



U.S. Citizenship and Immigration Services

Questions & Answers: USCIS Issues Guidance Memorandum on Establishing the "Employee-Employer Relationship" in H-1B Petitions

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Introduction

On Jan. 8, 2010, U.S. Citizenship and Immigration Services (USCIS) issued updated guidance to adjudication officers to clarify what constitutes a valid employer-employee relationship to qualify for the H-1B 'specialty occupation' classification. The memorandum clarifies such relationships, particularly as they pertain to independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The memorandum is titled, "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)." In addition to clarifying the requirements for a valid employer-employee relationship, the memorandum also discusses the types of evidence petitioners may provide to establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

Questions and Answers

Q1: Does this memorandum change any of the requirements to establish eligibility for an H-1B petition?

A1: No. This memorandum does not change any of the requirements for an H-1B petition. The H-1B regulations currently require that a United States employer establish that it has an employer-employee relationship with respect to the beneficiary, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of any such employee. In addition to demonstrating that a valid employer-employee relationship will exist between the petitioner and the beneficiary, the petitioner must continue to comply with all of the requirements for an H-1B petition including:

- 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.

Q2: What factors does USCIS consider when evaluating the employer-employee relationship?

A2: As stated in the memorandum, USCIS will evaluate whether the petitioner has the "right to control" the beneficiary's employment, such as when, where and how the beneficiary performs the job. Please see the memorandum for a list of factors that USCIS will review when determining whether the petitioner has the right to control the beneficiary. Please note that no one factor is decisive; adjudicators will review the totality of the circumstances when making a determination as to whether the employer-employee relationship exists.

Q3: What types of evidence can I provide to demonstrate that I have a valid employer-employee relationship with the beneficiary?

A3: You may demonstrate that you have a valid employer-employee relationship with the beneficiary by submitting the types of evidence outlined in the memorandum or similar probative types of evidence.

Q4: What if I am unable to submit the evidence listed in the memorandum?

A4: The documents listed in the memorandum are only examples of evidence that may establish the petitioner's right to control the beneficiary's employment. Unless a document is required by the regulations, i.e. an itinerary, you may provide similarly probative documents. You may submit a combination of any documents that sufficiently establish that the required relationship between you and the beneficiary exists. You should explain how the documents you are providing establish the relationship. Adjudicators will review and weigh all the evidence submitted to determine whether a qualifying employer-employee relationship has been established.

Q5: Am I required to submit a letter or other documentation from the end-client that identifies the beneficiary to demonstrate that a valid employer-employee relationship will exist between the petitioner and beneficiary if the beneficiary will perform services at an end-client/third-party location?

A5: No. While documents from the end-client may help USCIS determine whether a valid employer-employee relationship will exist, this type of documentation is not required. You may submit a combination of any documents to establish, by a preponderance of the evidence, that the required relationship will exist. The types of evidence listed in the memorandum are not exhaustive. Adjudicators will review and weigh all the evidence submitted to determine whether you have met your burden in establishing that a qualifying employer-employee relationship will exist.

Q6: What if I receive or have received a Request for Evidence (RFE) requesting that I submit a particular type of evidence and I do not have the exact type of document listed in the RFE?

A6: If the type of evidence requested in the RFE is not a document that is required by regulations, you may submit other similar probative evidence that addresses the issue(s) raised in the RFE. You should explain how the documents you are providing address the deficiency(ies) raised in the RFE. Adjudicators will review and weigh all evidence based on the totality of the circumstances. Please note that you cannot submit similar evidence in place of documents required by regulation.

Q7: Will my petition be denied if I cannot establish that the qualifying employer-employee relationship will exist?

A7: If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to an RFE. Your petition will be denied if you do not provide sufficiently probative evidence that the qualifying employer-employee relationship will exist for any time period.

Q8: What if I can only establish that the qualifying employer-employee relationship will exist for a portion of the requested validity period?

