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GMS Flash Alert

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United States – Policy Change for H1-B Petitions Involving Third-Party Placement

On February 22, 2018, the U.S. Citizenship and Immigration Services ("USCIS") published a policy memorandum entitled "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites."[1] The guidelines set out in the policy memorandum took effect immediately.

WHY THIS MATTERS

Petitioners may now be required to submit more comprehensive and detailed documentation in support of an H-1B petition filed for an employee who will work at a third-party work location. The updated policy regarding third-party placement of H-1B employees will apply to FY 2019 H-1B cap petitions and H-1B extension as well as amendment requests.

Context

The petitioner of an H-1B filing involving a third-party placement must establish, by a preponderance of the evidence, the following:

- The beneficiary will be employed in a specialty occupation.

  This means that the petitioner has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested in the petition.

- The petitioner will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.

The USCIS has concluded that employer violations are more likely to occur at third-party worksites. As a counter-measure, the new policy requires corroborating evidence that the work to be performed by the beneficiary at a third-party location will be in a specialty occupation. Further, the new guidelines require corroborating evidence that an employer-employee relationship will be maintained by the petitioner throughout the entire period of H-1B employment, including any periods during which the beneficiary will be deployed to a third-party location.

Contracts as Evidence of Specialty Occupation and Employer-Employee Relationship

The policy memorandum released on February 22, 2018, indicates that petitioners often provide uncorroborated statements describing the role that an H-1B beneficiary will perform at a third-party work location. The USCIS memo explains that such statements alone are often insufficient to establish by a preponderance of the evidence that the H-1B beneficiary will actually perform specialty occupation work. In addition to copies of contracts between the petitioner and the end-client relating to the particular work location(s) to which the H-1B employee will be deployed, the USCIS policy memorandum lists the following items as acceptable corroborating evidence:

- Copies of relevant signed contractual agreements between the petitioner and, if the petitioner has not contracted directly with the third-party, all other companies involved in the H-1B employee's placement.

- A letter signed by an authorized official of the ultimate end-client where the work will be performed by the beneficiary. The letter should include a detailed description of the specialized duties that the beneficiary will perform and how the H-1B employee will be supervised. The letter from the end-client should also confirm the qualifications required to perform the job duties to be carried out by the beneficiary, the duration of the engagement, the wages/salary to be paid to the beneficiary, any applicable benefits, and the hours to be worked.

- Other evidence of the actual work assignment(s), including market analysis, brochures, technical documents, milestone tables, funding documents, and cost-benefit analysis.

- Copies of detailed statements of work or work orders signed by an authorized official of the ultimate end-client company where the work will actually be performed by the beneficiary. The documents should detail the specialized duties the beneficiary will perform, the qualifications that are required to perform the job duties, the duration of the job, and the hours to be worked.

According to the updated policy, the USCIS will be better able to determine whether the requisite employer-employee relationship exists and/or will exist by evaluating the chain of contracts and/or legal agreements between the petitioner and the ultimate end-client.

Although a petitioner may redact confidential information in the documents submitted in support of an H-1B petition filed per the new guidelines, the evidence sent to the USCIS must be sufficiently comprehensive and detailed for the agency to determine whether the intended offsite placement meets H-1B criteria.

Itineraries as Evidence of Non-Speculative Employment

The regulatory requirement that an employer must submit an itinerary with a petition for an H-1B employee who will work in more than one (1) location is longstanding. The policy memorandum published by USCIS on February 22, 2018, acknowledges that the regulation only requires an itinerary to contain the dates and locations associated with the services to be provided, however, it states that a more detailed itinerary may assist in demonstrating specific and non-

speculative qualifying assignments. As per the USCIS, helpful information that may be included in a complete itinerary of services or engagements is as follows:

- The dates of each service or engagement;
- The names and addresses of the ultimate employer(s);
- The names, addresses (including floor, suite, and office numbers), and telephone numbers associated with the locations where the services will be performed for the period of time requested; and
- Corroborating evidence for all of the above.

Impact of Policy Change on H-1B Validity Periods

While an H-1B petition may be approved for up to three (3) years, the USCIS, in its discretionary application of the new policy guidelines, will generally limit the approval period to the length of time the petitioner can demonstrate that: 1) the beneficiary will perform non-speculative work in a specialty occupation, and 2) the requisite employer-employee relationship will be maintained with the beneficiary, as documented by contracts, statements of work, and other similar types of evidence.

KPMG NOTE: IMPLICATIONS FOR H1-B EXTENSIONS

The updated policy makes clear that the USCIS will apply increased scrutiny to H-1B extension requests. More specifically, the new policy guidelines indicate that the petitioner should establish that the H-1B requirements for third-party placement were met during the entire course of previous employment with the organization. This requires the petitioner to establish that the beneficiary was employed in a specialty occupation and paid the required wage during the relevant H-1B employment period.

In addition, the petitioner must provide evidence that it maintained the right to control the beneficiary's employment at all relevant times. If the USCIS finds that the petitioner has been non-compliant with H-1B requirements by failing to comply with the terms and conditions of the original petition and/or not filing a timely amended petition, then the USCIS may call into question the eligibility of any subsequent petitions filed to extend the beneficiary's employment.

FOOTNOTE:

1 To access "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites," February 22, 2018, PM-602-0157, click here.

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Contact us

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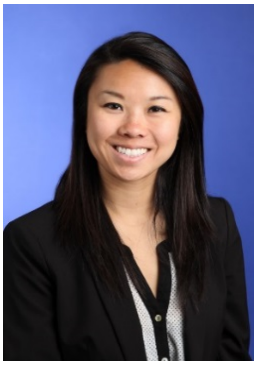

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