



June 17, 2020

PM-602-0114

## Policy Memorandum

**SUBJECT:** Rescission of Policy Memoranda

### Purpose

U.S. Citizenship and Immigration Services (USCIS) is rescinding two policy memoranda regarding the adjudication of certain petitions for H-1B nonimmigrant classification.

### Background

USCIS is rescinding the following policy memoranda and issuing updated policy guidance in their place:

- Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements (Reference AFM Chapter 31.3(g)(16)), HQ 70/6.2.8 (AD 10-24), issued January 8, 2010;<sup>1</sup> and
- Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites, PM-602-0157, issued February 22, 2018.<sup>2</sup>

The new guidance contained in this policy memorandum and the rescission of prior memoranda is effective immediately.

USCIS officers should not apply the above-listed memoranda to any pending or new requests for H-1B classification, including motions on and appeals of revocations and denials of H-1B classification.

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<sup>1</sup> This memorandum provided guidance on the requirement that a petitioner establish that an employer-employee relationship exists and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

<sup>2</sup> This memorandum provided guidance relating to H-1B petitions filed for workers who would be employed at one or more third-party worksites. It was intended to be read together with the 2010 memorandum and as a complement to that policy.

Petitioners must meet all other statutory and regulatory requirements, binding court precedent, Administrative Appeals Office adopted and precedent decisions, and effective policy guidance (that is, not relying on the itinerary requirement under [8 CFR 214.2\(h\)\(2\)\(i\)\(B\)](#) or guidance in the 2010 or 2018 policy memoranda).

When warranted, officers should continue to deny or revoke H-1B classification on the basis of material misrepresentations.

## **Guidance on the Adjudication of H-1B Petitions**

This section provides guidance to USCIS officers in the adjudication of petitions for H-1B nonimmigrant classification.<sup>3</sup>

### **A. Employer-Employee Relationship**

#### **1. Should an officer consider an H-1B petitioner and an H-1B beneficiary to have an employer-employee relationship if they meet only ONE of the “hire, pay, fire, supervise, or otherwise control the work of” factors under 8 CFR 214.2(h)(4)(ii)?**

The officer should apply the existing regulatory definition in assessing whether an employer and a beneficiary have an employer-employee relationship. The officer should consider whether the petitioner has established that it meets at least one of the “hire, pay, fire, supervise, or otherwise control the work of” factors with respect to the beneficiary. H-1B petitioners are required to submit a Labor Condition Application (LCA) and a copy of any written contracts between the petitioner and the beneficiary, or a summary of the terms of the oral agreement if a written contract does not exist.<sup>4</sup> Depending upon the content of such documentation, it may establish the employer-employee relationship. The officer may not apply the prior rescinded guidance.

#### **2. Must the H-1B petitioner establish that employment exists at the time of filing?**

A bona fide job offer must exist at the time of filing. The petitioner is required to attest under penalty of perjury on the H-1B petition and LCA that all of the information contained in the petition and supporting documents is complete, true, and correct. The petitioner has the burden of proof to establish that employment exists at the time of filing and it will employ the beneficiary in the specialty occupation.<sup>5</sup>

If the petitioner’s attestations and supporting documentation meet this standard, then the officer should not request additional evidence and should approve the petition, provided all other eligibility requirements are met by a preponderance of the evidence. If the officer finds that a petitioner has not established, by a preponderance of the evidence, statutory or regulatory

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<sup>3</sup> This revised guidance supersedes Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements, HQ70/6.2.8 (10-24), issued January 8, 2010; and Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites, PM-602-0157, issued February 22, 2018.

<sup>4</sup> See [8 CFR 214.2\(h\)\(4\)\(iv\)\(B\)](#).

<sup>5</sup> See [Matter of Chawathe](#), 25 I&N Dec. 369 (AAO 2010).

eligibility for the classification as of the time of filing, the officer should articulate that basis in denying the H-1B petition.

To make this determination, the officer should apply statutory and regulatory requirements, excluding the itinerary requirement under [8 CFR 214.2\(h\)\(2\)\(i\)\(B\)](#); binding court precedent; Administrative Appeals Office (AAO) adopted and precedent decisions; and current USCIS policy guidance concerning H-1B nonimmigrant classification.

## **B. Contracts**

- 1. Should an officer request the chain of contracts or legal agreements between the H-1B petitioner and third parties (including the ultimate end-client and any intermediary vendors) to assess the employer-employee relationship or non-speculative employment in a specialty occupation (work availability)?**

In support of the petition, an H-1B petitioner is not required by existing regulation to submit contracts or legal agreements between the petitioner and third parties. However, the petitioner must demonstrate eligibility for the benefit sought. In assessing whether an employer and a beneficiary have or will have an employer-employee relationship, the officer may consider any evidence provided by the petitioner, including chain of contracts or legal agreements between the petitioner and third parties. Further, if a petitioner provides contracts or legal agreements, the officer is not precluded from evaluating that evidence in the adjudication of other eligibility criteria.

## **C. Non-speculative Specialty Occupation Work**

- 1. Should an officer require evidence of day-to-day assignments to establish the availability of specialty occupation work?**

The officer should review the position as described by the H-1B petitioner to determine if the petitioner has met its burden of proof to establish that the beneficiary will be employed in a specialty occupation. While evidence of specific day-to-day assignments is not required to establish that the position is in a specialty occupation, the petitioner may choose to provide such evidence.