A8: If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you may be given an opportunity to correct the deficiency in response to an RFE. Your petition may still be approved if you provide evidence that a qualifying employer-employee relationship will exist for a portion of the requested validity period (as long as all other requirements are met). However, USCIS will limit a petition's validity to the time period of qualifying employment established by the evidence.

Q9: What happens if I am filing a petition requesting a "Continuation of previously approved employment without change" or "Change in previously approved employment," and an extension of stay for the beneficiary in H-1B classification, but I did not maintain a valid employer-employee relationship with the beneficiary during the validity period of the previous petition?

A9: Your extension petition will be denied if USCIS determines that you did not maintain a valid employer-employee relationship with the beneficiary throughout the validity period of the previous petition. The only exception is if there is a compelling reason to approve the new petition (e.g. you are able to demonstrate that you did not meet all of the terms and conditions through no fault of your own). Such exceptions would be limited and made on a case-by-case basis.

Q10: What if I am filing a petition requesting a "Change of Employer" and an extension of stay for the beneficiary's H-1B classification? Would my petition be adjudicated under the section of the memorandum that deals with extension petitions?

A10: No. The section of the memorandum that covers extension petitions applies solely to petitions filed by the same employer to extend H-1B status without a material change in the original terms of employment. All other petitions will be adjudicated in accordance with the section of the memorandum that covers initial petitions.

Q11: I am a petitioner who will be employing the beneficiary to perform services in more than one work location. Do I need to submit an itinerary in support of my petition?

A11: Yes. You will need to submit a complete itinerary of services or engagements, as described in the memo, if you are employing the beneficiary to perform services in more than one work location (in order to comply with 8 CFR 214.2(h)(2)(i)(B)). Furthermore, you must comply with Department of Labor regulations requiring that you file an LCA specific to each work location for the beneficiary.

Q12: The memorandum provides an example of when a beneficiary, who is the sole owner of the petitioning company or organization, would not establish a valid employer-employee relationship. Are there any examples of when a beneficiary, who is the sole owner of the petitioning company or organization, may be able to establish a valid employer-employee relationship?

A12: Yes. In footnotes 9 and 10 of the memorandum, USCIS indicates that while a corporation may be a separate legal entity from its stockholders or sole owner, it may be difficult for that corporation to establish the requisite employer-employee relationship for purposes of an H-1B petition. However, if the facts show that the petitioner has the right to control the beneficiary's employment, then a valid employer-employee relationship may be established. For example, if the petitioner provides evidence that there is a separate Board of Directors which has the ability to hire, fire, pay, supervise or otherwise control the beneficiary's employment, the petitioner may be able to establish an employer-employee relationship with the beneficiary.

Q13: The memorandum provides an example of when a computer consulting company had not established a valid employer-employee relationship. Are there any situations in which a consulting company or a staffing company would be able to establish a valid employer-employee relationship?

A13: Yes. A consulting company or staffing company may be able to establish that a valid employer-employee relationship will exist, including where the beneficiary will be working at a third-party worksite, if the petitioning consulting or staffing company can demonstrate by a preponderance of the evidence that it has the right to control the work of the beneficiary. Relevant factors include, but are not limited to, whether the petitioner will pay the beneficiary's salary; whether the petitioner will determine the beneficiary's location and relocation assignments (i.e. where the beneficiary is to report to work); and whether the petitioner will perform supervisory duties such as conducting performance reviews, training, and counseling for the beneficiary. The memorandum provides a non-exhaustive list of types of evidence that could demonstrate an employer-employee relationship.

Q14: What happens if I do not submit evidence of the employer-employee relationship with my initial petition?

A14: If you do not initially provide sufficient evidence of an employer-employee relationship for the duration of the requested validity period, you will be given an opportunity to correct the deficiency in response to an RFE. However, failure to provide this information with the initial submission will delay processing of your petition.

For more information on USCIS and its programs, call 1-800-375-5283.

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