To H-1B or Not to H-1B:  
Is It an H-1B Specialty Occupation?

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Introduction

Have you ever noticed during an initial consultation that the client already seems to know exactly what he or she needs? “I want H-1B” is a quip we’ve heard so many times, often before the consultation even begins. When this happens, you’ve got to remain cool, stay in control, and, as you flesh things out with the client, run through mental checklists as to whether or not the case is an H-1B. This practice advisory provides guidance on one of the many critical initial issues you should consider in developing the case strategy: Is it an H-1B “Specialty Occupation?”

To establish a specialty occupation, generally the employer must demonstrate that the duties require “theoretical and practical application of a body of highly specialized knowledge.”¹ The employer also must establish that a bachelor’s degree or its equivalent in a field related to the position is the minimum educational requirement for entry into that occupation. While the job title might be the first indicator that the position is a professional specialty occupation, you must

¹ 8 CFR §214.2(h)(4)(ii).
beware. Titles are nice, but not dispositive. Specialty occupation analysis requires you to closely examine the actual job duties, dissect the position, and look beyond its appearance.

**Regulations**

Pursuant to U.S. Citizenship and Immigration Services (USCIS) regulations, the petitioner must prove that one or more of the following holds true:

1. A bachelor’s degree or higher is normally required the position;
2. The degree requirement is normal to the employer for the position;
3. A degree requirement is normal to the industry, or the position is so complex or unique that the duties could be performed only by a degree holder; or
4. The nature of the duties for the particular position is so highly specialized and complex that the knowledge required is usually associated with the attainment of a bachelor’s or higher degree.

The more of the above criteria you can demonstrate, the greater the likelihood you will be successful. So, in developing your “specialty occupation” argument, consider some (or all) of the following:

**What is the nature of the job?**

The nature of the job duties is one consideration reviewed by USCIS examiners in deciding if the position would normally require a bachelor’s degree. The practitioner should provide a complete description of what the beneficiary will be doing on a day-to-day basis in the job. Specifically, the examiner will look at whether the specific job duties are so specialized and complex that knowledge required to perform the job duties is usually associated with the attainment of a bachelor’s or higher degree. If the listed job duties are sufficiently precise and complex, that may be helpful to guide the examiner towards a finding that the position is a specialty occupation. In this regard, you might submit an advisory or an opinion letter from an expert in the field such as a professor or member of a trade association. In this letter, the expert should render an opinion on whether a bachelor’s degree is normally required for such a position.

**Does the employer normally require a degree?**

The regulations also allow the employer to show that they normally require a degree or the equivalent for the position. This can be shown by submitting job advertisements for the position.

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2 8 CFR §214.2(h)(4)(iii).
3 8 CFR §214.2(h)(4)(iii)(3).
as well as copies of the degree of other individuals performing the job with the employer in similar positions. Although the regulations do allow for the employer to show that the position is a specialty occupation by show that they normally require a degree for the position, the USCIS will typically require some sort of detailed explanation of why the employer normally requires a degree for the position.

**Why is a degree required for this job?**

In some cases, the need for at least a bachelor’s degree in a related field is obvious (e.g., doctors, lawyers, engineers, architects), but this is not always the case. For example, many sales, marketing and administrative positions do not normally require a specific degree. Many employers with such positions would accept a bachelor’s degree in any field or would allow an individual with experience, but no degree, to qualify. Nevertheless, depending on the nature of the position or employer, a degree in a particular field could be required in any of these fields.

When analyzing H-1B cases for positions where a degree in a particular field or in one of a group of related fields is required by the employer, but the need for the degree is not immediately obvious, it is important to analyze why the employer is seeking an individual with at least a bachelor’s in a related field. Is theoretical and practical knowledge of a particular field of endeavor required in order to perform some or all of the essential duties of the position? Is that level of knowledge typically obtained through the completion of a baccalaureate program in the field? If the duties themselves are not traditionally seen as requiring such knowledge, are the duties made particularly complex due to the complexity or uniqueness of the employer’s business, service or product? Is the nature of the position or employer such that lacking the “right” educational credentials would damage the employer’s credibility? Will the individual supervise degreed professionals? Are there other legitimate business reasons for the degree requirement? The right questions to ask will depend on the nature of the position and the employer. And, simply being able to justify a legitimate business reason for the degree requirement may not be enough to satisfy the regulatory definition of “specialty occupation.” If the employer is requiring a particular degree, there may very well be a reason worth investigating and discussing in the H-1B petition.

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4 While sometimes the degree requirement is obvious to the practitioner, you still might have to argue that a bachelor’s degree or greater is required. For example, we have heard reports of USCIS challenging whether an Accountant must have a degree in accounting. So always be prepared to wage your argument. And pay particular attention to the content of the job duties.
Resources

To answer any of the above four questions, you will want to access some authoritative resources. Below are three of the basic resources every practitioner should know how to use.5

O*NET

A logical and often-relied-upon source for determining whether a job is in a “specialty occupation” is the O*NET.6 This web-based occupational resource is a publication of the Bureau of Labor Statistics and represents a compilation of approximately 850 occupations. In addition to job titles and duties, it lists training and educational requirements. In your quest to determine whether the position is a specialty occupation, you will want to scroll down to the section entitled Job Zone. In the Job Zone, you will note an entry for Education. This is the first indicator of whether or not the position is a specialty occupation. But don’t stop there. You must also look at the section entitled SVP Range. If the SVP range is 8 (four to ten years of training or experience), the occupation is very likely a specialty occupation. If the SVP range is 7 (two to four years), the occupation is likely a specialty occupation. If the SVP range is 6 (one to two years), you have a weak argument at best that the occupation is a specialty occupation. If the SVP range is below 6, the occupation is decidedly not a specialty occupation.

Occupational Outlook Handbook

USCIS relies heavily on the publication of the Bureau of Labor Statistics entitled the Occupational Outlook Handbook.7 In addition to describing the duties and industry trends, there is a section dedicated to educational requirements. If you see language such as “Most [occupation cited here] need at least a bachelor’s degree in [the specific field] or a related field,” you very likely have identified a specialty occupation, and this is the exact language you would want to quote in the H-1B petition filed with USCIS. Bear in mind, however, that even if the Occupational Outlook Handbook says a bachelor’s degree or higher is typically required, USCIS will scrutinize the nature of the duties described in the petition. Those duties must embrace

5 There are a host of resources you can use to develop your specialty occupation argument. These are just three of the basic resources you should consider. You might also research decisions of the Administrative Appeals Office (AAO), research industry trends, and access AILA publications such as Professionals: A Matter of Degree and Kurzban’s Immigration Law Sourcebook.
6 www.onetcenter.org/. Click on the center box, O*NET Online. Then click on Find Occupations. Enter the job title or occupation and ONET will present a list of related (and sometimes completely unrelated) job titles. Click on the occupation to review the job duties. If appropriate, scroll down to Job Zone.
7 www.bls.gov/oco/. This is so user-friendly that instructions are not necessary. Briefly, just click on the occupational grouping such as “Management” and then search for the clearly delineated subheadings for the occupation you want to research. A discussion of the education requirements is under the section on “Training, Other Qualifications and Advancement.”
“theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor”\textsuperscript{8} to be considered a specialty occupation.

