



AILA National Office
Suite 300
1331 G Street, NW
Washington, DC 20005

Tel: 202.507.7600
Fax: 202.783.7853

www.aila.org

To: Alejandro Mayorkas, Director
Roxana Bacon, Chief Counsel
United States Citizenship & Immigration Services

From: American Immigration Lawyers Association (AILA)

Date: March 19, 2010

RE: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements; Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15)(AFM Update AD 10-24), Donald Neufeld, Associate Director, Service Center Operations, HQ 70/6.2.8, January 8, 2010

Dear Director Mayorkas and Chief Counsel Bacon:

The American Immigration Lawyers Association (AILA) appreciates the continuing dialogue with U.S. Citizenship and Immigration Services regarding the above referenced January 8, 2010 guidance memorandum by Donald Neufeld concerning the employer-employee relationship in H-1B petitions (hereinafter referred to as the "Neufeld Memo" or the "Memo"). AILA has already submitted a memorandum that focuses primarily on owner-beneficiary issues in the Neufeld memo. AILA respectfully submits this memorandum to outline our serious concerns with the third-party placement policies announced in the Neufeld Memo and to provide examples of the impact of the policies adopted in the Memo on several industries and their lawful business models. AILA reiterates our request that the Memo be withdrawn.

The Neufeld Memo is highly problematic for four core reasons. First, the Memo announces a new policy that is inconsistent with current regulations. Second, the new policies and guidelines announced in the Memo impose significant economic burdens on a variety of industries at a time when the government should be implementing policies to encourage, not stifle growth. Third, the adjudication of petitions under the Memo's policies and guidelines will have serious adverse business consequences for many H-1B employers and workers. Finally, the Memo's misguided emphasis on certain elements in the employer-employee relationship in the H-1B context is now spreading to other nonimmigrant and immigrant visa adjudications where such concepts clearly do not belong. For the reasons detailed below, USCIS should withdraw the Neufeld Memo.

Current Regulations

The Neufeld Memo unlawfully seeks to impose new factors to be considered in determining whether an employer-employee relationship exists that exceed requirements in the regulations.

The regulation at 8 CFR § 214.2(h)(4)(ii) defines the term “United States employer” for purposes of identifying organizations which may petition for an H-1B worker. That regulation states:

United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:

- (1) Engages a person to work within the United States;
- (2) Has 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; and
- (3) Has an Internal Revenue Service Tax identification number.

According to the Neufeld Memo, the regulation “...lack[s]...guidance clearly defining what constitutes a valid employer-employee relationship...” On the contrary, the very regulation cited by the Neufeld Memo lists those factors that indicate “control,” that characteristic that is the “key determinant” of the employer-employee relationship: “control” exists when a “person, firm, corporation, contractor, or other association, or organization in the United States” *may* “hire, pay, fire, supervise, *or otherwise control* the work of any such employee.” (Italics added.) In a third-party placement arrangement, the petitioning employer retains these rights, though the rights may be shared with the client with whom the employee is placed. The Neufeld Memo, and the unpublished AAO cases that precede it, add additional requirements that are not found in the regulations.

The Economic Impact of the Neufeld Memo

There can be no doubt that the Neufeld Memo creates additional paperwork burdens for H-1B employers. Quite apart from the legal issue of whether “right to control” is a determinative factor in the adjudication of an H-1B petition, the Memo sets forth an exhaustive list of evidence an employer must present when filing an H-1B petition. The new evidentiary requirements will clearly weigh much more heavily on some types of employers than on others. The impact of the Memo on various types of employers is discussed more fully below. However, it is apparent that H-1B employers will now need to spend considerable time and money gathering additional evidence in order to file an H-1B petition, and to the extent that such additional material is not presented in an initial filing, the Neufeld Memo constitutes a blueprint for new extensive requests for evidence and notices of intent to deny that will be overwhelming and intimidating for such

employers. Even after responding to such requests, employers cannot be certain that they have met the new standards announced in the Memo. The increase in paperwork and the additional element of unpredictability in the H-1B process will clearly create a chilling effect on employers wishing to hire key workers who will need H-1B sponsorship. Indeed, anecdotal reports from AILA members indicate that this is already occurring in the field.

It is the wrong time to increase the challenges for employers who need to bring key workers into the U.S. on H-1B visas. The Memo comes at a moment when government agencies should be implementing policies that encourage investment and innovation in the U.S., and creating conditions in which such businesses can flourish and increase employment here. Yet the Neufeld Memo creates serious roadblocks to such economic growth, in particular by increasing the burdens for small businesses and technology companies. There can be no doubt employers of any size who find the administrative environment unduly restrictive in the U.S., and who are able to, will simply find friendlier venues outside the U.S. in which to establish, or expand, their businesses.

