Immigration Advisory: The New Form DS-160: Coming to a Consulate Near You

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The New DS-160 Form: Coming to a Consulate Near You

The U.S. Department of State has announced that by the end of April 2010, all U.S. Consulates abroad will be requiring use of the DS-160 form for non-immigrant visa appointments. The DS-160 form is entirely internet-based and aims to incorporate all previously used separate forms (DS-156, 157, 156E, etc.) into one easy to use form. As the required form at a particular Consulate could change without notice, visa applicants are advised to continue to check the Consulate's website between now and the end of April, up until the time of their visa appointment, with regard to this issue. The new DS-160 form can be viewed and completed online at: http://travel.state.gov/visa/frvi/forms/forms_1342.html.

By way of background, some U.S. Consulates (24 in all) have been successfully employing this new form during the pilot period. K visa applicants will need to still complete separate DS-156 and DS-156K forms instead of the DS-160 and some E visa applicants may need to manually complete the DS-156E if the Consulate at which they are applying has not yet updated their system to include this new form (in addition to completing the online DS-160). The following

link provides a list of Consulates that are expected to use the DS-160 by March 1st: http://www.aila.org/Content/default.aspx?docid=30736

Don't Be Caught Off-Guard: Consular Officers May Be Looking behind Approval Notices

It has always been the case that a U.S. Consular Officer can question the facts behind an approved petition and can not only refuse to issue the visa, but can also recommended to USCIS that it rescind or revoke the underlying approved petition. However, such practices have been very rare. Now, however, reports are surfacing among the immigration bar that, with increasing frequency, foreign nationals with H-1B and L-1 approval notices are no longer obtaining rubber-stamp approvals of visa applications at U.S. Consulates. With respect to H-1B visa applications, Consular Officers have been discussing wages with visa applicants, and if the Officer suspects that a wage is below the prevailing wage, the Officer is likely to delay issuing the visa until he or she has investigated whether the wage is in compliance with the prevailing wage stated on the Labor Condition Application (LCA) which was obtained as part of the H-1B petition process. With both H-1B and L-1 visa applications, Consular Officers are questioning the physical location where the visa applicant will be working, and if the Officer suspects that either H-1B/LCA and posting requirements are not being followed, or that L-1B applicants are being assigned to third-party sites not in accordance with the L-1B petition, then the Officer is likely to delay the visa issuance and request additional information.

We urge clients and their employees to discuss all visa processing plans with us in advance of leaving the U.S. to ensure visa beneficiaries are being correctly employed pursuant to the terms of their visa petitions.

USCIS Issues New Guidelines Regarding Acceptable Employer-Employee Relationships for H-1B Petitions, Independent Contractors, and Employers Placing H-1B Workers at Third Party Worksites

On January 8, 2010, USCIS issued new guidance to its Service Center Directors regarding "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements." This new guidance, known as "the Neufeld Memo" (one of a series of "Neufeld Memos"), amended the Field Manual used by adjudicators at USCIS when reviewing H-1B petitions. Challenges to the legality of the Neufeld Memo have already been filed due to USCIS failure to follow administrative procedures prior to making a material change in its rules and regulations.

The Neufeld Memo takes a deep look at what kind of "employers" may file an H-1B petition, and what is an "employer-employee" relationship for H-1B purposes. This new scrutiny by USCIS will change long-standing practice and policies at USCIS to approve H-1B petitions filed by job-shop employers who place their H-1B employees at third-party sites and then have nothing to do with the employee's actual work except to collect a monthly fee from the third-party employer. It will also curtail—but not end—the ability of foreign-national entrepreneurs to set up their own company to hire and employ themselves in H-1B status.

The term "United States employer" is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

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 Neufeld Memo outlines USCIS frustration that a lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites.

USCIS will now look at every H-1B petition to determine if the petitioner (Employer) who is filing an H-1B petition has the right to control when, where, and how the beneficiary (Employee) performs the job. USCIS will consider the following to make such a determination (with no one factor being 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?"

It is essential that all H-1B petitions be thoroughly vetted well prior to filing to be sure that a sufficient employer-employee relationship exists to support approval of an H-1B visa petition.

The Neufeld Memo offers some examples of what USCIS perceives to be a valid employer-employee relationship that will support an H-1B visa petition, and those that are not. The examples are meant only to be illustrative examples of an employer-employee relationship, and are not exhaustive.

