

Global Immigration Partners, Inc.

ANALYSIS OF THE JANUARY 8, 2010 USCIS H1B MEMO

SECTION I: HISTORY AND CONTEXT

The [January 8, 2010 USCIS memo concerning H1b “third party site placement”](#) has provoked a great deal of concern and controversy. In reality, there is little new in this memo. That is, the USCIS has been applying these same standards for at least the past one year. The new memo simply articulates in one document what we have been seeing in requests for evidence since January, 2009. For this reason, you should not expect to see radical changes in USCIS adjudications immediately following the publication of the memo.

The memo brings to a head a controversy that has been simmering for more than a year. To understand what the CIS is attempting to do, it is necessary to first go back and look at a bit of history. Only when the memo is placed into its proper context can you fully appreciate what has happened and what is likely to happen.

In September, 2008 the Department of Homeland Security’s Document Fraud and National Security (DFNS) unit produced a report titled [H-1B Benefit Fraud & Compliance Assessment](#). This report was based on an examination of just 246 cases out of a total case population of 96,827, or a sample size of just 0.25% of the whole. Within this tiny sample, they found 51 cases (20.73%) that had violations of some sort, ranging from minor technical violations to actual fraud. Out of this group, they found 33 cases that involved actual fraud and 18 cases that involved technical violations.

More specifically, they found that 28 of cases involved work at a site other than the site listed in the H1b petition. In another 14 cases, they found that the H1b beneficiary was not being paid the prevailing wage or had been “benched” without pay. Ten of the cases involved fraudulent education/experience documents. Seven of the cases involved situations where the address given for the job site did not exist. Six of the cases involved job duties that were different from those described in the H1b petition. Three cases involved situations where the beneficiary began work before the employer had filed the H petition. Finally, in two of the cases, investigators found that the H1b beneficiary had paid the ACWIA fee, which is prohibited by the regulations.

Within this sample of 0.25% of existing H1b cases, DFNS found that the most common occupations associated with fraud were accounting, human resources, business analysts, sales, and advertising occupations. Again, within this tiny and statistically insignificant sample, the “violation rate” for computer professionals was found to be 27%. DFNS further reported that “46% (114 cases) of the beneficiaries were born in India. Among this sample, 25% (29 cases) were associated with some type of fraud or

technical violation(s).”

Further findings included observations that companies in business less than ten years were four times more likely to have violations. Similarly, companies with 25 or fewer employees were five times more likely to have violations. Companies with gross income less than \$10 Million are six times more likely to have violations than companies that earn more than that amount. Finally, the report concluded that:

“Companies engaged in professional, scientific, and technical services (NAICS 54) make up 52% (128 cases) of the sample. Among this sample, 27% (35 cases) were associated with some type of fraud or technical violation(s). This category includes companies whose work involves computer software engineering/development contracting.”

Following the issuance of the report, the USCIS began issuing requests for evidence (RFE) in all cases involving information technology workers. They did not distinguish between those who worked in-house from those who worked for consulting companies and were placed with third parties. The new onslaught of H1b RFEs began in late December, 2009 and has continued through the present. The standards set forth in the January 8, 2010 memo simply incorporate the standards set forth in the RFEs that have been issued since December, 2008. It is very clear that the USCIS had decided to inquire into every IT H1b petition filed.

The DFNS memo concludes with the statement:

“Results from this BFCAs have established a 21% baseline fraud and technical violation(s) rate for H-1B petitions. Given the significant vulnerability, USCIS is making procedural changes, which will be described in a forthcoming document.”

The January 8, 2010 memo is presumably that “forthcoming document.”

In the next section of this article, we will discuss each of the specific aspects of the new memo and what each means in practice. The third section of the article will deal with the clear illegality of the standards set forth in the article and the correct legal standard. The fourth and final section will deal with recommendations for dealing with these requirements that have been imposed by the CIS over the past year.

SECTION II: ANALYSIS OF THE MEMO

The January 8, 2010 USCIS memo on the subject of H1b “employer-employee” relationships has caused a great deal of unnecessary panic. For example, while this memo does not in any way deal I-140 immigrant preference petitions, many people have mistakenly concluded that it does. The memo is limited to H1b situations only and does not attempt to go beyond that subject.