Reputable studies show the connection between hiring H-1B workers and economic growth. A 2008 report by the National Foundation for American Policy found that U.S. technology companies increase their employment by an average of five U.S. workers for each H-1B worker they hire. A study by Madeline Zavodny, a research economist at the Federal Reserve Bank of Atlanta, concluded that “[n]one of the results suggest that an influx of H-1Bs . . . lower contemporaneous average earnings. Indeed, many of the results indicate a positive, statistically significant relationship.” This means that H-1B employment is actually associated with better job conditions for U.S. workers because H-1B professionals are complementary to native professionals.

Other studies indicate that the H-1B program is used for key talent, not cheap labor. The National Science Foundation and other sources show that foreign-born scientists and engineers are paid as much or more as their native counterparts. If companies simply wanted to obtain services based only on wages, U.S. companies would move all of their work outside the United States. According to the Seattle-based market research firm PayScale, in 2006 the median salary for a computer software engineer was \$7,273 in Bangalore and \$5,244 in Bombay, compared to \$60,000 in Boston and \$65,000 in New York.

In addition, many H-1B professionals are now, or ultimately become, entrepreneurs or key employees in small, emerging businesses. A 2006 report found that over 50 percent of Silicon Valley engineering and technology startups were founded by immigrants, as were 25 percent of such startups nationwide. According to the Bureau of Labor Statistics, startups and small businesses create 64% of net new jobs in the United States. Another recent respected study, based on U.S. Census data, found that new and young firms are the primary source of new jobs. This report sends an important message to policymakers that young firms need extra support in the early years of formation so they can grow into viable job creators. The report recommends that, in order to improve the economic outlook, the government should remove roadblocks for entrepreneurs.

See, *Kauffman Foundation Research Series: Firm Formation and Economic Growth: Where will the Jobs Come From?*

http://www.kauffman.org/uploadedFiles/where_will_the_jobs_come_from.pdf. The Neufeld Memo is already having a deleterious impact on such small innovative businesses, as news of the Memo spreads throughout the business community.

Examples of the Impact of the Neufeld Memo on Various Industries and Professions

- **Physicians**

One of the most striking examples of the unintended consequences of the Neufeld Memo on the American workforce is in the area of healthcare. There is a recognized, and severe, physician shortage in the country (projected as 25% of the needed number of MDs by the end of this decade), and international medical graduates are a valuable source of medical personnel to fill that need. Physicians who graduated from medical schools outside the U.S. and who did their residency and fellowship training in the U.S. constitute nearly 30% of all physicians in the United States. The H-1B visa is the visa used by the vast majority of these international medical graduates once their training programs are completed. Despite the fact that the H-1B regulations specifically authorize the H-1B visa for physicians, policies found in the Neufeld Memo create potential conflicts with those very regulations, as well as with state and federal law regarding the corporate practice of medicine.

The following are just some of the examples illustrating this problem:

Corporate Practice of Medicine: Many states, including Texas, California and New York, have laws that prohibit the “corporate practice of medicine,” which means that a physician may not work directly for a hospital or for a corporation with non-physician ownership. Federal law also prohibits a physician from making a referral to an entity such as a hospital if he/she has a financial relationship with that entity. 42 U.S.C. § 1395nn (“Stark Law”); 42 CFR § 411.350, *et seq.*, (“Stark regulations.”) In order to comply with state and federal laws, many hospitals have either created separate wholly-owned subsidiaries, or have transferred the affected physician-employees to separate entities whose sole purpose is to employ the physicians at the particular medical facility, where the day-to-day duties are performed. Thus, while the entity employing the healthcare provider is the petitioner, it would not be able to satisfy the factors identified in the Memo. In essence, despite the H-1B regulations specifically authorizing this visa for physicians, it would be a near impossibility for certain physicians to be granted an H-1B under the Neufeld Memo.

Locum Tenens and Other Temporary Placements: *Locum tenens* physicians provide coverage in medical clinic, practice and hospital environments when a short-term need arises, such as when the incumbent is unavailable, such as on maternity leave, due to illness, on other leave, or due to resignation or other vacancy. In communities that are underserved, *locum* agencies hire doctors and place them where the need is great. Other healthcare workers, such as traveling nurses and physical therapists, also work in similar

arrangements. *Locum* agencies would have a difficult time satisfying the requirements of the Neufeld Memo.