\textit{Professional Occupations Education and Training Categories}

Another useful resource often overlooked by many practitioners is the U.S. Department of Labor’s (DOL) “Professional Occupations Education and Training Categories.” This select listing of “professional” occupations is found at Appendix A to the PERM Regulation\textsuperscript{9} and at Appendix D to the DOL’s Prevailing Wage Guidance.\textsuperscript{10} This document lists occupations that DOL considers “professional”—\textit{i.e.}, requiring a bachelor’s degree or higher. This is an excellent source to cite in presenting to USCIS the degree requirement for the occupation.

\textbf{Conclusion}

In closing, we recommend that you very carefully consider whether or not an employer’s position constitutes a “specialty occupation.” When answering the question “To B or not to B,” remember that every H-1B case requires extensive legwork to establish the specialty occupation standard.

\textsuperscript{8} 8 CFR §214.2(h)(4)(ii).
\textsuperscript{9} 20 CFR § 656 \textit{et seq}.
H-1Bs AND THIRD-PARTY WORKSITES: I’VE A FEELING WE’RE NOT IN KANSAS ANYMORE

by Larry L. Drumm, Teri A. Simmons, Ian D. Wagreich, and Annie J. Wang*

INTRODUCTION

Who can forget the wide-eyed expression on Dorothy’s face when she arrives in the colorful Land of Oz and utters those famous words: “I’ve a feeling we’re not in Kansas anymore”? Of course, the fiery Wizard behind Oz is proved a fraud—simply a man hiding behind a curtain—and Dorothy longs to return home to Kansas and the warmth of her Auntie Em’s embrace.1

Practitioners also will find themselves longing to return “home” to their prior practices as they deal with the effects of recent U.S. Citizenship and Immigration Services (USCIS) pronouncements on H-1B employee and employer relationships. On January 8, 2010, Donald Neufeld, the USCIS Service Center Operations Associate Director, issued a memorandum that proposes to provide guidance on which standards should apply when establishing that an employer-employee relationship exists throughout the duration of a requested H-1B validity date.2 While it purportedly intends only to “memorialize” USCIS policy, the Neufeld memo abrogates years of legal precedent and government policy without any formal notice and comment. In particular, the portions of the memo regarding beneficiary/owners represent a huge departure from prior practice (based on the Matter of Aphrodite3 beneficiary/owner case). As such, it is just as much of a fraud perpetrated on the separation of powers as the Wizard himself, and ripe for legal challenge unless portions of it are dramatically revised.

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The Neufeld memo was clearly an effort to aid adjudicators in identifying and challenging questionable H-1B employment scenarios, which has been a USCIS mission since an embarrassing H-1B fraud report 4 drew broad attention from members of Congress. 5 In particular, Senator Charles Grassley (R-IA) challenged USCIS for not taking action to root out H-1B fraud on the part of such companies as Vision Systems Group, an information technology (IT) firm that allegedly employed individuals at client sites nationwide based on prevailing wages culled only from a branch office in the state of Iowa. 6

Whatever the intentions were, it was extremely naïve of USCIS to believe that the memo’s application would be limited to the IT consulting scenario. “Unintended consequences” will abound. Already AILA liaison reports that the USCIS Vermont and California Service Centers are issuing denials based upon the Neufeld memo. 7 Anger erupted at a stakeholders meeting held in late February as legal and industry groups complained vigorously. 8 For example, only four days after the memo was released, there were reports of U.S. Customs and Border Protection officers at Newark Airport detaining H-1B employees suspected of working at client sites. In addition, some AILA members report USCIS and some consular posts requesting a full three years of pay stubs for extensions and visa stamp renewals. These issues appear at present to be limited to petitions based on employment with consulting companies. (In the Newark cases, the companies are apparently under investigation for fraud.) The memo very likely will reduce or even bar certain staffing company relationships as they pertain to H-1B employees, thus likely decreasing the availability of contingent workers. Given the current economic climate, many companies are relying on contingent workers to supplement headcount, so the effects of this prohibition could be far reaching, as staffing company H-1B extensions for contingent workers are no longer viable.

The AILA liaison has made a lengthy (24 pages) and compelling request that the entire memo be set aside. 9 In addition, many practitioners are contemplating lawsuits for their clients. 10 However, just destroying the memo with a lawsuit will not get the immigration practitioner “home”—we suspect that other ramifications will remain. Accordingly, this article will not delve into the legality of the memo, and will completely avoid discussing the most controversial topic of beneficiary/owners, as this has been well covered by the AILA liaison committee in its vigorous request. These issues will be better addressed by either a recalcitrant USCIS or, more likely, the courts. These issues have a decent probability of “going away.” Nevertheless, the memo will leave a legacy of massive change in the way each and every H-1B petition is adjudicated. Practitioners who do not adapt will be punished with requests for evidence (RFEs) and denials. Life is not always like a Hollywood classic, and in this case there is indeed no way “home” to the “old days” of simple H-1B filings.

Indeed, because the memo only states that USCIS “may” issue an RFE, not “must” issue an RFE, when doubtful of the employer-employee relationship, 11 failing to address the issue up front could result in a denial. Thankfully, the Neufeld memo was drafted in such a way that it has established four clear situations in which

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5 Senator Charles Grassley (R-IA) has been highly critical of the H-1B program. See Letter from Alejandro N. Mayorkas, USCIS Director, to Senator Charles Grassley (Nov. 10, 2009), published on AILA InfoNet at Doc. No. 09120161 (posted Dec. 1, 2009).
6 Id. See also U.S. Immigration and Customs Enforcement (ICE) News Release, “ICE Arrests 11 Following Investigation into Multi-State Visa Fraud Operation” (Feb. 12, 2009), published on AILA InfoNet at Doc. No. 09021230 (posted Feb. 12, 2009).
8 Id.
9 Letter from AILA-USCIS HQ Liaison Committee to Roxanna Bacon, USCIS Chief Counsel (Jan. 26, 2010), published on AILA InfoNet at Doc. No. 10012760 (posted Jan. 27, 2010).
10 AILA national teleconference, supra note 7, comments of Robert Divine.
11 Neufeld Memorandum, supra note 2, at 10.
H-1B employment is authorized. Practitioners should consider this a godsend—these should be considered “safe harbors,” and cases can be presented smartly to fit into one of the four key scenarios.

Practice pointer: Adjudicators now are focused on following the guidelines of this memorandum, so the practitioner would be wise to make their job easier. The memorandum is unclear as to whether an RFE is required to deny a case on the employer-employee relationship issue. At a bare minimum, an H-1B petition support letter should include a section specifically addressing the employer-employee relationship. Further, consider including a copy of the memo to show that you are aware of the issue.

Before getting to the four scenarios, some basic understanding of the Neufeld memo guidelines is required. By way of introduction, citing the U.S. Supreme Court’s Darden and Clackamas decisions, the Neufeld memo adopts a “right to control” definition of employment, and provides a list of 11 questions for adjudicators to consider when processing H-1B petitions:

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., are there weekly calls, routine reports back to the main office, 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., are there progress/performance reviews?
7. Does the petitioner claim the beneficiary for tax purposes?
8. Does the petitioner provide the beneficiary any type of 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?