The memo begins by citing the regulatory definition of an employer for H1b purposes. They begin by citing Immigration and Nationality Act Section 101(a)(15)(H)(i)(b) for the proposition that an H1b nonimmigrant is an otherwise qualifying foreign national:

“with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)” [an LCA]

Though not emphasized by the CIS memo, it is important to recognize that the statute implicitly requires the DOL to make the first determination as to whether the petitioner qualifies as an employer.

The CIS memo goes on to recite the regulatory definition of “employer” found in Title 8 of the Code of Federal Regulations (Immigration and Nationality): 214.2(h)(4)(ii) Definitions.

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.

The memo then proceeds to state that the USCIS relies on “common law” principals, as articulated in the holding by the United States Supreme Court in *National Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S. 440 (2003). The memo goes on to list a number of factors that they feel are appropriate to determine a bona fide employer-employee relationship. It is important that they note (a) this list is not exclusive; and, (b) no one factor is decisive:

- (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 USCIS memo emphasizes that they are concerned with the “right to control” and cite these criteria as important factors to be considered. It is important to understand that the judicial decisions from which these factors are taken make it very clear that they should be viewed as a whole and that it is not essential for each to be present before an employer-employee relationship can be found. Hopefully, USCIS adjudicators will understand this and not insist that each and every criterion be established before they will find a qualifying relationship.

Perhaps the most troubling aspect of the memo is the list of examples cited, beginning on page four. In particular, on pages six and seven, the following example is offered:

“Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in 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 third-party 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 client company, not the petitioner.

[Petitioner Has No Right to Control; No Exercise of Control].”

We will deal with this specific example, and why it is demonstrably legally wrong in the next section of this article. Suffice it to say that they do not explain how they arrived at this conclusion or offer any legal authority in support of it. They have simply declared that “job shops” do not qualify as employers under the law and have left it at that.

The memo next turns to documentation of the employer-employee relationship. For initial petitions, it provides an illustrative list of documentation and states that the

petitioner can establish an employer-employee relationship through a *combination of* the following or *similar* documents:

- 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;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- 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;
- 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;
- Copy of 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; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

This list is what the USCIS requires today for a successful H1b petition. There is nothing new; this is what they have required for at least the last one year.

Moving on to extensions of previously approved petitions, again, they provide an illustrative list of evidence and state that the petitioner should establish "the right to

control the work of the beneficiary” by provide a *combination* of the following or *similar* evidence:

- 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, web-site text, news copy, photographs of prototypes, etc.).Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

The next section provides a bit of potential good news, but it is unlikely that field adjudicators will take notice of it, much less follow it. Section C of the USCIS memo provides that if the evidence in the records of the employer-employee relationship is uncertain, an adjudicator may issue a *tailored* (emphasis original) request for evidence (RFE) to request additional, specific evidence. Such RFEs should explain which element the petitioner has failed to establish and provide examples of documentation that could be used to establish the missing element of proof.

As with all USCIS policy memos, this one does not achieve the status of “law” and is for field guidance only. It specifically states:

“This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.”

In summary, the USCIS has finally articulated its position on the subject of employer-employee relationships. This memorandum does not contain any new information or criteria that have not already been articulated in requests for evidence issued over the past one year. What it does do, however, is recite the USCIS position and reasoning in a single document.

The reasoning of the USCIS is badly flawed. The law they cite is incomplete and does

not support the position that they take. Indeed, as will be demonstrated conclusively in the next section of this article, “job shops” clearly qualify as “employers” under federal law – including specifically the legal authorities cited by the USCIS in support of its position.

SECTION III: WHY THEY ARE WRONG ON THE LAW

The USCIS memo on the issue of H1b employer-employee relationships is clearly and demonstrably wrong on the law. Imagine what would happen if they were right. “Job shops” would be able to assert, as an absolute affirmative defense in LCA enforcement actions, that they are not “employers” as that term is defined for H1b purposes. As such, the Department of Labor (DOL) regulations do not apply to them. By their own terms, those regulations only apply to H1b “employers.” If a “job shop” is not an employer for H1b purposes, then the LCA provisions do not apply to them.