Rural Practices and Hospital Call Services: Similarly, a physician serving a rural community with a private employer is often needed to help staff hospitals' emergency rooms or to cover physician shortages in the ER or hospital wards. Often, these physicians must work for their own corporations or for staffing companies to help staff these areas. The Neufeld Memo could impose insurmountable barriers to these *bona fide* employment arrangements.

Many physicians who had obtained waivers of the INA § 212(e) J-1 foreign residence requirement on condition that they practice medicine for three or more years in underserved areas ultimately stay in the underserved areas after completion of their periods of mandatory service. It is not uncommon for these physicians to either receive ownership interest in the practices, or to establish professional corporations to continue practice in these areas. As the Neufeld Memo imposes conditions that can be barriers to both options, this will force these physicians to leave the underserved areas (often areas with no doctors at all) and look for employment elsewhere, defeating the whole purpose of the J-1 waiver programs which place physicians in the underserved communities.

- **Government Contractors**

Another serious and unintended consequence of the Neufeld Memo is the impact it has on employment relationships in government contracting, and the corresponding impact on (i) the provision of professional services to the federal government, and (ii) the public-private partnership model utilized in many sectors of government activity. The new requirements and definition of the employer-employee relationship enunciated by the Service in the Neufeld Memo require that the H-1B petitioner have the right to control when, where and how the beneficiary performs the job. There are many sectors of government research, for example, where most H-1B petitioners would be hard-pressed to satisfy the new requirements and definition of employer-employee relationship. Many areas of government research are conducted through complex public-private partnerships, such that the employer of a number of key researchers and information technology professionals on any given project is a private entity, but the job duties are performed solely at a government facility, with work supervised by government employees. Periodically, such researchers and IT workers are non-citizens who hold H-1B status. These H-1B workers do not typically produce, or utilize, information or products that are proprietary to their employer, the H-1B petitioner. Many hundreds of millions of dollars in research projects are organized and staffed in this manner, which cannot be restructured in order to satisfy the newly created standard for identifying an employer-employee relationship for immigration purposes.

By way of example, the Service should consider that military medicine in the United States is organized through a public-private partnership of grants, funding sources, grant administration, and staffing that would not allow a single H-1B professional to satisfy the standards for petitioner's direct control over an H-1B beneficiary as formulated by the Neufeld memo. There are key researchers, information technology professionals, and others in H-1B status working on these projects as employees of private entities assigned

to government facilities, including, but not limited to, H-1B workers assigned to the Walter Reed Army Institute of Research (WRAIR), the Defense and Veterans Brain Injury Center (DVBIC), the Naval Medical Research Center (NMRC), the Biotechnology High Performance Computing Software Application Institute (BHSAI), and the U.S. Army Medical Research and Materiel Command (MRMC), as well as various military facilities across the country, where each H-1B worker is a direct employee of a private organization. These H-1B professionals are working on, and in some cases serving in integral, high ranking positions for, such military medicine programs as the U.S. Military HIV Research Program (MHRP), working on Traumatic Brain Injury (TBI) studies, and working on vaccine development for Enterotoxigenic Escherichia coli (ETEC), all of which are research programs conducted at government facilities supervised by government employees. Military medicine programs are some of the largest programs in the world addressing the medical research questions presented, and not only help our military personnel, but also provide solutions, such as vaccine development, for the general population in the U.S. and globally.

- **H-1B Entrepreneurs/Job Creators**

In our January 26, 2010 memorandum to Chief Counsel Roxana Bacon, AILA provided an analysis of the agency's stance against owner-beneficiaries in the H-1B context, and the lack of substantive legal support for that stance. The Neufeld Memo contains additional language that completely undermines a business owner's ability to be an H-1B beneficiary. This thrust against owner-beneficiaries can foreclose opportunities, not only for the potential new businesses that could be created by H-1B entrepreneurs, but also for the numbers of U.S. workers who would otherwise be employed by those businesses. No matter how many others are employed by an entrepreneur's enterprise, the owner of such a business will not be eligible for an H-1B visa even if (1) a viable corporation is established; (2) there is no third-party placement; (3) the corporate petitioner pays the beneficiary; (4) the corporate petitioner claims the beneficiary for tax purposes, and (5) the beneficiary produces goods or services tied directly to the petitioner's business. It is no answer to say that such entrepreneurs can rely on E-2 visas, as these are not available for all countries, or on EB-5 visas, which require very large investments. When our government should be committed to policies that help job creation, USCIS adopts a policy that does the very opposite. Nothing in existing law or regulation compels such a result.