Valid employer-employee relationship would exist in the following scenarios:

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.**[Exercise of Actual Control Scenario]**

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner. **[Right to Control Scenario]**

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the· project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work. **[Right to Control Specified and Actual Control is Exercised]**

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his/her duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the

petitioner and receives employee benefits from the petitioner. **[Right to Control Specified and Actual Control is Exercised]**

The following scenarios would *not* present a valid employer-employee relationship:

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary. The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work. **[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]**

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary. **[Petitioner Has No Right to Control; No Exercise of Control]**

Third-Party Placement/"Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it agrees to supply 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 propriety 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]**

In conclusion, we urge clients who may be considering filing an H-1B petition which might be considered by USCIS to be filed on behalf of someone who in reality is self-employed (despite the fact that a corporate entity is the petitioner); a petition filed for someone who otherwise could

be viewed as an independent contractor; or a petition that contemplates placing an H-1B worker at a third party worksite, to check with us early on in the consideration, so that we can offer constructive advice in light of this new restrictive guidance.

Wage Reductions

Wage and hour reductions present a significant area of concern for employers of H-1B workers in today's economy, as companies have increasingly sought to cut expenditures by imposing such reductions across the workforce. Indeed, if your organization employs H-1B workers, special considerations are present.

When an employer sponsors a foreign employee in the H-1B visa category, as part of its H-1B petition, the employer must file a "Labor Condition Application" (LCA) with the Department of Labor (DOL). In the LCA the employer must attest, among other things, that it will pay the H-1B employee the higher of (a) the actual wage paid to individuals with similar qualifications for the same position in that company or (b) the prevailing wage for the occupation in the area of employment. In all cases, the H-1B employee cannot be paid less than the prevailing wage for the particular position. Wages, for these purposes, include any guaranteed compensation treated as earnings for income tax and FICA purposes, and are exclusive of fringe benefits.

Employers may impose salary reductions across the board, believing that they are not problematic if they are imposed equally upon U.S. and foreign-born workers. However, salary reductions can cause an employer to run afoul of DOL regulations if they cause the wage of an H-1B employee to drop below the prevailing wage. Also relevant are other changes to the terms or conditions of employment, such as a bona fide reduction from a full-time to a part-time work arrangement, which would typically require the sponsoring company to file an amended H-1B petition with USCIS in order to maintain compliance with relevant regulations.

Such compliance failures will be exposed if the DOL selects the company for a worksite audit, which is occurring with increasing frequency. This issue also has come up where companies that have imposed such reductions then send their employees abroad to a U.S. Consulate to secure an H-1B visa. If a Consular Officer learns that reductions have taken place since the H-1B petition was filed and such changes cause the employee's wage to fall beneath the prevailing wage shown in the H petition and LCA (or that the status has been changed to part-time and an amended H-1B petition was not filed), the employee's visa may be denied, rendering him or her unable to return to the U.S. to resume his or her employment.

Accordingly, it is critical that companies think carefully about the immigration implications attendant to wage and hour reductions and consult with counsel prior to taking any action.

Government Audits and Site Visits

Ensuring compliance with the myriad of USCIS and DOL regulations has never been more important than now, in the current era of increased government enforcement initiatives. Clients of all kinds, including private companies, medical and educational institutions, and non-profit

agencies alike are reporting an increase in worksite audits by DOL, investigations by U.S. Immigration and Customs Enforcement (ICE), and unannounced site visits by USCIS.

When one of these government agencies conducts a worksite audit, it frequently examines the company's I-9 records, and payroll records, as well as the "public inspection files"[1] maintained by a company for its H-1B workers. The investigator will ask a series of questions to determine whether the terms of employment are in accordance with those stated in the employer's H-1B petitions including, but not limited to, whether the H-1B employees are in fact working at the worksite(s) as defined in the H petition and LCA , whether they are being paid the required wages, and whether they are performing the duties in the capacity described in the H-1B petition.

It continues to be critically important to ensure that an employer's I-9 records and H-1B public inspection files are in order and up to date, and that they can be readily identified and made available when required. The employer's Human Resources Manager (or other personnel, such as the office manager or receptionist who may receive the government investigators) should be able to direct any government inquiries to the appropriate individual who can respond to inquiries about particular H-1B employees. As always, we encourage clients to pursue proactive measures and bring in Mintz Levin's immigration expertise to review and ensure that immigration records are in order *prior to any government audits or site visits* to ease any potential concerns.

