

Who's the Boss? The Ever Evolving Question of Who is the Actual Employer of a Foreign National Who is Placed at a Third Party Job Site

There once was a time in this world when Average Joe, the prototypical American worker, woke in the morning; dressed for work; packed his lunch; and rode the bus to the office. There, he hung up his coat, grabbed a cup of coffee; swung by the boss' office for a morning greeting, and sat down at his desk for a day of work. If questions arose about the job on which he was working, Joe stopped in to see the boss for guidance. At the end of each day or week, Joe reported his time to his boss, and at the end of the week, his boss handed him a check for the week's work.

Depending upon the nature of the job, Joe might work at the same job site and possibly for even the same boss for years or even decades. On any given day of the year, Joe knew when he woke up in the morning where he was going to work, and who he was going to work for.

In today's ever evolving work world, Average Joe would be lost. Constantly changing job site assignments; contracted projects; and a web of interwoven and multi-layered contractual arrangements which govern his employment would leave his head spinning. He might never speak to the company who mailed his check each week other than to report his arrival at new assignments and to email his time in each week.

The realities of the new work environment affect everyone involved, from Joe, to Joe's boss, to the corporation Joe works for. And in the context of Joe's work visa if he is a foreign national, these realities have a significant impact upon Joe's ability to work in the United States.

United States Citizenship and Immigration Services (USCIS) has always carefully scrutinized the employer-employee relationship out of concern for the possibility of an employer bringing in a foreign national worker for a job that does not exist. However, in recent days, due

to a combination of the economic recession and heightened public sensitivity to foreign national worker issues, USCIS has begun to challenge the nature of the employment relationship which underlies petitions for foreign national worker visas, especially in the context of the H-1b visa, and specifically in the context of the staffing company business model. Some believe the goal of USCIS is to eliminate the staffing company business model from the foreign national worker equation altogether.

With that as a backdrop, it is appropriate to re-examine the standard which is to be used for determining when a corporation is the “actual” employer of a foreign national worker for the purpose of work visa issuance. The focus of this article will be the question of who is an “employer” in the context of a petition for an H-1B nonimmigrant visa.

In terms of the law on this subject which is relevant to adjudicating an H-1B visa petition, the primary issue to be determined is whether the petitioner is able to establish that it meets the regulatory definition of an intending employer pursuant to Section 101(a)(15)(H)(i)(b) of the Act and 8 C.F.R. § 214.2(h)(4)(ii). Specifically, when adjudicating a petition, the USCIS must determine whether the petitioner has established that it will have “an employer-employee relationship with respect to employees.” 8 C.F.R. § 214.2(h)(4)(ii)(2).

Section 101(a)(15)(H)(i)(b) of the Act, 8 U.S.C. § 1101(a)(15)(H)(i)(b), defines and H-1B nonimmigrant as an alien:

(i) who is coming temporarily to the United states to perform services . . . in a specialty occupation described in section 1184(i)(1) . . . who meets the requirements of the occupation specified in section 1184(i)(2) . . . and with respect to whom the Secretary of Labor determines . . . that the intending employer has filed with the Secretary an application under 1182(n)(1).

“United States employer” is defined in the Code of Federal Regulations 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.

Although “United States Employer” is defined in the regulations, “employee,” “employed,” “employment,” are not defined for purposes of the H-1B visa classification even though these terms are used repeatedly in both the Act and the regulations, including within the definition of “United States employer” at 8 C.F.R. § 214.2(h)(4)(ii).

Section 101(a)(15)(H)(i)(b) of the Act indicates that an alien coming to the United States to perform services in a specialty occupation will have an “intending employer” who will file a labor condition application with the Secretary of Labor pursuant to section 212(n)(1) of the Act, 8 U.S.C. § 1182(n)(1). The intending employer is described as offering full-time or part-time “employment” to the H-1B “employee”. Sections 212(n)(1)(A)(1) and 212(n)(2)(C)(vii) of the Act, 8 U.S.C. §§1182(n)(1)9A)(i) and 1182(n)(2)(C)(viii).

Further, the regulations indicate that “United States employers” must file Form I-129 in order to classify aliens as H-1B temporary “employees.” 8 C.F.R §§ 214.2(h)(1) and 214.2(h)(2)(i)(A).

Finally, the definition of “United States employer” indicates that the petitioner must have an “employer-employee relationship” with the “employees under this part,” i.e., the H-1B beneficiary, and that this relationship be evidenced by the employer’s ability to “hire, pay, fire, supervise, or otherwise control the work of any such employee.” 8 C.F.R. § 214.2(h)(4)(ii)(defining the term “United States employer”).

The Supreme Court of the United States has determined that where federal law fails to clearly define the term “employee,” courts should conclude that the term was “intended to describe the conventional master-servant relationship as understood by common-law agency

doctrine.” *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992)(hereinafter “*Darden*”)(quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). That definition is as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Darden, 503 U.S. at 323-324.

