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## **BIG CHANGES FOR EMPLOYERS HIRING FOREIGN WORKERS USCIS Redefines “Employer-Employee Relationship” Concerning Temporary Specialty Occupation Workers (H-1B Visa)**

April 1, 2010 is around the corner and the businesses are gearing up to file applications with the United States Citizenship & Immigration Services (USCIS) to obtain the temporary foreign skilled workers in specialty occupations under the H-1B program. Interestingly however, prior to this year’s filing season, USCIS issued a guidance memo on January 8<sup>th</sup> aimed specifically at employers who utilize H-1B workers to be placed at third party work sites. This memo will significantly impact many employers and companies in the field of IT and healthcare staffing. The memo clarifies the requirements to establish an ‘employer-employee relationship’ to qualify for the H-1B ‘specialty occupation’ classification.

The main theme of the memo revolves around the ‘employer’s right to control’ its employees work. The employer will still have to comply with the requirements of H-1B application of establishing that the beneficiary is coming to the United States temporarily to work in a specialty occupation; demonstrating that the beneficiary is qualified to perform services in the specialty occupation; and filing of a Labor Condition Application (LCA) specific to each location where the beneficiary will perform services. In addition, the USCIS will also look at the following eleven (11) factors (with no one factor being decisive) to establish whether or not there is a valid ‘employer-employee relationship’.

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.* weekly calls, reporting back to 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, *i.e.* 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?

The memo also provided scenarios in which otherwise duly complete H-1B applications will be approved or denied. In general, the H-1B applications will be approved for:

- Traditional employment, where the employee is only occasionally placed at off-site clients;
- Long-term off-site employment where the beneficiary reports to petitioner's staff and not to third-party clients' staff; and
- Long-term off-site employment where the beneficiary uses the petitioner's proprietary software/processes.

However, the application will not be approved if the H-1B application is for:

- Self-Employment of Beneficiary.
- Independent Contractors.
- "Job-Shop" where the H-1B employee is placed at a third-party off-site clients and the petitioner/employer exercises no control over the employee's work.

For more information on H-1B visas and the new USCIS regulations affecting H-1B visas, please contact your Lashly & Baer attorney or [Vivek Malik](#) at (314) 621-2939.