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WILL THE REVISED USCIS Q&A ON ESTABLSHING THE EMPLOYER-EMPLOYEE RELATIONSHIP IN H-1B PETITIONS SAVE STAFFING COMPANIES?

Posted on March 19, 2012 by Cyrus Mehta

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Since the issuance of the January 8, 2010 guidance memorandum by Donald Neufeld, concerning the employer-employee relationship in H-1B petitions (Neufeld Memo), especially when an employer places an H-1B worker at a third party client site, workers at IT consulting and staffing companies have been the most adversely impacted. Indeed, it seems that the Neufeld Memo was designed to kill the staffing company.

The adverse effects of the Neufeld Memo have been felt most keenly by Indian nationals on H-1B visas who make up most of the workforce at such companies. This legitimate IT business model, which has been readily embraced by US corporations, is associated with a distasteful term in immigration parlance, namely the "job shop," whose presence has become ubiquitous with Indian beneficiaries of employment visa petitions. The heightened scrutiny, often leading to an arbitrary denial, is exercised even if the USCIS has approved the H-1B petition previously on the exact same facts. Most problematically, H-1B visa applicants face unreasonable and arbitrary treatment at US Consulates in India, and are subject to unnecessary demands for the same documentation even after they were submitted to the USCIS, resulting in denials or recommendations for revocation of their petitions. Most Indian H-1B visa holders are fearful of travelling to India presently out of fear that they will be denied a visa based on an approved petition. CBP at ports of entry has also exercised this subjective scrutiny over Indian H-1B entrants in the IT consulting field at ports of entry.

On March 12, 2012, the USCIS issued a revised Q&A on the Neufeld Memo

containing helpful language under Questions 5 and Question 13, which did not exist in the prior guidance dated August 2, 2011.

Q5: Am I required to submit a letter or other documentation from the end-client that identifies the beneficiary to demonstrate that a valid employer-employee relationship will exist between the petitioner and beneficiary if the beneficiary will perform services at an end-client/third-party location?

A5: No. While documents from the end-client may help USCIS determine whether a valid employer-employee relationship will exist, this type of documentation is not required. You may submit a combination of any documents to establish, by a preponderance of the evidence, that the required relationship will exist. The types of evidence listed in the memorandum are not exhaustive. Adjudicators will review and weigh all the evidence submitted to determine whether you have met your burden in establishing that a qualifying employer-employee relationship will exist.

Q13: The memorandum provides an example of when a computer consulting company had not established a valid employer-employee relationship. Are there any situations in which a consulting company or a staffing company would be able to establish a valid employer-employee relationship?

A13: Yes. A consulting company or staffing company may be able to establish that a valid employer-employee relationship will exist, including where the beneficiary will be working at a third-party worksite, if the petitioning consulting or staffing company can demonstrate by a preponderance of the evidence that it has the right to control the work of the beneficiary. Relevant factors include, but are not limited to, whether the petitioner will pay the beneficiary's salary; whether the petitioner will determine the beneficiary's location and relocation assignments (i.e. where the beneficiary is to report to work); and whether the petitioner will perform supervisory duties such as conducting performance reviews, training, and counseling for the beneficiary. The memorandum provides a non-exhaustive list of types of evidence that could demonstrate an employer-employee relationship.

It is heartening to know that the failure to submit direct document from the end client will not be fatal. It is often times very difficult to obtain such a letter from the end client, especially when there are multi-vendor arrangements between the end client and the H-1B petitioner. Moreover, the end client may not want to be involved in any way in the visa petitioning process, without realizing that its reluctance to submit a letter can result in a denial of the H-1B petition and deprive it of a crucial worker for its project. The revised Q & A

states that the petitioner "may submit a combination of any documents to establish, by a preponderance of the evidence, that the required relationship will exist." It is hoped that USCIS will not willfully ignore this guidance. Also, consuls should note that the absence of direct documentation from the end client should not cause them to refuse the H-1B visa, and recommend to the USCIS that the H-1B petition be revoked.