What emerges is a “totality of the circumstances”-type analysis that departs from the more or less bright-line tests provided by the regulations, which only require that the employer may hire, pay, fire, supervise, or otherwise control. The memo then goes on to examine four different scenarios that are eligible for H-1B status, and three that are not. It further provides lists of probative documentation for adjudicators to look for in initial and extension H-1B filings. Finally, the memo provides clarification on RFE issuance and itineraries. As noted above, this article focuses on the four eligible scenarios. In addition, it will cover the new requirements for extension petitions.

DOCUMENTING THE FOUR VALID EMPLOYER/EMPLOYEE SCENARIOS OUTLINED IN THE NEUFELD MEMO

Traditional Employment

The first example that the memo provides of a valid, i.e., approvable, employer-employee relationship involves on-site employment, or a situation in which the H-1B beneficiary is working at a location or environment controlled by the petitioner. The example provided by USCIS includes the following elements:

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12 Id. at 4–5.
Beneficiary works at an office location owned/leased by the petitioner
Beneficiary reports directly to petitioner on a daily basis
Petitioner sets work schedule
Beneficiary uses tools/instrumentalities of the petitioner to perform the duties of the position
Petitioner directly reviews the work product
Petitioner claims beneficiary for tax purposes and provides medical benefits

The memo describes the above example as the “Exercise of Actual Control Scenario,” whereby the petitioner exercises actual control over when, where, and how the beneficiary performs the job, and the petitioner directly compensates and provides employee benefits to the beneficiary.

Small employers with less formal structures need to be vigilant about presenting sufficient documentation to establish that they fit within the traditional employment scenario, while large employers may have less to be concerned about. Evidence of the first element listed in this scenario should not be overlooked, as USCIS clearly considers this to be a critical element. (Compare this element with the factors cited in the off-site employment scenarios—whether temporary, long-term or permanent—discussed below.) Petitioners that fall within the traditional employment scenario by meeting one or more of the above elements may anticipate, and possibly forestall, receiving requests by USCIS for supporting letters from contracting companies with H-1Bs by addressing these elements up front with documentation of each applicable element.

Practice pointer: When addressing a traditional employment scenario, practitioners should present evidence that the petitioner owns or leases the location where the beneficiary will be working. Evidence of ownership can take the form of a deed to the property where the office is located reflecting ownership by the petitioner or a related company, or a letter confirming ownership by the property management company. For documentation of an office lease, the petitioner can provide a copy of the lease agreement or a letter describing the terms of the lease agreement, including the period of validity.

Practitioners have reported receiving an increasing number of RFEs asking for documentation that the proffered position qualifies as a “specialty occupation” in the context of whether there is an employer-employee relationship between the petitioning entity and the beneficiary. Specifically, these RFEs are seeking evidence of the sufficiency of specialty occupation work to be provided directly by the petitioner, rather than work that is being performed for the direct benefit of “end-client companies” with which the petitioner has entered into an agreement to provide the beneficiary’s services.

Practice pointer: Practitioners should be aware that using certain buzzwords such as “customer,” “consulting,” or “consultant” may trigger RFEs seeking evidence that the beneficiary’s services are actually being performed for an “end-client company.”

In addition, there are numerous reports of the issuance of so-called “in house” RFEs, in which USCIS presumes—rightly or wrongly—that the services performed by the beneficiary will be performed at client sites. An example of this type of RFE is as follows: “If the beneficiary will be working on an in-house project solely for the petitioner, please provide a detailed description of the project and if applicable, who will be working on the project with the beneficiary, the expected duration of the project, how the project is unique and proprietary to the petitioner, evidence the petitioner markets its own software and/or hardware.”

Interrelated Changes to Form I-129

On February 8, 2010, USCIS released a draft Form I-129 that contains revisions in a variety of areas. The instructions to the draft Form I-129 state that the attestation in the new form requires H-1B employers to certify that they will maintain a valid employer-employee relationship with the beneficiary at all times, and if assigning the beneficiary to a position in a new location, the employer will obtain and post a labor condition application (LCA) for that site prior to reassignment. In addition, the form itself contains a new section on additional job locations that requires the employer to provide the following information if the employee is going to be working off-site: the name of the company where the beneficiary will work if employment is to

be under a third-party contract, the address of the third-party worksite, and the name, title, and phone number of the contact individual at the third-party worksite.

The new form, as well as RFEs that have been reported by members, raise the issue of whether and to what extent USCIS is changing prior policy on itinerary-based I-129s. It is instructive to refer to legacy Immigration and Naturalization Service policy in this regard. On December 29, 1995, Assistant Commissioner Michael Aytes issued a memorandum stating that H petitions requiring services to be performed in more than one area must include an itinerary with the dates and locations of the service to be performed, but that this requirement could be met in any of a number of ways, including by listing multiple locations in the supporting LCA. In the case of an H-1B filed by an employment contractor, a general statement of the foreign national’s proposed or possible employment was acceptable. Now that the I-129 is requiring the listing of all third-party worksites, and RFEs from the service centers are requiring petitioners with employees who work at third-party worksites to show that the petitioner has arranged for work for the beneficiary for the entire requested period of authorization, it raises the issue of whether USCIS will consider changes in the third-party worksites to be material changes requiring amended petitions.

**Practice pointer:** The wait for a new form has not deterred USCIS from requesting the information that will be required by it. Practitioners working with companies of varying sizes may receive RFEs regarding the number of employees at the particular work location. This appears to be an important piece of information for the officers adjudicating I-129 petitions at the California Service Center (CSC), as they use it to better understand how the individual beneficiary fits into the overall company operations, as well as to determine if the location is a company facility or contract worksite. Therefore, in addition to the other information petitioners may be providing, they should be advised to head off this line of inquiry by clarifying such information up front. Practitioners may also recommend including language about the petitioner not being dependent on one particular client.

Although the I-129 only asks for the full number of employees at the company in part 12, petitioners can easily insert the number of employees at the worksite if space permits. In addition, the supporting letter could indicate that “the beneficiary will be working at our [location] worksite, where there are 12 employees.”

Practitioners also have reported receiving RFEs regarding the premises of the particular worksite. The CSC previously has advised that officers use public sources and the Internet to clarify or confirm information. If the petition states that there are 1,000 employees and the petitioner provides a lease for a 2,000-square-foot office or the Internet shows that the office location is small, CSC is going to question this apparent inconsistency. This is another reason why it may be helpful to provide information on both the company as a whole and the worksite where the beneficiary will work. If the site is not where the company’s main office is located, consider providing documentation to show that it is a bona fide company worksite. For larger, established companies, such documentation could be a “contact us” page from the website. For smaller organizations, a lease would be preferable.

**Temporary/Occasional Off-Site Employment**

The second example of an *approvable* relationship in the Neufeld memo involves temporary/occasional off-site employment. USCIS provides this example:

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. If the beneficiary travels to an off-site location outside the geographic location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.

The memo describes the above example as the “Right to Control Scenario,” whereby the petitioner has the right to control when, where, and how the beneficiary performs the job.