Endnotes

[1] A public inspection file (also known as a "public access file") is a file that all H-1B sponsoring employers are required to maintain for each H-1B worker at either the employer's principal place of business in the U.S. or the worksite. This file must be made readily available to the Department of Labor or any interested party and it must contain a number of documents, including a copy of the certified LCA, proof of the wage rate paid to the H-1B worker, and a copy of the documentation used to establish the prevailing wage and the actual wage, among other information required by the DOL.

Employment Authorization Document (EAD) for Family Members: Some Considerations

Many foreign national employees move to the U.S. with their spouses and/or children in tow. While these family members may not be employed in the U.S.—either because their derivative status does not allow it (such as an H-4 spouse), because of their age (young children), or because they simply do not wish to work—under certain circumstances they may be eligible to apply for an EAD, and there are many excellent reasons to do so. The number one benefit to obtaining an EAD for a derivative family member who does not plan on working is that an EAD provides the ability for that family member to obtain a U.S. social security number, which is beneficial for a variety of reasons and purposes. Even young children can benefit from this and it is not necessary that they be of an employable age. Another reason foreign nationals may want to consider obtaining EADs for family members relates to casual employment, which requires an EAD, to many people's surprise. Infrequent yet income-producing projects (e.g. casual assistance

to a non-profit organization in the publication of their newsletter) technically require pre-approved employment authorization. Obtaining an EAD, even if not using it on a continuous basis, allows family members to work as frequently or as infrequently as they like without worrying about any unauthorized employment. Finally, an EAD is a ready-made picture ID for a family member, in a world where government-produced picture IDs are becoming more frequently required for a number of transactions.

EADs are available to L-2 and E spouses, though not for children in the same status. Applicants for Adjustment of Status (Form I-485) are also eligible for initial EADs. Both spouses and children can file for I-485-based EADs. EADs are also available to certain other visa holders. If you have a question about whether a foreign national may be eligible for an EAD, please contact your Mintz Levin contact.

Employment-Based Immigrant Visa Availability

All employment-based applications for permanent residence are subject to numerical quotas set by Congress in the Immigration and Nationality Act. Within each category, there are also quotas based on the country of birth of the applicant. There are five employment based categories as outlined below:

1st Employment Preference Category: Priority workers including foreign nationals of extraordinary ability, outstanding researchers/professors, and multinational managers/executives

Employment Preference Category: Foreign nationals in jobs that require advanced degrees (master's or bachelor's plus 5 years of progressive experience) or have exceptional ability

3rd Employment Preference Category: Foreign nationals in jobs that require professional workers (bachelor's degree); jobs that require a skilled worker (2 years of experience or more); or, jobs requiring less than 2 years of experience (other workers)

4th Employment Preference Category: special immigrants and other specialized categories

5th Employment Preference Category: immigrant investors

The 4th and 5th preference categories are very specific and rarely used by U.S. employers for sponsorship, so the focus for this article is on the first three preference categories.

The quotas for these categories and for country of birth are monitored by the U.S. Department of State. The filing of the first step of the green card in each category establishes a foreign national's "priority date." That date represents that foreign national's place in line vis-à-vis those who filed before that date and are in line ahead of the foreign national, and those who will file after that date and will be in line behind the foreign national. The Department of State monitors the filings in each category and the country of birth of each filer to determine whether a particular category or country has more filers than immigrant visa numbers available. The Department makes visa number availability and cut-off dates available to the public through their monthly Visa Bulletin. The Visa Bulletin is published between the 10th and 15th of each month

for availability the next month and can be found online at http://www.travel.state.gov/visa/frvi/bulletin/bulletin_1360.html. If a visa number is available, the monthly visa bulletin will have a capital letter "C" in the appropriate column indicating that immigrant visas in that category or country are “current” or available. If the number of filers starting the permanent residence process exceeds the number available in the quota, the State Department will assign a cut-off date in the appropriate column. These categories with cut-off dates are said to be “backlogged.” This cut-off date means that only foreign nationals with an already established priority date on or before the cut-off date are eligible to immigrate in that category. Foreign nationals whose priority date is on or before the cut-off date listed on the Visa Bulletin are said to be “current” for their category and are eligible to proceed with processing. The rules do not allow the foreign national to file the I-485 adjustment of status—the final step of the permanent residence process—unless his or her priority date is current.