- **IT Consulting Companies**

The Neufeld Memo will render the H-1B classification inaccessible to an entire class of U.S. employers – companies that engage in staffing operations in the information technology field. These types of employers are frequently referred to as “IT staffing” or “IT consulting firms,” and they specialize in providing the right technical resources for a client's projects, when and how the client needs them. They typically serve their clients through highly-skilled technical resources presented in a variety of business options, including:

- a single resource or an entire team of professionals;
- an individual project manager – or a project manager leading a team comprised of the IT consulting firm’s resources;
- a team of consultants with the IT consulting firm’s oversight and the end-client’s project management;
- project outsourcing, whether onsite or offsite;
- vendor management solutions, including recruitment process outsourcing and service procurement outsourcing.

The business options presented by such companies afford their clients the ability to quickly ramp-up new projects with skilled resources, supplement existing workforces with in-demand skill sets, and even rely on an external provider to conduct recruitment, employment screening, and ongoing training where the end-client’s needs do not justify offering permanent employment to an individual IT professional, let alone a whole team.

These types of firms typically recruit, screen, train, hire, fire, pay wages, withhold employee taxes, pay employer payroll taxes, and provide benefits such as leave, health care, unemployment and workers compensation insurance, and retirement plan benefits. Most of these firms also have the right to discipline, promote, and even reassign their employees, although these actions might come about with end-client input, or as a result of a client request. In the IT consulting field, such resources are almost universally regarded as employees, and they are paid pursuant to a W-2. The employee usually has an ongoing relationship with the IT consulting firm that will last beyond the expiration of a given work assignment, and the employee is typically reliant on the employing IT consulting firm to provide or locate a new work assignment when a previous assignment is completed. In such instances, the IT consulting firm is also reliant on the employee to perform work obligations professionally and at a high level, as the company’s “product” is the skill, expertise, and professionalism of its resources in delivering IT services.

IT staffing and consulting companies constitute a wholly legitimate industry in the U.S. that is relied upon for needed resources by many U.S. businesses, as discussed more fully below. Yet the way in which the Neufeld Memo addresses this industry betrays a lack of understanding of its business model, and as well as a total disregard for the realities of the employer-employee relationships within this business model. For example, in its discussion of scenarios that would not present a valid employer-employee relationship, the Neufeld Memo cites the example of a computer consulting company, referring to it in the paragraph heading by the pejorative term, “Job Shop.” How the Neufeld Memo interprets “right to control” obliterates the right of these companies to use the H-1B.

The course introduced by the Neufeld Memo is likely to produce severe instability in ongoing projects due to the inability of key workers to extend their H-1B stays in the U.S. The H-1B worker likely to be most severely jeopardized by the sudden shift in policy brought by the Neufeld Memo is the beneficiary of an approved I-140 petition under the EB-2 from India or China, or EB-3 from any country (especially India, which is more backlogged than other countries), who must file many extensions of H-1B status while waiting endlessly for immigrant visa availability. After many routine extensions, an

employer of such a worker may find that it does not satisfy the dictates of the Neufeld Memo, particularly the misconstrued “right to control” element. A key worker on a client project may be summarily sent home, thus causing a major business disruption for both the H-1B employer and its client, at a time when the employee possesses significant project-related knowledge and has become a major asset for both the employer and the client.

- **End-users of Services of IT Consulting Companies**

Businesses large and small, as well as federal, state and local government agencies, are consumers of information technology services provided by IT consulting firms, for both system development work, as well as project-related staff augmentation. The users of these IT services look outside their own organizations for many reasons, including assistance in making their operations more efficient and profitable, and for specific problem solving in areas in which the businesses lack expertise. In such situations, it makes no economic sense to add permanent staff for short-term projects. Moreover, these business users of IT consulting services require predictability in the staffing of projects as well as the outcomes, commonly called “deliverables” in the industry. It is often not feasible for U.S. business users to locate talent to staff their own IT projects. These businesses necessarily contract with IT consulting firms to manage and complete a given project with qualified workers.

For the IT consulting companies, it is typically not possible to find an exclusively U.S.-worker project team. The ability to staff projects exclusively with U.S. workers is especially problematic in the case of emerging technologies that were developed outside the United States. American businesses, as well as U.S. government entities, should not be precluded from incorporating these emerging technologies as the best, or simply the most appropriate, IT solutions into their operations. If, due to application of the Neufeld Memo, U.S.-based IT consulting firms are unable to partially staff the projects with the services of skilled foreign professionals, the result will be for the project to move offshore where the talent exists. Apart from the negative impact on U.S. employment, offshore development actually increases the project management costs for the users.