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When broken down into component parts, this example of an approvable relationship involving temporary/occasional off-site employment includes the following elements:

- Beneficiary travels to client sites to perform audits
- Petitioner provides food and lodging costs if beneficiary must travel out of the petitioner’s geographic location to perform an audit
- Petitioner has a centralized office where beneficiary reports
- Beneficiary is assigned space in the centralized office when not performing audits off-site
- Beneficiary is paid by the petitioner
- Beneficiary receives benefits from the petitioner

*Practice pointer:* When presented with a scenario involving temporary/occasional off-site employment, practitioners should present evidence that clearly distinguishes the situation from one involving an impermissible third-party placement or “job shop.” Since the Neufeld memo has been issued, AILA liaison has seen RFEs aimed at determining whether an impermissible third-party placement exists with increasing frequency, even in traditional employment situations. Carefully documenting the temporary/occasional nature of any off-site employment in the initial petition can lessen the frequency of such RFEs.

A petitioner can demonstrate the temporary/occasional nature of any off-site employment by showing the following or similar types of initial evidence:

- Contracts or other documentation showing that the beneficiary travels to multiple client sites rather than only working at one client site
- Contracts between the petitioner and client companies establishing that the petitioner continues to have the right to control the beneficiary while placed at the client site
- Letters from clients confirming that they have an ongoing relationship with the petitioner and that the petitioner regularly places individuals for a short time at the worksite
- An employment agreement and/or an assignment letter showing that the petitioner provides food and lodging to the beneficiary when the beneficiary is working off-site
- Documentation that the beneficiary has assigned office space with the petitioner when not visiting client sites. This documentation can be included in the initial employment contract or an employment offer letter describing the nature and scope of employment, or other similar evidence.
- Pay-stubs showing that the beneficiary is paid by the petitioner
- A description of the performance review process documenting that the petitioner, rather than the client, is directly reviewing the beneficiary’s work product

*Practice pointer:* In situations involving temporary/occasional off-site employment rather than long-term placements at client sites, petitioners are less likely to need to heavily document the nature of the relationship. Encourage petitioners to clearly document their policies covering employees who visit client sites, including their expense reimbursement and employee review process so it is clear the petitioner retains control over such employees even when working off-site.

*Practice pointer:* It may be easier to get a client letter rather than contracts between the petitioner and client companies for a variety of reasons, including the proprietary nature of such contracts. It can save energy and effort if you draft a letter for the clients to sign describing the practice of placing the petitioner’s employees at their worksite for a temporary period and using the same letter for each petition. Ideally such letters can be re-used for future H-1B petitions to document occasional off-site work requirements.

**Long-Term/Permanent Off-Site Employment**

The third example of an approvable relationship in the memo involves a very long-term (or permanent) off-site placement for an H-1B worker. USCIS provides this example:

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner’s main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract
between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project; the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary’s work.

The memo describes the above example as the “Right to Control Specified and Actual Control is Exercised Scenario,” whereby the petitioner has both legal and actual control over when, where, and how the beneficiary performs the job.

Broken down into its subpoints, this example includes the following elements:

- Petitioner has contract indicating off-site location
- Contract states petitioner will manage its employees at off-site location
- Contract states petitioner has right to ultimate control of beneficiary’s work
- Petitioner provides instruments and tools
- Beneficiary reports directly to petitioner
- Petitioner does beneficiary’s progress reviews

Practitioners who previously have filed H-1B cap-exempt third-party petitioner cases should be familiar with structuring this type of evidence. In order for these cases to qualify for the cap exemption, the work must be performed completely at the site of a qualifying research institution. Thus, while still controlled by the private employer, the H-1B nonimmigrant would not work at the employer’s office. An example from a cap exemption case will facilitate better understanding. In an anecdotal situation, the petitioner was a private employer with a government facility research/management contract. In this case, the evidence presented included:

- A copy of an offer letter stating the beneficiary will work on the specific government research contract
- A press release on the contract award stating that the project would last five years (this is important, as the contract award did not clearly specify the estimated time frame)
- A copy of the contract award letter
- Relevant sections of the final contract covering:
  - job titles (that matched the offer letter)
  - services to be performed (mostly general research services)
  - the facility’s research mission (to prove the exemption)
- An LCA prepared exclusively for the research facility worksite
- A website page printout indicating the exact work address of the research facility (that matched the LCA).

In addition, the petitioner’s support letter and the attorney’s transmittal letter both made it clear on the first page that the case was a “Third-Party Petitioner H Cap Exempt Worksite” case, and the transmittal letter clearly described the evidence noted above and how it met the required criteria. As a result of this comprehensive evidence, several H-1B cases were approved for a period of three years without any RFE.

Note how the supplied information clearly linked the contract worksite to the end user of services. For example, the website page printout of the research facility indicating the exact address matched the contract and the LCA. When this is not available, practitioners can consider supplementing the H-1B petition with external photos of the worksite, Google maps documentation, and, if available, a lease for the property showing the end user of services.

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Practice pointer: The abundance of evidence generated by a large government contract makes it easy for USCIS to approve such cases. Unfortunately, USCIS expects the same level of documentation for smaller employers with private contracts. However, documentation of such caliber is generally only available on large government contracts, and it will be impossible for smaller employers to produce contemporaneous documentation at a level similar to what was produced for the government contract as indicated above. In fact, even on a government contract, the contract would not state “the petitioner has right to ultimate control of [X employee’s] work.” Practitioners need to try to educate USCIS adjudicators that such evidence is unavailable; however, they may meet with mixed results. It may be wiser to educate clients to contemplate immigration issues within their off-site employment contracts or proactively execute addendums to existing contracts to support the evidence required by this new memorandum. This is discussed in more detail below.

Long Term Placement at a Third-Party Worksit

The final example of an approvable relationship in the Neufeld memo involves long-term placements at a third-party worksite. USCIS provides the following example:

The petitioner is a computer software development company that has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner’s proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client’s main warehouse, where they will develop a computer system for the client using the petitioner’s software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company’s facility. While the beneficiary is at the client company’s facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.

Broken down into subpoints, this example of an approvable relationship includes the following elements:

- Petitioner has a contract with a third-party client
- The contract necessitates use of petitioner’s proprietary product and/or knowledge
- The contract requires placement of petitioner’s employee(s) at client’s worksite
- Petitioner’s employee(s) will perform contractually stipulated services using petitioner’s proprietary product and/or knowledge
- Beneficiary has been offered employment by petitioner to satisfy the terms of petitioner’s contract with client
- Beneficiary performs duties at client’s facility
- While at client’s facility, beneficiary reports regularly to a manager employed by petitioner
- Beneficiary is paid by petitioner
- Beneficiary receives benefits from petitioner

According to the Neufeld memo, the defining features of this approvable relationship are that: (1) the petitioner’s “right to control” the beneficiary has been contractually specified; and (2) the petitioner exercises “actual control” over the beneficiary’s work.

In contrast, the memo provides an example of a nonapprovable relationship, also involving long-term placement at a third-party worksite. In this “job shop” example:

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies by which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the company’s payroll. Once placed at the client company, 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. The beneficiary’s end-product, the payroll, is not in any way related to the petitioner’s line of business, which is computer consulting. The beneficiary’s progress reviews are completed by the company, not the petitioner.

