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HALCYON DAYS IN H-1B VISA PROCESSING

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Much has already been written to deservedly criticize the USCIS Memo by Donald Neufeld dated January 8, 2010 (Neufeld Memo), http://tiny.cc/z3ZU8, which suddenly undermines the ability of IT consulting firms to file H-1B visas, http://cyrusmehta.blogspot.com/2010/01/new-uscis-memo-on-employer-employee.html. The latest is an excellent blog post from my friend and colleague, Angelo Paparelli, http://blogs.ilw.com/angelopaparelli/2010/02/my-entry.html, who shows how the Neufeld Memo is a thinly veiled attempt to kill a successful business model that have benefited American businesses. Our firm is beginning to see Requests for Evidence that regurgitate the language of the Neufeld Memo regardless of the substantial evidence submitted that established the nexus between the IT consulting firm and its client. Winning the H-1B visa petition filed by an IT consulting company used to be tough, but it has never been more challenging since the issuance of the Neufeld Memo. We hark back at the days when interpretations from the prior Immigration and Naturalization Service, although not a piece of cake, were far more reasonable and commonsensical.

The H-1B worker likely to be most severely jeopardized by the sudden shift in policy brought by the Neufeld Memo is the beneficiary of an approved I-140 petition under the EB-2 from India or China, or EB-3 from any country (especially India which is more backlogged than other countries), who must file many extensions of H-1B status while waiting endlessly for immigrant visa availability. Suddenly, this time around while requesting for the H-1B extension well beyond six years under Sections 104 (c) or 106(a) of the American Competitiveness in the 21st Century Act, the petitioner must overcome the disqualifying example, cited in the Neufeld Memo, 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 likely 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), an adjudicator can rely on the Neufeld Memo, which will give him or her sufficient leeway to arbitrarily deny the H-1B extension request. 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 - which may be most difficult to establish in the context of an IT consulting firm if it does not have its own proprietary product or methodology.

We look back with dreamy eyed nostalgia at earlier guidance. A 1995 memo by the then Assistant Commissioner of legacy INS, Michael L. Aytes, Interpretations of Itinerary in H-1B Petitions, HQADN (1995), more sensibly recognized that a contractor who paid the H-1B worker at all times remained an employer. Mr. Aytes advised:

Since the purpose of the regulation is merely to insure that the alien has an actual job in the United States, the itinerary requirement…can be met in a number of ways…the regulation does not require that the employer provide the Service with the exact dates and places of employment. As long as the officer is convinced of the bona fide of the petitioner's intentions with respect to the alien's employment, the itinerary requirement has been met. The itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States. Service officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien.

With respect to the employer-employee relationship, Mr. Aytes in the good old days of 1995 reasoned so differently from Mr. Neufeld in 2010:

In the case of an H-1B petition filed by an employment contractor, Service officers are reminded that all prospective H-1B employers have promised the Department of Labor through the labor condition application process that they will pay the alien by appropriate wage even during periods of time when the alien is on travel or between

assignments. Since the contractor remains the employer and is paying the alien's salary, this constitutes employment for purposes of H-1B classification.

Mr. Aytes' guidance on determining the employer of an H-1B petition, based on who pays the alien's salary, was so much simpler and consistent with real world economic reality and tax law. Take a look at this Op-Ed in last Sunday's NY Times, http://www.nytimes.com/2010/02/21/opinion/21shulman.html?scp=5&sq=shulman&st=cse, drawing attention to Section 1706 (especially after the plane crash by a computer programmer pilot into the IRS building in Austin), which specifically requires people in the IT consulting industry to be treated as employees and not as independent contractors, and excludes computer programmers from the safe harbor Form 1099 requirement under Section 560 of the IRC. The Neufeld Memo assumes, in contradiction of Section 1706, that H-1B programmers are not considered employees of the IT staffing firm, when Congress specifically directed them to be treated as such, at least for tax purposes, under 1706. Moreover, in a letter dated October 23, 2003 to Lynn Shotwell, Efren Hernandez III, then Director, Business and Trade Branch of USCIS recognized that if a new LCA was obtained as a result of a change in work location after the H-1B petition was filed, an amendment to the H-1B petition was not required. It is noted that the Neufeld Memo also contradicts DOL regulations that allow an H-1B worker to be placed for 30 or 60 days without the need to obtain a new LCA. 20 C.F.R. § 655.735(c). All this points out to the fact that an employer who assigns employees at third party sites, contrary to the Neufeld Memo, need not determine the location of every job site when filing the H-1B petition.

When a management consulting firm that may either use employees in-house to work on various client projects, or station its employees at client sites for extended periods of time, files H-1B petitions on behalf of prospective employees, it is not expected that such a firm will pinpoint every client engagement in which an H-1B employee may be involved and every client site at which an H-1B employee may be stationed. Similarly, when a law firm that may use associates in-house to handle various client matters, or station associates at client corporations for extended periods of time, files an H-1B petition, it is not expected that such a firm will pinpoint every client engagement in which an H-1B employee may be involved, and every client site

at which an H-1B employee may be stationed. The rules do not differ for IT consulting firms in this respect simply because its business is software development and consulting rather than management consulting or the practice of law. And in the event of a lag between work assignments, INA 212(n)(2)(C)(vii) and 20 C.F.R. §655.731(c)(7)(i) prohibit an employer from "benching" and must continue to pay the required wage. Congress contemplated time lags between assignments, and enacted a law that required the employer to pay during the unproductive period.

We demand that USCIS immediately withdraw the Neufeld Memo and to revert back to the halcyon days of Mr. Aytes' 1995 guidance. The Neufeld Memo not only hurts the competitiveness of U.S. business but also jeopardizes the status of H-1B workers who are waiting endlessly for the green card. If there were no backlogs in the EB quotas, they would be permanent residents by now and would not be needlessly harassed by the Neufeld Memo when applying for the next round of H-1B extensions.