The practical effect of the January 8, 2010 Neufeld Memo on the U.S. companies and government agencies that use outside IT services will be to increase their costs and to shut them off from expertise that is critical to their operations.

The DOL and Congress Recognize H-1B Third-Party Placement

Regulations of the Department of Labor explicitly contemplate third-party placement arrangements, including provisions regarding third-party placements involving H-1B dependent employers at 20 CFR § 655.738.

Moreover, Congress is well aware of H-1B third-party placement and has done nothing to restrict or prohibit it in many revisions to the INA specifically concerning H-1B visas. The L-1 Visa and H-1B Visa Reform Act of 2004 was enacted by Congress to address

concerns about the L-1B and H-1B categories. The H-1B modifications were to detail the Labor Department's investigative authority, mandate that the Labor Department provide at least four levels of prevailing wage data for each occupation, and require employers to pay 100% of the prevailing wage level. Congress sought to address the use of the L-1B visa to place nonimmigrant workers in positions at third party sites that did not necessarily involve "specialized knowledge," positions that the bill's proponent, Senator Saxby Chambliss, considered more appropriate for the H-1B visa category. In his statement introducing the bill to amend the L-1 provisions, Senator Chambliss said:

The situation in question arises when a company with both foreign and U.S.-based operations obtains an L-1 visa to transfer a foreign employee who has "specialized knowledge" of the company's product or processes. The problem occurs only when an employee with specialized knowledge is placed offsite at the business location of a third party company. In this context, if the L-1 employee does not bring anything more than generic knowledge of the third party company's operations, the foreign worker is acting more like an H-1B professional than a true intracompany transferee.

149 Cong. Rec. S11649, *S11686, 2003 WL 22143105 (September 17, 2003).

At the same time that Congress amended the L-1 provisions to restrict third-party placement, and amended the H-1B classification with "reforms," such as making the "Training Fee" and "H-1B-dependent" attestations permanent, adding the anti-fraud fee, and removing the "95% of prevailing wage" option, Congress did not outlaw H-1B "labor-for-hire," i.e., third-party placement arrangements. USCIS cannot do that now through the Neufeld Memo.

The Impact of Policies Adopted by the Neufeld Memo on Adjudications Outside the H-1B Context

The factors defining the employer-employee relationship adopted by the Neufeld Memo, particularly relating to beneficiaries who have ownership interests in the petitioning firms, have found their way in adjudications outside the H-1B context for some time, specifically, in the L context and in the I-140 context. The Darden-Clackamas doctrine has been relied on by the AAO to deny an executive-manager I-140 petition to senior corporate executive or manager beneficiaries who are sole owners or significant shareholders of the petitioning corporations. (In Re: Name Not Provided, SRC 07 800 23180, AAO, September 23, 2009 [http://www.uscis.gov/err/B4%20-%20Multinational%20Managers%20and%20Executives/Decisions_Issued_in_2009/Sep232009_01B4203.pdf].) More recently, an AILA member has reported receiving a denial of an EB-1-3 I-140 petition for a CEO and President of a multi-national corporation on the grounds that the beneficiary owned a majority of the shares of the company and that no one supervised the beneficiary's work. (In Re: [name redacted], SRC 09 157 52345 (NSC, February 3, 2010)). Clearly, this is not a basis for denial of a multi-national manager/executive petition. Indeed, the fact that no one supervised the President and CEO of the company would seem to constitute evidence that the beneficiary qualified for

the classification of multi-national manager or executive. Similarly, several AILA members have reported denials based on the employer-beneficiary language found in Neufeld Memo in L-1A and O-1 visa contexts. The doctrines underlying the Neufeld Memo are infecting adjudication of other categories of temporary worker petitions.

Promulgation of the Neufeld Memo is in Violation of the APA

The Neufeld Memo constitutes a significant change in prior regulation, policy and practice, without the appropriate notice and comment required by the rulemaking process under the Administrative Procedure Act. There exists a regulation at 8 CFR § 214.2(h)(4)(ii)(2) that identifies the factors defining an employer-employee relationship. USCIS cannot use a memorandum to alter the regulation. Nor can USCIS use a memorandum to fill any perceived void in the regulation to limit the use of the H-1B visa classification by consulting companies. The Agency must make such changes through the regulatory process.

Conclusion

It is AILA's hope that the information provided in this memorandum is helpful to USCIS in understanding the impact and drastic consequences – both foreseen and unforeseen – of the Neufeld Memo. We reiterate our request that the Memo be withdrawn as soon as possible.