and can sponsor a beneficiary for an H-1B visa. See USCIS GRAPPLING WITH THE RIGHT OF A CORPORATION TO PETITION FOR ITS OWNER FOR AN H-1B VISA,

http://tiny.cc/OwSOX . This too will kill innovation and enterprise. Don't we want more folks to come here to start another Google? I am not sure the officials at Department of Homeland Security get it. DHS' mission is to ensure national security and not to promote economic dynamism and make the U.S. the most attractive destination in the world for the hardworking, creative and innovative.