Also welcome is the absence of the pejorative term "job shop" in the answer to Question 13, and the fact that the Q&A states that a consulting or staffing company can still demonstrate through the preponderance of the evidence that it has the right to control the work of the beneficiary, even though he or she may be at a third party client site. It also provides helpful tips on how the consulting or staffing firm can demonstrate a right of control through conducting performance reviews, training and counseling for the beneficiary. While the USCIS would doubtless prefer the daily assertion of actual control by the H-1B petitioner even though it has professed that the H-1B employer only exercise the right of control, it is encouraging to note that this latest guidance does indeed provide concrete examples that are truly indicative of "the right to control." It would appear that, so long as the indicia of ultimate supervision are present, the absence of day-to-day review will not be fatal. Such flexibility will not only restore a utilitarian suppleness to the H-1B but to other non-immigrant visa categories, notably the off-site L-1B intra-company transferee, where artificial notions of rigid control have also proved consistently at variance with contemporary business practice.

Beyond that, while the H-1B petitioner must always retain primary control, Neufeld redux does not demand total or exclusive control. This could mean, for example, that input from end users as part of performance reviews would not only be tolerated but sanctioned. While the selection of locations and assignments remain the province of the H-1B petitioner, as they should, there is no reason why daily on-the-job consultations with end user management cannot take place consistent with retention of H-1B status. A distinction between first and last decisions as compared to every day tactical adjustments is good news for an economy still struggling to get back on its feet. Though this may not have been their intent, the drafters of this update have brought the Neufeld memorandum closer to what Judge Kessler had in mind when she dismissed the Broadgate complaint:

To summarize, the Court concludes the Memorandum establishes interpretive

guidelines for the implementation of the Regulation, and does not bind USCIS adjudicators in their determinations of Plaintiffs' H-1B visa applications

This latest guidance represents an unspoken but nonetheless enlightened attempt to align the Neufeld Memorandum with the way America works. If followed, it can help save H-1B petition requests from impending doom. The only remaining issue is whether this revised Q&A will be seriously followed by the USCIS officers, and in turn, by the US Consulates. Regardless, an H-1B petitioner whose business model involves placing H-1B workers at third party client sites should actively rely on this revised Q&A when filing H-1B petitions or when responding to requests for evidence to assert its right of control over the beneficiary.

There is a larger reason why those of us who have so strenuously attacked the Neufeld Memorandum should welcome this revision. The absence of guidance is the lawyer's worst nightmare. Without knowing how the game is played, the lawyer does not know when to advance or when to retreat. He or she is prone to putting in too much or not enough, placing undue emphasis on what is tangential while glossing over the truly essential. Some cases take an excessive amount of time to prepare while others are filed prematurely. Law becomes a high stakes poker game, justice by ambush. The USCIS adjudicator is also at sea. Uncertain what standards to employ, frustrated by nagging suspicion that agile advocacy by an unscrupulous bar will win benefits for clients who do not deserve them, the line analyst at the Vermont or California Service Center faced with a subtle H-1B fact pattern looks in vain to Washington for clarity that does not come. The process becomes complex, complicated and expensive. Conflict replaces cooperation leading to litigation and micromanagement. There seems no exit. When nothing is certain, almost anything can happen.

That is where the Neufeld Memorandum and the August 2011 guidance left us (although the earlier guidance consistent with DHS's policy to welcome entrepreneurs clarified how an owner of a company could get an H-1B visa). Not really knowing how the USCIS would interpret the third party placement of an H-1B temporary worker, we were left with a Hobson's choice between bedlam and litigation. The only thing that was certain was the absence of certainty itself. That is why this most recent Neufeld Q&A is so welcome for it has within it the potential to restore clarity and stability to a singularly important question of law in the increasingly contentious H-1B debate at a time when both qualities were singularly lacking. Rhetoric is not reality, however,

and the possibility that skeptical USCIS adjudicators will simply ignore this most recent guidance remains a disturbing possibility. We all know from bitter experience the gap between promise and performance. Good intentions in Washington DC can be frustrated quite well by sustained resistance in the trenches. If the wisdom of good men and women will prevail, this will not happen. Hopefully, the deliberate deployment and informed application of this newly minted wisdom will turn the Neufeld Memo from a symbol of intransigence into a tool for nuanced adjudication. That will deserve the genuine approbation of all those who doubtless will wonder why the USCIS did not think of this earlier.

(*The views expressed by guest author, Gary Endelman, are his and not of his firm, FosterQuan LLP*)