The odds of that kind of defense surviving federal court litigation are about as close to zero as you can get. The DOL will never accept the USCIS definition of “employer” as it would deprive them of jurisdiction to enforce LCAs.

In *Section Two* of this article, we observed that the USCIS began their memo with a tacit acknowledgement that the governing statute requires the Secretary of Labor to make the first determination as to whether the petitioner qualifies as an employer. The USCIS memo also relied upon the Supreme Court’s decisions in *National Mutual Ins. Co. v. Darden*, (Darden) and *Clackamas Gastroenterology Assoc. v. Wells* (Clackamas) as authority for the interpretation they have adopted.

Their reliance is misplaced.

The USCIS, and its predecessor the INS, have both had ample opportunity to go through the public notice and comment rulemaking procedure to define the term “employer” beyond that contained in the existing regulations. The current regulations were promulgated more than fifteen years ago. Interestingly, an early interpretation of these same regulations, dated November 13, 1995 by Louis D. Crocetti, Jr. at then-INS Headquarters, cautioned field adjudicators against excessive inquiries concerning H1b petitions filed by contracting companies:

“Officers are again reminded that not every case relating to a specific occupation should be returned to the petitioner for additional information unless it is for a specific time period, with a particular objective in mind. In such “blitz” projects, advanced notice of Headquarters and, if practical, affected organizations such as AILA should be advised. *It appears that a large number of cases are being returned to employment contractors for the submission of contracts between the employer and the alien work site. The submission of such contracts should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor.* Requests for contracts should be made only in those

cases where the officer can articulate a specific need for such documentation. The mere fact that a petitioner is an employment contractor is not a reason to request such contracts.” [Emphasis added]

The new USCIS memo fails to explain why they changed their interpretation of the same regulations that were in place when the above guidance was issued. We are not dealing with new regulations. The same regulations have been in place since before the Crocetti memo was issued in 1995. It is incumbent upon the USCIS to explain what has changed since 1995 to require such a radical departure from their previous interpretation. It is particularly noteworthy that this USCIS interpretation is not the product of public notice and comment rulemaking and, as such, is not a “rule.” That is, it is a statement of opinion and does not carry any legal weight as a regulation.

In 2000, following extensive public notice and comment, the DOL promulgated new H1b rules. The DOL provided the following definitions at 20 CFR 655.715:

*“Employed, employed by the employer, or employment relationship means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." NLRB v. United Ins. Co. of America, 390 U.S. 254, 258 (1968).*

Employer means a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B, H-1B1, or E-3 nonimmigrants and/or U.S. worker(s). In the case of an H-1B nonimmigrant (not including E-3 and H-1B1 nonimmigrants), the person, firm, contractor, or other association or organization in the United States that files a petition with the United States Citizenship and Immigration Services (USCIS) of the Department of Homeland Security (DHS) on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant. In the case of an E-3 and H-1B1 nonimmigrant, the person, firm, contractor, or other association or organization in the United States that files an LCA with the Department of Labor on behalf of the nonimmigrant is deemed to be the employer of that nonimmigrant.”

In their notice of final rule, the DOL explained:

“The Department stated its view in the NPRM that where Congress has not specified a legal standard for identifying the existence of an employment relationship, the Supreme Court requires the application of "common law" standards, as held in *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). Noting the Supreme Court's teaching that the common-law test contains "no

shorthand formula or magic phrase that can be applied to find the answer, * * * [and requiring that] all of the incidents of the relationship must be assessed and weighed with no one factor being decisive" (*NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)), the Department proposed regulatory language setting out 16 factors (adapted from EEOC Policy Guidance on Contingent Workers, Notice No. 915.002 (Dec. 3, 1997)) that would indicate the existence of an employment relationship under the common law test. The NPRM sought comments regarding the proposed test and alternative formulations of the common law or other tests for determining whether an employment relationship exists, such as the test under the FLSA and the test used in the federal tax context.

...