In categories with cut-off dates, the forward movement of the cut-off dates is virtually impossible to predict. In fact, it is even possible for cut-off dates to move backward instead of forward if an unexpectedly large volume of applicants has filed during the previous month.

The current employment-based immigrant visa availability and cut-off dates from the February 2010 Visa Bulletin are reproduced below.

Employment-Based Categories from February 2010 Visa Bulletin

	All Charge-ability Areas Except Those Listed	**CHINA-mainland born**	**INDIA**	**MEXICO**	**PHILIP-PINES**
Employment -Based					
1st	C	C	C	C	C
2nd	C	22MAY05	22JAN05	C	C
3rd	22SEP02	22SEP02	22JUN01	01JUL02	22SEP02
Other Workers	01JUN01	01JUN01	01JUN01	01JUN01	01JUN01
4th	C	C	C	C	C
Certain Religious Workers	C	C	C	C	C
5th	C	C	C	C	C
Targeted Employment Areas/ Regional Centers	C	C	C	C	C

5th Pilot Programs	C	C	C	C	C

As you can see from this chart, the 3rd employment-based category is backlogged for all countries of birth and there is a longer backlog for foreign nationals born in mainland China (Taiwan and Hong Kong are not included in the mainland China category). The 2nd employment-based category is backlogged only for foreign nationals born in mainland China and India.

Using the 2nd employment-based category for mainland China as an example, the listed cut-off date of May 22, 2005 means that only foreign nationals born in mainland China who have a priority date of May 22, 2005 or sooner are eligible to file the I-485 final step of their permanent residence applications.

Special Situations

Outlined below are a number of special situations that can arise in this context that merit their own brief discussion.

Cut-off Date Retrogression

As indicated above, it is possible for a cut-off date to move backward from one Visa Bulletin to the next. This is referred to as "retrogression" and is usually the result of a large number of unanticipated filings in a particular category since the last Visa Bulletin. In some of these situations, the foreign national may have filed his or her I-485 in a previous month when the priority date was current, but with a subsequent retrogression, the priority date is no longer current. As long as the I-485 was properly filed when the foreign national's priority date was current, it can remain pending and the foreign national can continue to obtain the benefit of the employment card and advance parole travel documents. However, the I-485 cannot be approved by USCIS until the cut-off date moves forward again beyond the foreign national's priority date.

In July and August 2007, the State Department made all employment-based categories current to allow the immigration service to approve a large number of pending cases to use up available visa numbers before the end of the government fiscal year on September 30, 2007. As a result of this, a large number of foreign nationals were suddenly eligible to file their I-485 adjustments, but with the knowledge that the cut-off dates would be reinstated, backlogging their category. These permanent residence applicants now have to wait for the forward movement of their categories' cut-off date before they can be approved for permanent residence.

Cross-Chargeability

Chargeability refers to the allocation of immigrant visa numbers by country of birth. A foreign national applying for permanent residence born in the United Kingdom is chargeable to the United Kingdom for purposes of the immigrant visa. The foreign national's family members are also chargeable to the United Kingdom regardless of where they were born. So, a mainland born Chinese spouse is chargeable to the United Kingdom for immigrant purposes to avoid separation

of families. The rule also works even if the primary beneficiary of the employment-based visa is born in a backlogged country, but the spouse is not. Cross-chargeability allows the employee to be chargeable to the more favorably country of his or her spouse. This rule can be very beneficial if the foreign national employee seeking permanent residence based on one of the backlogged categories is married to a foreign national whose country of birth is not subject to a backlog. Even though the foreign national employee is the primary beneficiary of the permanent residence application, he or she can cross-charge the immigrant visa to his or her spouse's country of birth. This is most beneficial in the 2nd employment based category if the foreign national employee was born in China or India, but his or her spouse was born in a country other than China or India since no other countries are backlogged in this category.

Immigrant visa number availability is a problem that employers and sponsored foreign nationals will have to deal with for the foreseeable future. Immigrant visa quotas were established many years ago and have not kept pace with demand. With the current economic and political climates, it seems unlikely that Congress will increase the employment-based quotas unless it is as part of a comprehensive immigration reform. In the meantime, employers and foreign national employees will have to continue to monitor the visa bulletin and in many cases, wait many years before completing the permanent residence process.

We encourage our clients to contact us with any "priority date"-related questions that arise.

For assistance in this area please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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