Broken down into subpoints, this example of a nonapprovable relationship includes the following elements:

- Petitioner has a contract with a third-party client
- The contract requires that petitioner supply client with employee(s) for specific staffing needs at client’s worksite
- The contract does not outline specific positions; rather, positions are staffed on an “as-needed” basis
- Beneficiary is assigned by petitioner to work for client in a core position in client’s operations
- Once placed, beneficiary reports to a manager employed by client
- Beneficiary does not report to petitioner for work assignments
- Client determines all work assignments
- Petitioner does not control how beneficiary completes daily assignments
- No proprietary information of petitioner is used by beneficiary to perform assignments
- Beneficiary’s end-product is not related to petitioner’s line of business
- Beneficiary’s progress reviews are completed by client, not by petitioner

According to the Neufeld memo, the defining features of this nonapprovable relationship are that: (1) the petitioner has no “right to control” the beneficiary; and (2) the petitioner exercises no “actual control” over the beneficiary’s work.

Having identified these features of approvable and nonapprovable relationships, the memo states that the petitioner “must” establish the described employer-employee relationship with sufficiently detailed evidence. The memo adds that if USCIS determines that the petitioner will not have the described “right to control” the beneficiary, the petition “may” be denied.

With regard to initial petitions, the memo states that the petitioner must: (1) show that an employee-employer relationship exists between the petitioner and beneficiary; (2) establish that the petitioner has the “right to control” the beneficiary’s work (including the ability to hire, fire, and supervise the beneficiary and responsibility for the overall direction of the beneficiary’s work); and (3) establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period.

The memo states that the petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies:
  - dates of each service or engagement;
  - names and addresses of actual employers; and
  - names and addresses of establishments, venues, or locations where services will be performed for the period of time requested

  **Practice pointer:** The practitioner should request that his or her client provide such an itinerary, including all such content. The practitioner should review this itinerary carefully and, as needed, work with the client to make appropriate modifications.

- If it exists, a copy of a signed employment agreement between the petitioner and the beneficiary that details the terms and conditions of employment

  **Practice pointer:** The practitioner should request that his/her client provide any such employment agreements, existing and prospective. The practitioner should carefully review any such agreements to determine whether the employer-employee relationship is appropriately described therein. To the extent such agreements have not yet been entered into, appropriate modifications to those agreements should be made. Before entering into any such agreements, or submitting the agreements to the USCIS, employment
law counsel should be engaged to determine whether such agreements expose the petitioner to potential liability.

- A copy of an employment offer letter

  Practice pointer: The practitioner should request that his or her client provide any such draft employment offer letters, existing and prospective. The practitioner should review any such letters carefully to determine whether the employer-employee relationship is appropriately described therein. To the extent such letters have not been issued yet, appropriate modifications to those letters should be made. Before issuing any such letters, employment law counsel should be engaged to determine whether such letters expose the employer to potential liability.

- A copy of relevant *portions of valid contracts* between the petitioner and the client (in which the petitioner has entered into a business agreement for which the petitioner’s employees will be utilized) that establishes that while the petitioner’s employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees

  Practice pointer: The practitioner should request that his or her client provide any such contracts, existing and prospective. The practitioner should review any such contracts carefully to determine whether the employer-employee relationship is appropriately described therein. If inappropriately described, such contracts should be modified to the extent possible. Consistent with the elements illustrated in the examples above, such contracts should demonstrate that contractual performance requires the use of the petitioner’s proprietary product and/or knowledge. Moreover, such contracts should stipulate that (1) the beneficiary will report to a manager employed by the petitioner; (2) the beneficiary will be paid by the petitioner; (3) the beneficiary will receive benefits from the petitioner; (4) the petitioner will determine all work assignments; (5) the petitioner will control how the beneficiary completes daily assignments; and (6) the petitioner will complete progress reviews of the beneficiary. Practitioners also may consider providing redacted copies of contracts showing that the employer-employee relationship exists.

- A copy of *signed contractual agreements, statements of work, work orders, service agreements, and letters* between the petitioner and authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, providing information such as:
  - A detailed description of the duties the beneficiary will perform
  - The qualifications that are required to perform the job duties
  - Salary or wages
  - Hours worked
  - Benefits
  - A brief description of who will supervise the beneficiary and their duties
  - Any other relevant evidence

  Practice pointer: The practitioner should request that his or her client provide any such agreements, statements, orders, and letters, existing and prospective. The practitioner should review any such items carefully to determine whether the above-requested content is appropriately described therein. If not described or inappropriately described, such agreements, statements, orders, and letters should be modified to the extent possible. Consistent with the elements illustrated in the examples above, such agreements, statements, orders, and letters should demonstrate that contractual performance requires the use of the petitioner’s proprietary product and/or knowledge. Moreover, such agreements, statements, orders, and letters should stipulate that (1) the beneficiary will report to a manager employed by the petitioner; (2) the beneficiary will be paid by the petitioner; (3) the beneficiary will receive benefits from the petitioner; (4) the petitioner will determine all work assignments; (5) the petitioner will control how the beneficiary completes daily assignments; and (6) the petitioner will complete progress reviews for the beneficiary.

- A copy of a *position description* or any other documentation that describes:
  - The skills required to perform the job offered
— The source of the instrumentalities and tools needed to perform the job
— The product to be developed or the services to be provided
— The location where the beneficiary will perform the duties
— The duration of the relationship between the petitioner and beneficiary
— Whether the petitioner has the right to assign additional duties
— The extent of petitioner’s discretion over when and how long the beneficiary will work
— The method of payment
— The petitioner’s role in paying and hiring assistants to be utilized by the beneficiary
— Whether the work to be performed is part of the regular business of the petitioner
— The provision of employee benefits
— The tax treatment of the beneficiary in relation to the petitioner

Practice Pointer: The practitioner should request that his or her client provide this specific content. When provided, the practitioner should develop a comprehensive job description that addresses each of these items in a manner consistent with the USCIS guidance in the Neufeld memo.

• A description of the performance review process

Practice pointer: The practitioner should ensure that the petitioner, rather than the petitioner’s client, is performing periodic reviews of the beneficiary’s performance. The petitioner’s performance review process should be described appropriately in the petitioner’s employment agreement with and/or offer letter to the beneficiary. Likewise, the petitioner’s performance review process also should be described appropriately in any signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the petitioner’s client.

• A copy of the petitioner’s organizational chart, demonstrating beneficiary’s supervisory chain

Practice pointer: The practitioner should request that his or her client provide such a chart. The practitioner should review this chart carefully and modify it, as needed, to reflect an appropriate supervisory chain of control for the beneficiary.

Practice pointer: It is critical that the practitioner proactively address these issues with his or her clients. To the extent that the practitioner has not done so already, he or she should immediately contact any existing clients that place H-1B nonimmigrant employees at third-party worksites for long-term assignments. The practitioner should review the guidance contained in the Neufeld memo carefully with each such client. The practitioner and each such client should develop and implement an action plan for reviewing and making appropriate modifications to the above-described items, to the extent necessary and possible.

Practice pointer: It is important that the practitioner proactively address these issues with the beneficiary, specifically before the beneficiary seeks to apply for a visa at a U.S. consular post or seeks admission to the United States. The beneficiary must be able to describe the nature of the employer-employee relationship accurately at those critical, procedural junctures.

Practice pointer: To limit exposure to potential liability, it is important that the practitioner make appropriate modifications to the practitioner’s standard correspondence with clients that place H-1B nonimmigrant employees at third-party worksites for long-term assignments.