In the Department's view, the EEOC's approach (in EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997) provides an especially useful model for identifying particular factors that can be applied in the context of H-1B employment, particularly where workers are placed at third-party employer worksites. The EEOC established the list as guidance for ascertaining an individual's employment status in the analogous context of staffing firm workers, i.e., workers who are "placed in job assignments by temporary employment agencies, contract firms, and other firms that hire workers and place them in job assignments with the firms' clients." As such, the list is oriented towards individuals providing services, and it provides a focus that facilitates a differentiation among individuals who may possess attributes of both employees and independent contractors. This focus, the Department believes, makes the EEOC formulation useful for resolving employee status questions in the H-1B environment, with its mix of individuals working at a facility operated by one employer, but who may be self-employed or employees of another employer(s). Employers may wish to consider other sources in determining employee status, including IRS materials. The IRS, for instance, has identified the following factors that may be helpful in determining employee status in the H-1B context: the firm or the client provides training to the worker so that the worker may perform services in a particular manner or method; the worker performs services for only one firm at a time; and the worker has been personally selected to perform the job by the client or firm. See IRS Rev. Rul. 87-41, 1987- Cum. Bull. 296, 298-99."

Both the DOL notice of final rulemaking and the USCIS H1b memo cite the *Darden* case as authority for their interpretations. *Darden* was decided in 1992. Subsequently, the U.S. Supreme Court decided the *Clackamas* case in 2003. *Clackamas* built upon the *Darden* holding. In *Clackamas*, the Court cited with approval the same Equal Employment Opportunity Commission (EEOC) analysis (*EEOC Policy Guidance on Contingent Workers*, Notice No. 915.002, Dec. 3, 1997) earlier employed by the DOL in its December 2000 notice of final rulemaking. The Supreme Court held:

“The Court is persuaded by the EEOC’s focus on the common-law touchstone of control”

In that analysis, the EEOC explicitly dealt with the issue of “employees” at “staffing companies.” The EEOC first defined the term “staffing company” very broadly, including situations ranging from taking on the payroll of another company and then leasing back the employees, to temporary placement of their own employees at third party sites to work under the direction of third party supervisors. Specifically, the EEOC held:

“This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.

Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee." “

Now, this conclusion, the same one referenced with approval by the DOL in its notice of final rulemaking for its H1b regulations, and also referenced with approval by the United States Supreme Court, in the very case the USCIS cites as its authority (*Chickamas*), draws the precise opposite conclusion that the USCIS reached in their memo. The clear weight of legal authority is on the side of consulting companies (*i.e.*, “job shops”) being regarded as employers for all legal purposes.

This conclusion makes sense. Were it otherwise, as we observed at the start of this article, the DOL would be powerless to enforce LCA violations against offending H1b employers if they are job shops. They could assert the USCIS interpretation of the term “employer” to defeat the DOL action. That, obviously, is not going to happen.

The USCIS is attempting to promulgate a rule unlawfully. Rather than go through the public notice and comment procedure that they abhor, they are trying to slip in this new legal standard through the back door. It is illegal and flies in the face of existing law. When this issue is litigated, we have no doubt that the USCIS will lose.

Consider the list of factors specified in the USCIS memo (discussed at length in the next section). The USCIS factors are not the same factors articulated in the authorities cited

by the USCIS as authorities. Instead, the USCIS has selected some, discarded others, and loosely paraphrased those factors that they do use. USCIS adjudicators have made an unfortunate practice of regarding lists of illustrative criteria as lists representing the *minimum* evidence necessary. They tend to disregard wholly instructions to “consider such factors as” and instead demand that each factor be established convincingly.

Significantly, the Department of Labor (cited with approval by the USCIS) decided after public notice and comment, that they should *not* articulate a list of factors. Rather, they deferred to the Equal Employment Opportunity Commission memo (EEOC Policy Guidance on Contingent Workers, Notice No. 915.002, Dec. 3, 1997) because, as they concluded:

“Upon reflection, however, the Department has concluded that the regulation should not include a detailed list of prescribed factors. The Department believes that the factors identified in the NPRM provide a useful framework, based on the common law, for distinguishing between employees and independent contractors. Nevertheless, to avoid any potential misunderstanding that the factors on the list are exclusive or that factors not listed are less deserving of consideration, the Department has decided that no list of factors should be included in the Interim Final Rule. The Interim Final Rule reiterates that the common-law test requires an assessment of all the factors bearing on the employment relationship, with the right to control the means and manner of work being the key determinant but with no one factor controlling.”

