

USCIS Opines on “Appropriate” Employer-Employee Relationships for H-1B Purposes

A recent USCIS memorandum from Associate Director Donald Neufeld provides guidance with respect to what will be construed by the agency as the “correct” employer/employee relationships in the context of the H-1B petition. Specifically, the memo advises that for H-1B petitions to be successful, an employer-employee relationship, as defined by the memo, must exist and that the relationship must continue to exist throughout the duration of the requested H-1B validity period. The memo points to the difficulty in clearly defining the employer-employee relationship in cases involving independent contractors, self-employed beneficiaries, and beneficiaries at third-party worksites. According to USCIS, the crux of the employer-employee relationship is whether the petitioner maintains the “right to control” the “when, where and how” the beneficiary performs the job, which the memo distinguishes from “actual control”, throughout the beneficiary/employee’s employment term with the petitioner.

While seeking to clarify these relationships more clearly, this memo offers somewhat conflicting guidance for self-employed beneficiaries, a scenario that is listed as an example of an invalid employer-employee relationship. The memo notes that “USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner.” Yet, the memo also states that “an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him [*sic*] or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite ‘control.’” The memo notes that “while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.” The underlying message of the memo discourages the filing of H-1B petitions in non-traditional employer/employee situations, which is an unfortunately narrow interpretation of the immigration regulations and will likely result in increased requests for evidence, denials and appeals of petitions that had consistently been approved. Limiting, or largely eliminating, the ownership in the petitioning entity for H-1B purposes, will likely have a chilling effect on continued innovation by H-1B employees as they will not be eligible to participate in any meaningful financial manner in the overall performance of the company through stock ownership.