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Immigration Alert

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H-1B Cap Concern: USCIS Targets Staffing Companies and Third-Party Site Placements

The United States Citizenship and Immigration Service (USCIS) has issued new guidance regarding requirements for H-1B petitioners just in time for the 2011 H-1B cap. USCIS' January 8, 2010, memo "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" ("H-1B Memo" or "memo") goes into great detail regarding the employer-employee relationship requirement for H-1B petitions and concludes that most staffing companies and companies that utilize third-party placements do not qualify as H-1B petitioners.

Employer-Employee Relationship

The H-1B regulations define a U.S. employer filing an H-1B petition as "having 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."[1] Stating that the "right to control" is the primary element in establishing an employer-employee relationship rather than one of several factors, the H-1B Memo lists factors to be considered in determining whether a right to control exists. The H-1B Memo directs petitioners to establish the employer-employee relationship by submitting sufficiently detailed evidence that demonstrates a right to control. The H-1B petitioner will need to show that it has the right to control over when, where and how the H-1B employee performs the job and that it will be a totality of the circumstances analysis, rather than one factor being decisive.

The H-1B Memo also provides a list of documentation that can be submitted as evidence of the employer-employee relationship. The H-1B Memo also examines different employment scenarios with conclusions about whether the requisite right to control and, therefore, an employer-employee relationship exist in each.

Staffing Companies

The staffing business model, referred to as "Third-Party Placement/'Job Shop,'" is among the employment scenarios examined in the H-1B Memo. In the example, an H-1B employee of a computer consulting company is working at a client site on a project to maintain the client's payroll. The H-1B employee is supervised and all work assignments are determined by the client. The analysis finds that the computer

[1] 8 CFR §214.2(h)(4)(ii) [emphasis added].

consulting company has no right to control the H-1B employee and therefore lacks a valid employer-employee relationship with the H-1B employee. From this analysis, it appears that a staffing company will fail to satisfy the "right to control" test set out in the H-1B Memo.

Third-Party Site Placements

The H-1B Memo also highlights and expands on the itinerary requirement. The regulations require that, when an H-1B employee will provide services in more than one location, the H-1B employer must submit "an itinerary with the dates and locations" of when and where those services will be performed.[2] The H-1B Memo says that the itinerary must include the names and addresses of the establishments, venues or locations and of the "actual employers."[3]

H-1B Cap and Extension Cases Affected

The memo states that H-1B petitioners are required to demonstrate the existence of the employer-employee relationship for the duration of the H-1B validity period. The H-1B Memo has already resulted in Requests for Evidence (RFEs) and denials for those employers who utilize third-party placement. Medical and IT staffing companies are concerned about whether they can continue to hire foreign workers or whether their current H-1B employees' status will be extended. H-1B visa holders who work at client sites are anxious in that their status in the U.S. is in jeopardy.

To address growing concern regarding the H-1B Memo, USCIS held a Collaboration Session on February 18, 2010 in Washington, DC. The two-hour session was attended by nearly 500 people, over 400 of whom attended via teleconference. USCIS responded that it appreciated the opportunity to learn about "unintended consequences" resulting from the H-1B Memo. The participants, including the American Immigration Lawyers Association (AILA), told the USCIS representatives that the H-1B Memo should be withdrawn.

Where Did This Come From?

As GT has reported, USCIS has been cracking down on H-1B fraud over the last two years. With the H-1B Memo, USCIS has taken another shot at reducing fraud in the H-1B visa program. Even though USCIS says the H-1B Memo is intended to memorialize existing policy, until very recently, USCIS has always recognized staffing companies as H-1B petitioners. During the February 18, 2010 Collaboration Session, USCIS explained that its stakeholders included members of Congress and mentioned Senator Chuck Grassley (R-IA), who has contacted USCIS regarding H-1B fraud. USCIS' reference to congressional influence clarifies that the H-1B Memo is an attempt to police bad actors within the H-1B program. Unfortunately, in its effort to respond quickly to pressure from Capitol Hill, USCIS has managed effectively to eliminate the staffing industry, which includes federal contractors, from the H-1B program. Perhaps this is an "unintended consequence" of the H-1B Memo, but the effect on established and reputable staffing industry companies is real.

[2] 8 CFR §214.2(h)(2)(i)(B).
[3] H-1B Memo at 10.

Conclusion

At this time, unfortunately, it does not appear that USCIS plans to withdraw the H-1B Memo. If your company uses third-party placement for potential or existing H-1B workers, it is critical that you contact your GT attorney as soon as possible to develop a strategy to comply with the new USCIS guidance.

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Greenberg Traurig's **Business Immigration and Compliance Group** has broad experience in advising multinational corporations on how to minimize exposure and liability regarding a variety of employment-related issues, particularly I-9 employment eligibility verification matters. In addition to assisting in H-1B (Labor Condition Application) audits, GT develops immigration-related compliance strategies and programs and performs internal I-9 compliance inspections. GT has also successfully defended businesses involved in large-scale government worksite enforcement actions and Department of Labor Wage and Hour investigations. GT attorneys provide counsel on a variety of compliance-related issues, including penalties for failure to act in accordance with government regulations, IRCA anti-discrimination laws, and employers' responsibilities upon receiving Social Security Administration "No-Match" letters.

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