The initial DOL list of factors reflected the analysis originally developed by the Equal Employment Opportunity Commission, cited with favor by the U.S. Supreme Court:

“As noted in the NPRM, the proposed list of factors for determining whether an employment relationship exists was drawn from a framework developed by the EEOC for its policies on contingent workers. And as the EEOC recognized, its framework was derived from non-exclusive lists of factors in *Darden* and the other sources for the common law test cited by the Supreme Court in *Darden*; *Reid*, the IRS ruling, and the *Restatement (Second) of Agency* 220(2) (1958).

Each of these sources for the common law test recognizes “the right to control” as the key determinant in ascertaining the existence of an employment relationship. As stated by the EEOC:

“The worker is a covered employee * * * if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself.” Similarly, the IRS Revenue Ruling states: “[G]enerally the relationship of employer and employee exists when the person or persons for whom the services are performed have the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is to be accomplished. * * * It is not necessary that the employer actually direct or control

the manner in which the services are performed; it is sufficient if the employer has the right to do so." See also the Supreme Court in the *Darden* and *Reid* and Section 220(1) *Restatement (Second) of Agency*. Thus, an employer that properly applies any formulation of the common law test, grounded upon the cited authorities, should obtain the same conclusion regarding an individual's employment status"

In the *Clackamas Gastroenterology Assoc. v. Wells*, 538 U.S.440 (2003) (*Clackamas*) decision, the United States Supreme Court also deferred to the EEOC analysis as to what constitutes an "employer-employee" relationship. In that case, the Court was faced with the issue of "whether four physicians actively engaged in medical practice as shareholders and directors of a professional corporation should be counted as 'employees.'" This is a very different question than the one presented by this petition. Nonetheless, the reasoning of the United States Supreme Court as to the correct decisional methodology is equally valid in determining whether an employer-employee relationship exists in this case.

In *Clackamas*, the court was presented with the issue of whether shareholder-directors of a corporation qualified as employees. To resolve the issue, the Court turned to the Equal Employment Opportunity Commission analysis of that specific question. Following the EEOC guidelines, the Court employed a six question test to resolve the "shareholder-director as employee" question:

"This is the position that is advocated by the Equal Employment Opportunity Commission (EEOC), the agency that has special enforcement responsibilities under the ADA and other federal statutes containing similar threshold issues for determining coverage. It argues that a court should examine "whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control." Brief for United States et al. as *Amici Curiae* 8. According to the EEOC's view, "[i]f the shareholder-directors operate independently and manage the business, they are proprietors and not employees; if they are subject to the firm's control, they are employees." *Ibid.* Specific EEOC guidelines discuss both the broad question of who is an "employee" and the narrower question of when partners, officers, members of boards of directors, and major shareholders qualify as employees. See 2 Equal Employment Opportunity Commission, Compliance Manual [449] §§ 605:0008–605:00010 (2000) (hereinafter EEOC Compliance Manual).⁷ With respect to the broad question, the guidelines list 16 factors—taken from *Darden*, 503 U. S., at 323–324—that may be relevant to "whether the employer controls the means and manner of the worker's work performance." EEOC Compliance Manual § 605:0008, and n. 71.⁸ The guidelines list six factors to be considered in answering the narrower question, which they frame as "whether the individual acts independently and participates in managing the organization, or whether the individual is subject to the organization's control." *Id.*, § 605:0009. We are persuaded by the EEOC's focus on the common law touchstone of control, see *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944),⁹ and specifically by its

submission that each of the following six factors is relevant to the inquiry whether a shareholder-director is an employee:" (*Clackamas*, at 448, 449)

Here, we are not dealing with shareholder-directors; we are dealing with an employee that has been placed at a third party site. Just as the EEOC provided an analysis of the six factors that should be employed to determine whether a shareholder-director is an employee, the EEOC has provided a number of factors to determine whether someone placed at a third part job site by a consulting company qualifies as an "employee" of the consulting company.