EXTENSION PETITIONS

Practitioners will want to take note that the Neufeld memorandum expresses new standards of evidence for extension petitions as well. Even for cases filed by the same petitioner for the same employee without a material change in the terms of employment, additional documentation is mandated by the memorandum. The petitioner must provide evidence that it continues to have the “right to control” the work of the beneficiary. In particular, the memo indicates that a combination of any of seven possible types of evidence (or similar evidence) would be appropriate:
Copies of the beneficiary’s pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status

Copies of the beneficiary’s payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status

Copy of time sheets during the period of previously approved H-1B status

Copy of prior years’ work schedules

Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period (i.e., copies of business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, website text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created.

Copy of dated performance review(s)

Copy of any employment history records, including, but not limited to, documentation showing date of hire and dates of job changes, i.e., promotions, demotions, transfers, layoffs, and pay changes with effective dates.

Once again, the Neufeld memo is a game changer. What used to be a simple forward-looking process in terms of adjudication now also encompasses a de novo review of compliance with the initial H-1B petition. Thus, the memo seeks to apply its evidentiary principles retroactively, with the possible result of a denial of the extension petition, to actions during the prior H-1B period with the same employer. It is still too early to know what will happen; however, one could imagine that USCIS might determine that, due to the lack of a pay stub, the beneficiary had a status violation, and deny the extension of stay. In egregious cases, the extension could be denied and the prior H-1B revoked before it expired. As we know from the fraud cover sheet that USCIS inadvertently circulated, a negative action on one petition for a company also can affect the fraud profile for adjudication of future petitions.18

Suffice it to say, the days of simple and straightforward reliance on the prior initial petition approval may be gone. Apart from including a section of the support letter addressing the topic of the employer-employee relationship, as suggested elsewhere in this article, practitioners must decide what evidence of the prior H-1B employment period to include. In evaluating the evidence indicated by the Neufeld memorandum, three categories emerge: easy to include; burdensome to include; and outright controversial.

**Easy to include items.** The following items are probably the easiest to include:

- **Pay records.** Practitioners have long included evidence of prior payroll in change of employer and change of status petitions, so it should be relatively straightforward to adopt the same procedures for same-employer extension petitions. However, it seems unduly burdensome, and a great waste of paper, to include pay stub copies or printouts for the prior three-year approval period. Further, given that past RFEs tended to request only the last three or four pay stubs, three years’ worth is a lot. Practitioners will need to be sensitive to the reactions of their employees and clients when requesting such documentation. For larger clients with a relatively low RFE ratio, perhaps just the last three or four would be enough. For smaller clients, or clients with a high RFE ratio, a more robust showing might stem some of USCIS’s concerns. For these employers, the prior year’s pay stubs could be requested.

  Practitioners also should review the pay stubs carefully for accurate wages throughout the full period. In addition, other items, such as the employee’s home address and state withholdings, could be subjects of scrutiny if not in line with the worksite indicated on the petition. As in family-based cases where the pay stub claims the petitioner’s status as “single,” USCIS examiners routinely will use perceived evidentiary “disconnects” like this to justify an RFE, so they should be carefully noted and any inconsistencies addressed prior to filing.

- **Payroll summaries/W-2s.** For the prior H status period. It seems far easier to include a W-2 to cover a full year in lieu of providing two dozen copies of pay stubs. Is it necessary? Prior to the Neufeld memo, the trend in

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18 USCIS Fraud Referral Sheet, published on AILA InfoNet at Doc. No.10012861 (posted Jan. 28, 2010).
RFEs was to request the prior year’s W-2s. Depending on the RFE ratio of the petitioner and the willingness of the employee, practitioners will need to carefully consider adding W-2s to their checklists. Again, close attention is required for any inconsistencies on wages, address, and other benefits withholdings. Practitioners can advise clients that they can redact certain portions if they need to for privacy reasons.

**Complex items.** A second category of items raises a bit more concern. This category ranges from work product to time sheets:

- **Documentary examples of work product.** While practitioners wrestling with proving “specialized knowledge” on intracompany transfer L-1B cases may be used to backing up the petition letter’s assertions with documentary evidence regarding the beneficiary’s work product, it is unlikely that these same practitioners are used to including such evidence on H-1B petitions. On the one side, unless the beneficiary is an author of publicly released “white papers,” confidentiality concerns will need to be addressed. Employers and employees are likely to feel broadsided if practitioners request this evidence without further explanation. Further, depending on the RFE ratio of the petitioner, USCIS may not even require such evidence to satisfy its curiosity on whether the beneficiary is actually working for the employer or in the specialty occupation.\(^{19}\)

  If the client is amenable to discussing the issue, confidentiality concerns may remain. If the internal document written by the beneficiary contains trade secrets or other proprietary information, the practitioner can point out that the information being provided to USCIS can be heavily redacted. The first couple of pages can be provided—usually enough to evidence authorship and the topic being addressed. The same holds true for PowerPoint slide decks used for training clients or other employees. If a client’s RFE ratio is high, such evidence could help prevent an RFE on specialty occupation, and provide documentary proof of the complexity of the specialty occupation performed by the beneficiary.

- **Time sheets for the prior period of H status.** This item would seem burdensome to produce and completely unnecessary in light of the payroll evidence noted above. Such payroll evidence generally contains salary and number of hours worked, even for exempt employees. As such, most practitioners should consider the other options carefully prior to requesting such information.

- **Prior year’s work schedules.** Again, this request begs being burdensome in light of the W-2 and payroll documentation being requested above.

**Controversial Items.** Finally, there are controversial items noted in the Neufeld memo that should not be requested by USCIS or provided by an employer absent extraordinary circumstances.

- **Dated performance reviews.** Practitioners are cautioned about asking for copies of performance reviews. The release of such information outside of an attorney-client relationship might not comport with state employment law. Most immigration practitioners would do well to advise the company to consult with its employment law counsel in this regard. Even if allowed under state law, employee releases may be required for such information.

  Taking this a step further, what if the review identified areas of poor performance with the employee? How might this impact the petition? In the balance, how does providing this information help the officer to evaluate an extension petition? Many reviews focus on such general check-off items as communications, organizational skills, and the like, far from being the type of information that would be germane to confirming whether the role is a specialty occupation. Overall, this piece of evidence is probably better left alone. In lieu of this information, practitioners can address the issue by stating in the petition that the company as a policy does not release confidential employment history records or performance review information; however, they can indicate the name and title of the company manager in the support letter and advise that all inquiries be directed to the human resources department. If USCIS persists in such inquiry, a letter from employment counsel regarding internal policies and external laws governing the release of such records can be provided.

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\(^{19}\) CSC Stakeholders Meeting, unofficial comment of Bret Gregg, USCIS CSC Deputy Director, Jan. 27, 2010, when asked by a representative from a large company if the company needed to change the way cases were filed.
Employment history records. This evidentiary “door” is similar to the performance review door. Exposing promotions, demotions, transfers, layoffs, and pay changes to USCIS scrutiny could invite inquiry without being at all probative to the issue of specialty occupation being raised. A similar approach, involving employment law counsel, could be used to forestall providing such evidence.

