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WHAT A COMPANY NEEDS TO KNOW THAT HOSTS BUT DOES NOT EMPLOY SKILLED NONIMMIGRANT WORKERS

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I would like to share my article, Due Diligence Considerations For Companies Contracting With Vendor Service Providers, which appeared in the New Jersey Lawyer, October 2011 issue. This is an emerging area and it behooves corporations that contract with companies for skilled nonimmigrant workers on H-1B, L-1 or B-1 visas to know more about whom they are getting on board. Indeed, exercising greater due diligence can be a win-win for all the parties involved – the petitioning company, the end user client company and the nonimmigrant worker. In addition to protecting itself from potential liability, the client company by cooperating with the petitioning company on a number of fronts can also ensure a swift and more firm approval of the visa.

Many corporations in need of specialized skilled workers who are in short supply do not sponsor foreign nationals for their work permits. Instead, these companies contract with other entities that employ skilled workers, who in turn are then assigned to the client company for a specific project. This is especially true with information technology (IT) services, where foreign nationals on temporary visas predominate. While the obligations for a sponsoring employer are onerous, it is important for the end user client company to be vigilant to ensure that foreign national workers assigned to a company are working under the appropriate visa categories. In the event that the end user client has knowledge or encourages activities not authorized under these visa categories, there is potential for the company to be ensnared in criminal liability. Even short of criminal liability, it is important to make sure due diligence has been done to avoid being caught up in an embarrassing investigation against a partner company.

Here are a few examples of how an end user company can get unwittingly caught up with liability. If the end user company urgently needs software engineers through its IT contracting company for a project, a manager within the end user company may be requested to write a letter as a client of the contracting company to justify the need for its employee overseas to visit the U.S. on a B-1 visa. If this letter indicates that the software engineer is required for meetings, or to conduct an analysis of the project to be subsequently worked on overseas (a permissible B-1 activity), but the actual purpose is for the engineer to actually participate in programming and working on the solution in the U.S., it may come back to haunt the end user company if there is a criminal investigation against the IT contracting company. Therefore, when drafting such a letter, it is important to ensure that the proposed activities discussed in the letter are permissible B-1 activities, and when the foreign national arrives, he or she engages in activities that are consistent with the listed activities.

Similarly, under a January 8, 2010, USCIS guidance memorandum by Donald Neufeld, concerning employer/employee relationship in H-1B petitions, especially where an H-1B employer places employees at a third-party site, it is important for the sponsoring employer to demonstrate that it exercises the right of control over its non-citizen employee if he or she is placed at a third-party client site. In order to win an H-IB approval, the petitioning employer generally requests confirmation from its client company about the H-IB worker's assignment arrangement at its location, and that it is the employer who actually exercises the ultimate control over the employment. The end user client company, often through layers of middlemen vendors, must take care that the letter accurately describes the arrangement. On the one hand, the issuance of such a letter confirms that the company is not the employer, thus eliminating a situation where it may be held liable as an employer for wages and benefits. On the other hand, there may be situations where the petitioning entity exercises no control over the H-IB worker's employment, and the person reports directly to a manager with the client company rather than the petitioner. In the post Neufeld Memo era, client companies may also want to cooperate with the petitioning company to allow a representative to visit the client location to evaluate its employee's performance and to provide regular assessments and feedback of the nonimmigrant worker's performance to the petitioning employer even while the immediate supervision lies with the client

company.

Care should, therefore, be taken not to inadvertently misrepresent the nature of the assignment at the company. Moreover, the petitioner must demonstrate that the position being filled by the H-1B worker at the company requires a bachelor's degree or higher in a specialty. Here too, the client must take the utmost precautions to not misrepresent the minimum requirements of the position. Some end user companies choose not to issue letters as they are not obligated to do so. If however they really need the services of the skilled nonimmigrant worker for a project, it would be more prudent for them to cooperate with respect to such a letter – as well as confirming who exercises immediate supervision and ultimate control – as that would allow the nonimmigrant to win the visa approval while giving the client company an opportunity to also conduct due diligence regarding the hosting of such an individual.

Moreover, if an H-1B worker is assigned to a client location, DOL regulations require that the petitioning employer must have posted notice at two conspicuous places where the work is actually performed informing about the occupational classification, wages offered, period of employment and the work location, among other things. While the petitioner is solely responsible for posting the notice at the physical location, it would behoove the responsible officer at the client company to cooperate with the posting in order to ensure that its contractor is fully compliant with the attestation requirements.

Finally, the USCIS's fraud detection national security division may also pay a "friendly" surprise visit to the client company to ensure that the work location and other terms of employment are consistent with the H-1B petition. Similarly, specialized knowledge workers on L-1B visas at client locations must satisfy the FDNS investigator that they are under the "control and supervision" of the petitioning company, and this person should also be implementing a product or application of the contracting company or deploying a methodology that is unique to the petitioning company. Moreover, any letters issued by the client company can also be verified via a surprise call from the State Department when the foreign national applies for the nonimmigrant visa at the US consulate.

By exercising due diligence, a client company can avoid an investigation, which even if not targeted against it can still generate bad publicity, as well as

potential liability. More important, by cooperating with the petitioning company, the nonimmigrant visa petition can withstand scrutiny while it is being processed, and can potentially result in a quicker and surer approval, resulting in the skilled nonimmigrant worker being able to come on board to work on a critical project for the client company.