- 2. May an officer deny a petition for H-1B nonimmigrant classification on the basis that the petitioner, while having identified and described the nature of the specialty occupation, has not specified the beneficiary's day-to-day assignments in that role?**

An officer should deny a petition when the petitioner has not established that the beneficiary will work in a specialty occupation. While a petitioner is not required to identify and document the beneficiary's specific day-to-day assignments, the petitioner must meet all statutory and regulatory requirements, excluding the itinerary requirement under [8 CFR 214.2\(h\)\(2\)\(i\)\(B\)](#); binding court precedent; AAO adopted and precedent decisions; and current USCIS policy guidance concerning H-1B nonimmigrant classification. If the officer finds that a petitioner has not established, by a preponderance of the evidence, statutory or regulatory eligibility for the classification, the officer should articulate that basis in denying the H-1B petition. The officer should not apply the rescinded guidance.

**3. May an officer deny an H-1B extension or change of status request, or revoke approval of H-1B nonimmigrant classification, if evidence in the record establishes that the beneficiary was benched or never worked but still was paid?**

Except in certain limited circumstances, “benching” is prohibited by law to prevent foreign workers from unfair treatment by their employers and to ensure that the job opportunities and wages of U.S. workers are being protected.<sup>6</sup> The failure to work according to the terms and conditions of the petition approval may support, among other enforcement actions, revocation of the petition approval, a finding that the beneficiary failed to maintain status, or both.

Guidance concerning benching remains unchanged. The officer may issue a Notice of Intent to Deny (NOID) for failure to maintain status or a Notice of Intent to Revoke (NOIR), as appropriate, if evidence in the record indicates that there has been a material change in the terms and conditions of employment that may affect eligibility.<sup>7</sup> Lack of work may be a material change in the terms and conditions of employment that could affect eligibility for H-1B nonimmigrant classification and could require the filing of an amended petition.<sup>8</sup>

The regulations further state that being “no longer employed in the capacity specified in the petition” is a basis for revocation on notice.<sup>9</sup> Being placed in non-productive status or training for an extended time period, even if paid, may qualify as being “no longer employed in the capacity specified in the petition.” If a beneficiary is in non-productive status because of a lack of work, that could indicate that the beneficiary no longer is in a specialty occupation and there has been a material change in the terms and conditions of employment that may affect eligibility. However, it would not be a violation of H-1B nonimmigrant status for a beneficiary to be in non-productive status during a period that is not subject to payment under the petitioner’s benefit plan or other statutes such as the Family and Medical Leave Act or the Americans with Disabilities Act.<sup>10</sup> If a beneficiary has never been in a working status, the officer should carefully examine the reasons and consult with a supervisor as appropriate.

In assessing whether a beneficiary’s non-productive status constitutes a violation of the beneficiary’s H-1B nonimmigrant classification, the officer must assess the circumstances and time spent in non-productive status. While neither statutes nor regulations state the maximum allowable time of non-productive status, the officer may exercise his or her discretion to issue a NOID or a NOIR to give the petitioner an opportunity to respond, if the time period of non-productive status is more than that required for a reasonable transition between assignments. As always, if the officer encounters a novel issue, the officer should elevate that issue to local service center management or Service Center Operations, as appropriate.

If a petitioner files an amended or new petition for H-1B classification reflecting the changed terms and conditions of employment, the officer should not revoke the approval of the original

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<sup>6</sup> See INA section 212(n)(2)(C)(vii) (listing exceptions to the prohibition on unpaid benching).

<sup>7</sup> See [8 CFR 214.2\(h\)\(11\)](#).

<sup>8</sup> See *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015) (requiring the filing of an amended petition in the event of material changes to terms and conditions of employment).

<sup>9</sup> See [8 CFR 214.2\(h\)\(11\)\(iii\)\(A\)](#).

<sup>10</sup> See 20 CFR 655.731(c)(7).

petition unless the record establishes a pattern or practice of failure to file an amended or new petition when required to do so. Instead, the officer should adjudicate the amended or new petition and may find, if warranted, that the beneficiary did not maintain status and issue a denial of the H-1B extension or change of status request, if appropriate. Ultimately, the officer's adjudication requires consideration of the time period in non-productive status, the circumstance of the non-productive status (including, but not limited to, medical or personal leave), and whether the petitioner filed an amended or new petition.

#### **D. Itinerary**

##### **1. Should an officer continue to apply the itinerary requirement under [8 CFR 214.2\(h\)\(2\)\(i\)\(B\)](#) or [8 CFR 214.2\(h\)\(2\)\(i\)\(F\)\(1\)](#)?**

USCIS will abstain from the application of the itinerary requirement at 8 CFR 214.2(h)(2)(i) in the limited instance of applicable H-1B adjudications until the Department of Homeland Security or USCIS issues new adjudicative and/or regulatory guidance on this requirement. The officer also should not apply the rescinded guidance. If the officer finds that a petitioner has not established, by a preponderance of the evidence, eligibility for the classification under other statutory and regulatory requirements, binding court precedent, AAO adopted and precedent decisions, and effective policy guidance, the officer should articulate that basis. Officers should continue to apply the itinerary requirement at [8 CFR 214.2\(h\)\(2\)\(i\)\(F\)](#) for H-1B petitions filed by agents.

#### **E. Limiting Validity Periods**

##### **1. May an officer limit the validity period of an approved H-1B petition?**

USCIS may issue approvals for H-1B petitions with validity periods shorter than the time period requested by the H-1B petitioner. However, the decision must be accompanied by a brief explanation as to why the validity period has been limited. This includes, but is not limited to, instances in which the certified LCA has a validity period of shorter duration than that specified on the H-1B petition.

#### **Use**

This PM is intended solely for the guidance of USCIS personnel in the performance of their official duties, but it does not remove their discretion in making adjudicatory decisions. It may not be relied upon to create any right or benefit, substantive or procedural, enforceable under law or by any individual or other party in removal proceedings, in litigation with the United States, or in any other form or manner.

#### **Contact Information**

If USCIS officers have questions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.