

# GMS Flash Alert



## Immigration Edition

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# United States - Settlement Reached between H1-B IT Employers and USCIS

A settlement agreement has been reached between a nonprofit organization that represents the interests of IT companies and U.S. Citizenship and Immigration Service (USCIS). As per the settlement, USCIS will rescind two guidance memoranda and one regulation that the agency had relied upon for years when adjudicating H-1B petitions.

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## WHY THIS MATTERS

The settlement agreement, which must be implemented within the next ninety (90) days, is significant for IT companies and other consulting firms that offer employment at a third-party worksite.

USCIS is not required to re-open all previously denied petitions. H-1B employers who have had similar denials based on the USCIS memos mentioned above may wish to consider taking steps that could help overturn past denials or approvals of short duration.

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## Court Decision and Settlement in Brief

The settlement follows nearly two years of litigation, wherein the U.S. District Court for the District of Columbia had found that the USCIS guidance memos in question imposed additional burdens on employers within the IT industry, and were inconsistent with immigration laws, lawfully passed by Congress.<sup>1</sup> The court found that USCIS did not have the authority to issue its own guidance without going through proper rule-making procedures. Further, the court noted in its Opinion that these adjudication memos *"caused the H-1B approval process to slow dramatically and resulted in a high level of rejected visa petitions from employers in the IT industry."*<sup>2</sup>

## More Details

Specifically, the U.S. District Court invalidated the following USCIS policy memos:

- January 8, 2010 Memo, entitled "**Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements memo**"<sup>3</sup>

This memo requires a petitioner to establish that an employer-employee relationship exists and will continue to exist throughout the duration of the requested validity period. According to this 2010 policy memo, employers are required to show actual control over the H-1B beneficiary. The court stated that the "control test" required by USCIS to determine whether the employer-employee relationship exists, goes beyond the agency interpretation and amounts to a legislative rule.

The court confirmed that USCIS does not have the authority to adopt legally binding regulations without going through the rule-making process.

- February 22, 2018 Memo, entitled "**Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites**"<sup>4</sup>

This policy memo requires that the petitioner demonstrate that it has specific and non-speculative qualifying assignments for the beneficiary for the entire duration sought within the petition. Such assignments must be documented by contracts, statements of work, etc. Following the issuance of this memo, USCIS began to shorten the validity of many H-1B visas to less than the standard three-year period and forced employers to file new petitions if they were unable to comply with this requirement.

The court found that it was irrational, arbitrary, and capricious to require contracts or other corroborated evidence of dates and locations of temporary work assignments for three future years.

- **The INS 1991 Itinerary Regulation** requires an employer to submit dates and locations of services on Form I-129, when an H-1B employee is performing work at multiple locations. However, without rule-making, USCIS requires contracts or other corroborated evidence of dates and locations of temporary work assignments for three future years. This was also invalidated by the district court.

To comply with the settlement order, USCIS will not issue approvals for H-1B petitions with validity periods shorter than the time period requested by the H-1B petitioner, unless such decisions include or are accompanied by a brief explanation as to why the validity period has been limited.

## FOOTNOTES:

1 *ITSERVE Alliance, Inc. v. United States Citizenship and Immigration Services*. See the [March 10, 2020 decision](#).

2 Ibid.

3 The January 8, 2010 USCIS [memo](#).

4 [February 22, 2018 Policy memorandum "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites."](#)

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## Contact us

For additional information or assistance, please contact your local GMS or People Services professional\* or one of the following professionals with the KPMG International member firm in Canada:



**Stephanie Lipstein**  
**Partner, Immigration**  
KPMG Law LLP, Canada  
Tel. +1-514-840-2119  
[slipstein@kpmg.com](mailto:slipstein@kpmg.com)

**Aurélie Espana**  
**Manager, U.S. Immigration**  
KPMG Law LLP, Canada  
Tel. +1-514-840-8610  
[aurelieespana@kpmg.ca](mailto:aurelieespana@kpmg.ca)

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