THE NEUFELD MEMO REVISITED AND THE H-1B VISA CLIMATE: The New Face of Enforcement in the H-1B World.

As a result of increased site visits and a general inclination to decrease the number of H-1B's approved, the U.S. Citizenship and Immigration Services ("USCIS") published a watershed memo on January 8th, 2010 ("the Neufeld Memo"). The Neufeld Memo radically changed the way that H-1B's were adjudicated. The Neufeld Memo also put enormous pressure on employers to satisfy additional evidence requirements justifying any work performed by an H-1B visa holder off of the H-1B visa petitioner's premises. Additionally, the Neufeld Memo added additional requirements for H-1B petitioners to obtain H-1B extensions. It is this author's opinion that as a result of this Neufeld Memo, employers will see automatic requests for evidence in any case where the beneficiary may be performing offsite work and for any H-1B visa extension petition. It continues to be our strong recommendation that employers add a section to their H-1B petitions which cover the issues addressed by the Neufeld Memo. Even one and one half years after this Memo was promulgated.

USCIS is still concerned about whether or not there is a valid employer-employee relationship. The Neufeld Memo basically states that hiring a person to work in the United States requires more than merely paying the wage or placing that person on the payroll of the H-1B petitioning organization. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer exercises a sufficient level of "control" over the prospective H-1B employee. Clearly, if the employee will be working "on site" in the H-1B petitioner's office, doing specific tasks for the petitioner, this will not be viewed as raising a "control" issue. However, with the publication of the Neufeld Memo, it remains our opinion that all employers need to address the "control" issue upon initial submission of an H-1B petition to the USCIS.

The prospective H-1B petitioner organization must be able to establish that it has the "right to control" when, where, and how the prospective H-1B nonimmigrant beneficiary will perform the professional and specialty occupation job and the USCIS will consider the following items to make such a determination (with no one of the following factors being decisive with regard to the issue of "control"):

(1) Does the potential H-1B petitioner supervise the prospective H-1B 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?

In addition to the foregoing, the USCIS provides specific examples of employment situations in which the "control" issue is not considered to be problematic. Please note that there are numerous variations of these scenarios and that each employment situation may not fit squarely into the examples provided by the USCIS.

The "Traditional Employment" Scenario:

If the prospective H-1B beneficiary works at an office location owned/leased by the prospective H-1B petitioner and 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.

The "Temporary/Occasional Off-Site Employment" Scenario:

The prospective H-1B nonimmigrant 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.

The "Long-Term/Permanent Off-Site Employment" Scenario:

The prospective H-1B nonimmigrant 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.

The USCIS has specifically stated that the following scenarios are now NOT acceptable to meet the "control" issue with regard to H-1B employment:

The "Self-Employed Beneficiaries" Scenario:

The prospective H-1B nonimmigrant 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 the corporation, and not the beneficiary herself, will be controlling her work.

The above example (cited in the Neufeld Memo) is similar to a case recently addressed by our office for one of our clients. We have successfully processed a case such as this in the past. However, it is likely that these facts will inevitably lead to a much more complex H-1B case processing procedure by the government.
The USCIS admits that a sole stockholder of a corporation can be employed by a corporation as the corporation is a separate legal entity from its owners and even its sole owner. However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or her may not be able to establish that a valid employment relationship exists in that the beneficiary. The issue is whether the prospective H-1B nonimmigrant petitioner can establish the requisite "control".

The Neufeld Memo states that the Administrative Appeals Office ("AAO") correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B nonimmigrant employees. However, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 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.

What we believe that the USCIS is saying is that if a corporation’s sole shareholder and sole employee is the H-1B nonimmigrant beneficiary, the case is likely to be denied. If the H-1B nonimmigrant beneficiary is one of several shareholders (not a majority shareholder of the corporation and is NOT the sole employee) then the USCIS can approve the case. It appears to be the case that any person who has a small company, where the H-1B beneficiary is one of the main officers or shareholders of the company, will have a very difficult time obtaining an H-1B approval. This was one of the new rules that came out of the Neufeld Memo. In addition, our office continues to find that prospective H-1B nonimmigrant petitioners which have approval of an H-1B already (that fit in this scenario) are likely to have difficulty extending the H-1B nonimmigrant professional and specialty occupation visa on a going forward basis.

The "Independent Contractor" Scenario:

The beneficiary is a sales representative. The prospective H-1B nonimmigrant 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.

In the past, the USCIS has stated that H-1B nonimmigrants must be employees, which means that they must be paid using a W-2 (and not a 1099). The Neufeld Memo solidifies this long-standing rule and provides a basis for a denial of an H-1B where an H-1B visa holder is treated as an "Independent Contractor".

The "Third-Party Placement/ "Job-Shop"" Scenario:

The prospective H-1B nonimmigrant 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 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.

This scenario eliminates personnel or consulting agency placements for the H-1B nonimmigrant visa category. All placement firms that now use the H-1B visas to place workers at third-party companies whereby the H-1B petitioner’s role is basically relegated to payroll will no longer be able to utilize H-1B visas. The only type of H-1B visas that will be allowed by personnel agencies will be for in-house positions. One good thing that comes out of the Neufeld Memo is that many current H-1B visas, being used by some Indian Job Shops, who place workers in third-party positions, will be permissible only if the "control" issues are appropriately met. As a result of the Neufeld Memo, shabby and ill prepared job shops will slowly be eliminated as they will be unable to use the H-1B classification. Ultimately, this will leave more H-1B visas available for the "traditional" employers.

As previously pointed out, H-1B nonimmigrant professional and specialty occupation worker employers will have an extra burden proving the Employer-Employee relationship on initial H-1B petitions.
The Neufeld Memo states that the prospective H-1B nonimmigrant petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

• 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.

Our office continues to suggest to our prospective H-1B nonimmigrant petitioners that employer's filing initial H-1B petitions submit some or all of this information as part of their petition. If not, the employer should expect an extensive Request For Evidence ("RFE") document from the government requesting detailed information.

The New Rule For H-1B Extension Petitions.

The new rule for H-1B extension petitions is that a beneficiary must continue to establish that a valid employer-employee relationship exists. The prospective H-1B nonimmigrant petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above. The prospective H-1B nonimmigrant petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

• 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.

If USCIS determines, while adjudicating the extension petition, that the prospective H-1B nonimmigrant petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of his own.)

Until the promulgation of the Neufeld Memo, H-1B extensions have been granted almost automatically as long as the prospective H-1B nonimmigrant petitioner stated that the beneficiary would be performing the same work as previously petitioned for. The Neufeld Memo exponentially increased the number of RFE's and denials in extension cases.

Our office is convinced that these new and harsh rules are a result of the USCIS site visits and numerous violations USCIS has seen as a result of the site visits. The state of the U.S. economy certainly has not helped the situation any either. USCIS will no longer permit employers to flaunt the rules and "business as usual" will no longer be an acceptable mode. We continue to see an uptick in ICE, CIS, and DOL compliance issues. We continue to warn our employer clients about the government scrutiny in many areas where there may be perceive abuse of the U.S. immigration and nationality laws.