In the *EEOC Compliance Manual*, cited with approval by the Supreme Court in *Clackamas* as the correct analytical framework, we find the following:

1. Are staffing firm workers "employees" within the meaning of the federal employment discrimination laws?

Yes, in the great majority of circumstances.⁷ The threshold question is whether a staffing firm worker is an "employee" or an "independent contractor." The worker is a covered employee under the anti-discrimination statutes if the right to control the means and manner of her work performance rests with the firm and/or its client rather than with the worker herself. The label used to describe the worker in the employment contract is not determinative. One must consider all aspects of the worker's relationship with the firm and the firm's client.⁸ As the Supreme Court has emphasized, there is " no shorthand formula or magic phrase that can be applied to find the answer, . . . all incidents of the relationship must be assessed with no one factor being decisive."⁹ Factors that indicate that the worker is a covered employee include:¹⁰

- a) the firm or the client has the right to control when, where, and how the worker performs the job;
- b) the work does not require a high level of skill or expertise;
- c) the firm or the client rather than the worker furnishes the tools, materials, and equipment;
- d) the work is performed on the premises of the firm or the client;
- e) there is a continuing relationship between the worker and the firm or the client;
- f) the firm or the client has the right to assign additional projects to the worker;
- g) the firm or the client sets the hours of work and the duration of the job;
- h) the worker is paid by the hour, week, or month rather than for the agreed cost of performing a particular job;
- i) the worker has no role in hiring and paying assistants;
- j) the work performed by the worker is part of the regular business of the firm or the client;
- k) the firm or the client is itself in business;
- l) the worker is not engaged in his or her own distinct occupation or business;

- m) the firm or the client provides the worker with benefits such as insurance, leave, or workers' compensation;
- n) the worker is considered an employee of the firm or the client for tax purposes (i.e., the entity withholds federal, state, and Social Security taxes);
- o) the firm or the client can discharge the worker; and
- p) the worker and the firm or client believe that they are creating an employer-employee relationship.

This list is not exhaustive. Other aspects of the relationship between the parties may affect the determination of whether an employer-employee relationship exists. Furthermore, not all or even a majority of the listed criteria need be met. Rather, the fact-finder must make an assessment based on all of the circumstances in the relationship between the parties.

Example 1: A temporary employment agency hires a worker and assigns him to serve as a computer programmer for one of the agency's clients. The agency pays the worker a salary based on the number of hours worked as reported by the client. The agency also withholds social security and taxes and provides workers' compensation coverage. The client establishes the hours of work and oversees the individual's work. The individual uses the client's equipment and supplies and works on the client's premises. The agency reviews the individual's work based on reports by the client. The agency can terminate the worker if his or her services are unacceptable to the client. Moreover, the worker can terminate the relationship without incurring a penalty. In these circumstances, the worker is an "employee." [Emphasis added]

Here we see, clearly and conclusively, that the EEOC finds that staffing company workers are "employees" – even in situations where they are placed at third party sites and work under the specific direction of the third party client.

This conclusion by the EEOC is clearly opposite the conclusion reached in the January 8, 2010 USCIS memo. Unlike the USCIS memo, however, the EEOC Compliance Manual has been hailed by both the United States Supreme Court and the U.S. Department of Labor (in its NFRM for the H1b regulations at 20 CFR. 655) as an outstanding and indeed, definitive analysis of the question of employer-employee relationships.

The USCIS memo purports to cite the authorities relied upon by the Supreme Court and the EEOC as authority for the conclusions reached by the USCIS. There is no showing in that memo, however, that links specific legal holdings to the conclusions reached. They simply cite authority and ask the reader to accept it blindly. Unless you are willing to ignore the specific findings of the Supreme Court, the Department of Labor, and the Equal Employment Opportunities Commission, it is impossible to accept the conclusions of the USCIS memo as having any legitimacy.

Keep the DOL decision and the EEOC memo in mind as we next turn to the list of eleven factors the USCIS elected to cite. As we will see, the USCIS did not recite factors relied upon by the authorities they cite, as much as loosely paraphrase them, omitting several important factors relied upon by the courts.