CONCLUSION

The Neufeld memo leads the immigration practitioner down a yellow brick road fraught with peril. Like Dorothy, the practitioner will need to be resourceful and creative in handling the challenges presented. This article presents approaches that will work in many difficult situations. Although they certainly are not the magical “ruby slippers” that Dorothy used to get back home again, they should help get the worthy petitions approved.
FILING H-1B PETITIONS INVOLVING OFF-SITE EMPLOYMENT IN THE IT INDUSTRY: USCIS GUIDANCE & EMPLOYER PRAXIS

by Elizabeth Garvish, Jeremy Fudge, and Jeffrey Crusha*

Over the course of the past 15 years, Congress has imposed additional restrictions on companies that employ foreign workers, most notably the American Competitiveness and Workforce Improvement Act of 1998 (ACWIA),1 the L-1 Visa (Intracompany Transferee) Reform Act of 2004,2 and the H-1B Visa Reform Act of 2004.3 In part, these legislative changes reveal Congress’s intent to further regulate employers that hire foreign workers and reflect concerns about fraudulent usage of the L-1 and H-1B visa categories. In the past two years, the immigration bar, and companies alike, have witnessed unprecedented scrutiny and harsher interpretive standards applied by adjudicators of L-1 and H-1B petitions.

L-1 VISA CATEGORY AND THE L-1 VISA REFORM ACT OF 2004

Congress enacted the L-1 Visa Reform Act in an effort to eliminate the proliferation of so-called “job shops” or “body shops,” whereby foreign information-technology (IT) companies allegedly were bringing L-1B workers into the United States in order to contract them out to third parties. This practice was seen as contravening the L-1 program’s intention of facilitating the “intracompany” transfer of executives, managers and specialized knowledge workers employed in the United States by a global corporation’s parent, branch, subsidiary or affiliate.4

This act added a new section to the Immigration and Nationality Act (INA), rendering ineligible for L-1B status a worker who will be “stationed primarily” at the worksite of an employer other than the petitioner or an affiliate, subsidiary, or parent, if either (1) the alien will be “principally” under the “control and

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4 According to the Office of the Inspector General (OIG) of the Department of Homeland Security (DHS), the “job shop” or “body shop” phenomenon consists of “companies whose business involves providing the services of their own employees to other companies for a fee. Some of these companies are general purpose temporary employment agencies ... [while others are] high-tech information technology (IT) service providers that specialize in computer operators, network managers, systems analysts, and programmers.” See OIG, “Review of Vulnerabilities and Potential Abuses of the L-1 Visa Program” (OIG-06-22, Jan. 2006), at p. 14, available at www.dhs.gov/xoig/assets/katovsrght/OIG_06-22_jan06.pdf. Many unemployed U.S. workers have seen themselves as displaced by an increasing number of foreign IT workers, although the OIG found that these claims “do not seem to represent a significant national trend.” Id. Nonetheless, “the appearance of foreign companies establishing branches in the United States and then driving American workers out of their jobs with transplanted competitors,” id., led Congress to address the body shop issue in the L-1 Visa Reform Act.
supervision” of the unaffiliated employer, or (2) the placement at the unaffiliated worksite is “essentially an arrangement to provide labor for hire for the unaffiliated employer,” rather than a placement in connection with the provision of a product or service for which specialized knowledge specific to the petitioning employer is necessary. 5

H-1B VISA CATEGORY AND THE NEUFELD MEMORANDUM

The increased scrutiny of L-1 petitions by U.S. Citizenship and Immigration Services (USCIS) in recent years coincides with heightened scrutiny for H-1B petitions. On January 8, 2010, USCIS published an interpretive memorandum, issued by Donald Neufeld, Associate Director, Service Center Operations, entitled “Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements,” which possibly imposes new requirements on H-1B petitioners.6

This article reviews this recently issued Neufeld memorandum and provides practice tips to advise practitioners how to prepare H-1B petitions for IT professionals successfully.

Off-site employment in the IT industry: What does the Neufeld memorandum say?

Within the IT industry, in particular, it is commonplace for IT consultants to travel frequently to client sites or work off-site due to the nature of the service delivery model. If the employee is stationed off-site, USCIS is especially concerned with the employer’s supervision model, i.e. the employer-employee relationship.7

In the Neufeld memorandum, USCIS was faced with the task of addressing the perceived fraudulent usage of the H-1B category by “job shops.” USCIS is quick to point out that the Neufeld memorandum does not, in fact, impose “new” rules, which potentially would be invalidated by the Administrative Procedure Act.8 In support of this assertion, USCIS points to the fact that the Neufeld memorandum bases its guidance on the definition of “employer” under 8 CFR §214.2(h)(4)(ii) and cites several cases. Notwithstanding its legal underpinnings, the practical impact of having this new guidance in writing may be that USCIS adjudicators and U.S. Customs and Border Protection officers will apply new legal interpretations of what constitutes a lawful employer-employee relationship in the IT industry.

As practitioners, it is critical that we closely examine the language of the Neufeld memorandum to fully understand its potential effects on H-1B petitioners, to permit us to proactively advise our clients on how to document and file successful H-1B petitions and defray potential costs to clients from subsequent Requests for Evidence (RFEs).

Before delving into the actual test of factors indicative of an employer-employee relationship, it is worth noting that the Neufeld memorandum does not per se rule out all business scenarios involving off-site placement. Instead, the Neufeld memorandum stresses a “totality of the circumstances” test, citing numerous factors that should be considered. This “flexible” approach is evident in the examples that the memorandum cites as valid and invalid employer-employee relationships. However, the examples cited by the Neufeld memorandum are not especially useful, because real-world business is not typically so black and white.

To analyze how your particular situation or client will fare, you will need to clearly understand the factors USCIS considers and proactively strategize with your client, based on those factors, to complete Form I-129 correctly and to provide adequate supporting documentation.

7 Commentators and other stakeholders have expressed concerns that the Neufeld memorandum may have a deleterious effect in other industries, including the health care industry and entrepreneurial ventures. See Letter from AILA-USCIS HQ Liaison Committee to Roxanna Bacon, USCIS Chief Counsel (Jan. 26, 2010), published on AILA InfoNet at Doc. No. 10012760 (posted Jan. 27, 2010).
8 See 5 USC §553(b) (requiring notice of rulemaking and opportunity for public participation in process).
The Neufeld memorandum cites common-law principles and case law in defining the overall test as whether the petitioner has the right to control “the manner and means by which the product is accomplished.”\footnote{Neufeld Memorandum, supra note 6, at 2.} Put another way, the Neufeld memorandum seems to indicate the underlying test involves the petitioner’s control “over when, where, and how the beneficiary performs the job.”\footnote{Id at 3.}

What exactly the “right to control” means will vary on a case by case basis, but the Neufeld memorandum states 11 factors that are indicative, but not dispositive, in determining an employer’s right to control:

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—by weekly calls, reporting back to the 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, \textit{i.e.}, are there progress/performance reviews?
7. Does the petitioner claim the beneficiary for tax purposes?
8. Does the petitioner provide the beneficiary any type of 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?\footnote{Id at 3–4.}

What type of evidence may a petitioner provide to prove that a valid employer-employee relationship exists?

