



Executive Summary

February 19, 2010

Collaboration Session – Determining Employer-Employee Relationships for Adjudication of H-1B Petitions

Background

On February 18, 2010, the Office of Public Engagement (OPE) hosted a collaboration session at the Tomich Center to discuss the implementation of the January 8, 2010 H-1B memo which provides guidance on determining if a valid employer-employee relationship exists. The session - attended by approximately 40 stakeholders in person and more than 600 via telephone provided clarification on the purpose of the memo and affirmed the Agency's commitment to actively solicit and consider stakeholder input in the development and implementation of guidelines and policy. This document summarizes the concerns raised by the stakeholders during this session but does not reflect the Agency's position on the legality of the memorandum.

Principal Themes

- **Staffing Model**

The stakeholder community was concerned over the implications that the guidance poses on the staffing model. Stakeholders pointed out that the IT and healthcare industries would bear the brunt of this guidance, citing several examples associated with current business practices and the impact of federal and state laws. In the context of the medical profession, stakeholders indicated that a few states (Texas, California, and New York) have laws prohibiting the corporate practice of medicine, in addition to the challenges associated with the placement of physicians in underserved areas. Stakeholders expressed the belief that the Agency failed to take into consideration the business reality of the staffing industry, including companies and consulting businesses that have to build "bench strength" in advance of peak periods. The stakeholders questioned whether it was the Agency's intent to eliminate the staffing model entirely. Stakeholders suggested that by eliminating the staffing model, companies will be forced to outsource, leading to a loss of revenue for the U.S. business industry. Stakeholders recommended that the Agency incorporate the business community in developing future guidance and policy.

- **Agency's definition of Employee-Employer Relationship**

Multiple stakeholders voiced that the Agency's interpretation of the employee-employer relationship is incorrect, specifically referencing the misinterpretation of the two Supreme Court decisions cited in the memo. Stakeholders expressed concern with the Agency's emphasis on the "right to control" as the primary factor in determining the existence of an employer-employee relationship, with the ability to hire, fire, pay wages, and supervise playing a subordinate role. Stakeholders indicated that it appears current RFEs are emphasizing the right to control – rather than the totality of elements. Stakeholders also argued that the Agency is not best placed to determine the existence of the employer-employee relationship and USCIS should accept the determination of the IRS who defines when a person is an independent

contractor. Furthermore, it was suggested that there is nothing within the statute or the regulations that requires an employer-employee relationship as defined by this memo.

- **Utilize Rule Making Process**

An underlying concern with the memo is the idea that the issuance of the memo was improper rulemaking and did not follow the regulatory process with appropriate channels for public comment. Stakeholders requested that the agency withdraw the memo, conduct further engagement with the business community, and follow the regulatory process for the proper vetting of its final guidance.

- **Unintended consequences**

Stakeholders also brought to our attention what they believe to be some unintended consequences of the memo. These include:

- **Impact on the healthcare industry:**
Physicians in several large states cannot be directly employed by a hospital and are often placed by staffing companies while the hospitals retain many “right to control” factors including holding of malpractice insurance, etc.;
- **Disproportionate impact on small and mid-size companies and on the economy:**
In addition to forcing companies to outsource, stakeholders suggested that the memo runs contrary to current efforts to promote economic health and prosperity;
- **Application to Other Visa Categories:**
Stakeholders commented that the memo was being applied to L-1s and was resulting in denials;
- **Increase in RFEs:**
Stakeholders believed that the memo has resulted in the development of stock RFEs that request excessive documentation. Some suggested that we should consider amending the instructions so that petitioners can provide this information upfront; and
- **Challenge to Agency goals in the areas of transparency and consistency:**
Some suggested process was less than transparent (as measured by response to engagement) and was not consistent with the spirit of the law.