As the common-law test contains “no shorthand formula or magic phrase that can be applied to find the answer . . . all of the incidents of the relationship must be assessed and weighted with no one factor being decisive.” *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

It is important to note that the factors listed in *Darden* are not exhaustive and must be evaluated on a case-by-case basis. 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; however, the USCIS must weigh and compare a combination of the factors in analyzing the facts of each individual case. The determination must be based upon all of the circumstances in the relationship between the parties, regardless of whether the parties refer to it as an employee or as an independent contractor relationship. See *Clackamas*, 538 U.S. at 448-449; *New Compliance Manual* at § 2-III(A)(1).

Likewise, the “mere existence of a document styled ‘employment agreement’ shall not lead inexorably to the conclusion that the worker is an employee. *Clackamas*, 538 U.S. at 450.

“Rather, as was true in applying common-law rules to the independent-contractor-versus-employee issue confronted in *Darden*, the answer to whether a shareholder-director is an employee depends on ‘all of the incidents of the relationship . . .with no one factor being decisive.’ *Clackamas* at 451.

Of the three parts of the test outlined in the definition of “United States employer” identified in the Code of Federal Regulations at 8 C.F.R. § 214.2(h)(4)(ii), job in the US, control, and tax identification number, the control issue is the one which offers the greatest potential for disagreement between the USCIS and petitioning employers.

On January 8, 2010, USICS released a Memorandum titled *Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements*. This memorandum, authored by Donald Neufeld, Associate Director, Service Center Operations, eliminates the usage of the regulatory and Supreme Court’s definition of the employer-employee relationship and establishes its own definition which focuses on the sole factor of the petitioning employer’s control of the employee’s work.

The memorandum outlines the relevant law and then concludes that while some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. The memorandum declares that the petitioning employer’s control over the beneficiary must be established when the beneficiary is placed in another employer’s business, and expected to become a part of that business’s regular operations. The requisite control may not exist in certain instances when the petitioner’s business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements, the Memorandum concludes, are likely to require close review in order to determine if the required relationship exists.

Unfortunately, this memorandum elevates one criteria, employer control, over all others, in contravention of existing regulations and statutes which address this issue. To comply with the memorandum, a petitioning employer must show, to the satisfaction of USCIS, that it has nearly complete control over all of the activities of the employee.

The memorandum offers the following factors to consider when making a determination that the employer has the right to control the employee. The petitioner must be able to establish that it has a right to control when, where, and how the beneficiary performs the job. The memorandum directs USCIS to consider the following when making such a determination:

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 the 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 Memorandum pays lip service to the regulations and Supreme Court definition by reminding examiners that the law is flexible about how these factors are to be weighed and says the petitioner will have met the relationship test, if, in the totality of the circumstances, the petitioner is able to present evidence to establish it has the right to control the beneficiary's employment. However, in reality, the memorandum shifts the entire focus to the issue of control.

Unfortunately, what USCIS has done with this memorandum is attempt to elevate the issue of control to a greater significance than the other factors identified in the federal

regulations. It attempts to make the entire determination dependent upon whether the employer controls the work of the employee according to a series of factors it has arbitrarily created, when in fact the regulations already identify the factors which are to be determined, *i.e.*, hiring, paying, firing, supervising or otherwise controlling the work of the employee. The additional factors delineated in the memorandum are not provided for by statute, regulation, or case law. They have simply been created by USCIS and imposed upon petitioning employers.

Of greatest concern is the conclusion drawn by USCIS about what it calls “Third-Party Placement/”Job Shops,”” which it asserts lack the requisite employer-employee relationship and therefore do not qualify to petition for an H-1B visa.

The memorandum offers an example in which 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 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.

The conclusion which the memorandum reaches regarding this business model is, quite simply, incorrect and in conflict with existing law on the subject. This is clearly an issue which is going to be litigated in coming months as increasing numbers of petitions are denied on the grounds that the petitioner cannot document, to the satisfaction of USCIS, the employer-employee relationship and the ability of the employer to control the work of the employee according to the newly identified factors listed in the memorandum.

USCIS does not have the authority to modify the law based upon its dislike of a particular business model; unfortunately, the time and effort required to force USCIS to comply with the law rather than its own beliefs are going to be considerable.

Going forward, petitioning employers (and especially staffing companies) must be aware of the new level of scrutiny which USCIS is going to apply to this issue and modify their relationships with their clients and the documentation which they submit with their petitions accordingly. A greater emphasis must now be placed upon identifying who controls the actions of an employee, and upon documenting that through out the business relationship, from contracts to work orders to employee reviews, and similar pieces of the relationship between an employer and its employees.

While doing so may not actually be required by the law, having this type of documentation will certainly enhance the chances of a petition being approved while this issue is litigated and USCIS policy is corrected to comply with existing law.

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