The Neufeld memorandum cites a list of examples of evidence that are acceptable to prove that your client has the right to control the beneficiary, including:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested
- A copy of a signed employment agreement between the petitioner and the beneficiary, detailing the terms and conditions of employment
- A copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary
- A copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner’s employees will be utilized) that establishes that while the petitioner’s employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary
or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence

- A copy of a position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner

- A description of the performance review process

- A copy of the petitioner's organizational chart, demonstrating the beneficiary's supervisory chain

“Similar types of evidence” are also acceptable. \(^{12}\)

**Practice pointer:** It is advisable to marshal your evidence and provide it in a clear and concise fashion to the USCIS adjudicator. Using headings that mirror the above questions/factors and documenting as many of those questions/factors with matching evidence is strongly recommended. If other similar or convincing evidence is available, we encourage practitioners to supplement the record by providing thoughtful explanations about the documentation provided. It is also advisable to annotate relevant sections of Form I-129 if the employee will work off-site or at multiple locations.

**What should a petitioner provide to file an H-1B extension?**

In light of the Neufeld memorandum, it is important for employers to take a proactive approach when dealing with H-1B extensions as well as initial filings for off-site or roving employees, to avoid lengthy RFEs or denials. \(^ {13}\) Roving employees include employees who travel to work at various off-site locations on different projects. The Neufeld memorandum advises service center directors that RFEs should be tailored to request the specific evidence that USCIS believes to be deficient, and to refrain from duplicative or voluminous requests. \(^ {14}\) The petitioner should provide documentary evidence demonstrating that: (1) a valid employer-employee relationship continues to exist; and (2) the employer continues to exercise control over the employment of the beneficiary.

**Practice pointer:** To demonstrate that the employer has the right to control the work of the beneficiary, many of the same types of documentation required for initial H-1B filings should be submitted for H-1B extensions. Further, H-1B extension petitions should include evidence that the employer and the employee have maintained a valid relationship continuously throughout the validity period of the initial approval. According to the Neufeld memorandum, this documentation should include copies of the following:

- The beneficiary’s pay statements, leave and earnings statements, and pay stubs for the initial H-1B approval period;
- Evidence of wage paid to the beneficiary, such as W-2 forms and payroll summaries;
- Time sheets;
- Work schedules;
- Examples of work product created by the beneficiary during his or her H-1B employment, such as business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, website text, news copy, or photos of prototypes; \(^ {15}\)
- Dated performance reviews; and/or

\(^ {12}\) *Id.* at 8–9.

\(^ {13}\) *Id.* at 10.

\(^ {14}\) *Id.*

\(^ {15}\) Be sure to clearly list the author and date created for all such material.
Employment records that list the date of hire, the date of any job change, promotion, demotion, transfer or layoff, and/or any changes to pay with the effective dates.\(^\text{16}\)

An H-1B petition requesting an extension of status may be denied if the petitioner does not provide sufficient evidence to establish the continuity of the employer-employee relationship during the previous H-1B validity period for the same employer.\(^\text{17}\)

**Practice pointer:** Practitioners must also be aware that the Department of Homeland Security has the authority and is conducting more pre- and post-adjudication compliance review site visits, so it is important to maintain the appropriate documentation on-site as evidence of the continuous employer-employee relationship.

**How can an employer with roving employees satisfy the Neufeld memorandum?**

For roving employees, the Neufeld memorandum reiterates that the employer must be compliant with 8 CFR §214.2(h)(2)(i)(B), requiring the filing of an itinerary with the dates and locations of the services or training, because USCIS wants to be assured that the services to be performed by the beneficiary are that of a “specialty occupation,” and that the beneficiary is not “benched” between projects.\(^\text{18}\) Under a strict interpretation of Neufeld, a petitioner should be prepared to specify the anticipated supervision model for roving employees during the entire length of the requested validity period.\(^\text{19}\)

**Practice pointer:** It would be prudent for companies with roving employees to proactively address this requirement before filing an H-1B petition. First, the employer should be advised to plan the locations, services, and dates of employment for each project to the extent possible, and compile as much documentary evidence in support of the employer-employee relationship as recommended above. Second, the petitioner should be advised to file the H-1B petition by annotating Form I-129 and appending a detailed itinerary, as well as supporting evidence that specifies the dates of employment and the supervision model for each project.

Under the Neufeld memorandum, failure to comply with 8 CFR §214.2(h)(2)(i)(B) may result in shortened H-1B validity periods. For example, USCIS may choose to approve the H-1B petition *only* for the duration of a specific project if the adjudicator determines that the petitioner has failed to meet its burden under the Neufeld memorandum.\(^\text{20}\)

**Practice pointer:** In practice, it may be difficult for companies to accurately predict all of the projects a roving H-1B beneficiary may undertake within a three-year period. However, as long as the employer files the petition in good faith and makes a bona fide attempt to document a roving employee’s anticipated projects (without violating 8 CFR §214.2(h)(2)(i)(B)), a petitioner may deal with an employee’s unanticipated geographical move (without filing an amended H-1B petition) by filing a new labor condition application (LCA) that satisfies the wage and hour obligations, provided the LCA is certified and posted according to the regulations.\(^\text{21}\)

**CONCLUSION**

In light of the legislative changes that have created further restrictions on employment arrangements for foreign workers in the United States, it remains unclear if the Neufeld memorandum imposes ultra vires legal requirements on H-1B petitioners. Notwithstanding its legality, what seems clear is that petitioners may be required to affirmatively provide voluminous documentation in support of initial H-1B petitions, as well as requests for extension of status, to establish prima facie H-1B eligibility. Because the Neufeld memorandum

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\(^{16}\) Neufeld Memorandum, *supra* note 6, at 9.

\(^{17}\) *Id.*

\(^{18}\) *Id.* at 10.

\(^{19}\) *Id.*

\(^{20}\) *Id.*

\(^{21}\) *Letter from Efren Hernandez III, Chief, Business and Trade Branch, USCIS, to Lynn Shotwell, American Counsel on International Personnel, Inc. (Oct. 23, 2003), published on AILA InfoNet at Doc. No. 03112118 (posted Nov. 21, 2003).*
does not fully address every suitable employer-employee relationship, it will likely cause greater confusion among adjudicators about how to apply the legal standard for prima facie H-1B eligibility properly and consistently.
Resource Materials

Publications

http://aila.stores.yahoo.net/profmatofdeg.html

*Kurzban’s Immigration Law Sourcebook* 12th Edition


Guidance Memos

**Neufeld AC21 Memo**  
http://www.aila.org/content/default.aspx?docid=25599  
[AILA Doc No. 08060560]

**USCIS Letter on H-1B Portability from Cap Exempt to Cap Subject**  
http://www.aila.org/content/default.aspx?docid=22436  
[AILA Doc No. 07052563]

**USCIS Memorandum on AC21 Section 103 Exemption from H-1B Cap**  
http://www.aila.org/content/default.aspx?docid=19621  
[AILA Doc No. 06060861]

Internet Resources:


U.S. Department of Labor, Occupational Information Network (O*NET) – [www.onetcenter.org](http://www.onetcenter.org)


Resource Page for AILA Webinar on FDNS Site Visits -  
http://www.aila.org/content/fileviewer.aspx?docid=35469&linkid=238277

Laws and Regulations:


8 C.F.R. §§214.2(h)(4)(i)-(viii)

20 C.F.R. §§655.700-655.760