Section IV: Recommendations for dealing with the memo

The USCIS memo is demonstrably wrong on the law. That is an irrefutable fact. The problem is that as with so many other USCIS policies that are without legal foundation, the agency will follow them no matter what the law provides. The issue thus becomes how to deal with USCIS adjudicators until the legality of this policy memo is decided in the courts.

The USCIS memo lists eleven criteria that they feel are important in determining whether an employer-employee relationship exists. The memo states:

“The petitioner must be able to establish that it has the **right to control** over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive)”

Even though the memo explicitly states that “no one factor [is] decisive” we have no doubt that USCIS adjudicators will try to require proof as to each of the eleven enumerated factors. Let’s examine those factors individually, and what can be done to deal with them:

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?

The memo does not define “supervise.” The dictionary definition is:

- oversee: watch and direct; "Who is overseeing this project?"
- monitor: keep tabs on; keep an eye on; keep under surveillance; "we are monitoring the air quality"; "the police monitor the suspect's moves"

Petitioners need to describe how they will supervise their employees working at third party sites. This might involve having an on-site supervisor (another employee on the same project) or having the employee send back regular reports.

(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?

To the extent that the employee reports back to company headquarters, the company needs to keep detailed records and archive these reports. If the

petitioner makes site visits, again the petitioner needs to document these visits carefully.

(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?

What is “day to day control?” The USCIS doesn’t define this phrase. Day to day control potentially includes everything from “looking over the employee’s shoulder” supervision to simply having the authority to fire or transfer the employee to a new job site. The petitioner must give this careful thought and take all of the unique facts and circumstances into consideration. The petitioner must at least attempt to explain how it exercises control over the employee.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?

This is not a “big ticket” consideration if this is not the case. If the petitioner does provide equipment or software, that is a huge plus and should be documented carefully. If not, the petitioner should not worry about it.

(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?

This is critical. Without this element, it will be impossible for a petitioner to document an employer-employee relationship. Fortunately, this is always the case.

(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?

If the petitioner does not yet do this, the petitioner should start doing it. Keep careful records in case the USCIS asks for them in the future.

(7) Does the petitioner claim the beneficiary for tax purposes?

Again, this is critical to establishing a genuine employer-employee relationship. Again, fortunately, this is always the case.

(8) Does the petitioner provide the beneficiary any type of employee benefits?

While not critical, it is a very important factor if it is present.

(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

This factor is not all that important. I am afraid the USCIS, not knowing any

better, will try to over-emphasize it. If it isn't present, however, don't worry about it.

(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

This also is not all that critical. Generally, consulting companies are in the business of placing staff with third parties. The work done for the third party is rarely related to this type of business. This factor will be present rarely and you shouldn't worry overly much about its absence.

(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The petitioner can assert that it has the right to place the employee in the job, replace the employee with another worker, and terminate the employee. While this is not "over the shoulder" supervision, it does provide a measure of control over the manner in which the beneficiary's work is accomplished.

Petitioners should not obsess over the presence or absence of specific factors (other than payroll). The authorities cited by the USCIS in the memo all speak to the issue of looking at a variety of factors to determine the existence of an employer-employee relationship.

To the extent that the authorities cited by the USCIS memo did provide lists of factors, they are somewhat different from the list contained in the memo. The USCIS has taken certain liberties and paraphrased factors cited by the courts. This, in turn, raises further questions as to the legitimacy of their understanding and analysis of the law.

On a go forward basis, employers need to think through their petition submissions carefully. We have seen all of these issues raised over the past year in the context of requests for evidence, and have dealt with them successfully. There is no "one size fits all" solution. Satisfying the USCIS requires careful thought, analysis, and creative solutions.

Our experience since January of last year has taught us that it is possible to fashion individual solutions for employers that capitalize on their unique strengths and minimize their particular weaknesses. There is no reason why a legitimate IT consulting company cannot continue to receive H1b approvals. Petition submissions will have to be more carefully documented and argued, but it is not particularly heavy lifting.

If your company would like to discuss possible solutions, please feel free to call us at 818-990-4922 to talk about your situation.

Jim Gotcher
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