



PM-602-0157

Policy Memorandum

SUBJECT: Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites

Purpose

This policy memorandum (PM) establishes U.S. Citizenship and Immigration Services (USCIS) policy relating to H-1B petitions filed for workers who will be employed at one or more third-party worksites.

Scope

Unless specifically exempted in this memo, this PM applies to and shall be used to guide determinations by all USCIS officers adjudicating Form I-129 H-1B petitions.

Authority

Section 214 of the INA and Title 8, Code of Federal Regulations (CFR), section 214.2(h).

Background

- (1) On June 6, 1995, the Office of Adjudications issued a memorandum entitled “Contracts Involving H-1B Petitions” (Contracts Memo).

This memo stated that the former Immigration and Naturalization Service (INS) may request and consider any additional information deemed appropriate to adjudicate a petition. The memo required INS to make such requests, which include requests for third-party contracts, on a case-by-case basis. This PM supersedes the Contracts Memo to the extent that it is contrary to this PM.

- (2) On November 13, 1995, the Office of Examinations issued a memorandum entitled “Supporting Documentation for H-1B Petitions” (H-1B Supporting Documents Memo).

This memo stated that “[t]he submission of ... contracts [between the employer and the alien worksite] should not be a normal requirement for the approval of an H-1B petition filed by an employment contractor. Requests for contracts should be made only in those cases where the officer can articulate a specific need for such documentation. The mere fact that a petitioner is an employment contractor is not a reason to request such contracts.” It appears that this memo has been interpreted as generally excusing the H-1B petitioner from having to submit third-party contracts despite the director’s specific regulatory authorization to require any such evidence that he or she believes is necessary for adjudicating the petition. *See* 8 CFR 214.2(h)(9)(i). This PM supersedes the H-1B Supporting Documents Memo to the extent that it is contrary to this PM.

- (3) On December 29, 1995, the Office of Adjudications issued a memorandum entitled “Interpretation Of The Term ‘Itinerary’ Found in 8 CFR 214.2(h)(2)(i)(B) As It Relates To The H-1B Nonimmigrant Classification” (Itinerary Memo).

This memo stated that, in the case of an H-1B petition filed by an employment contractor, INS could accept a general statement of the alien’s proposed or possible employment, since the regulation does not require that the employer provide the *exact* dates and places of employment. Because the Itinerary Memo allows general statements in certain instances instead of exact dates and places of employment, some adjudicators and the public may have incorrectly interpreted the policy as excusing the petitioner from having to submit an itinerary when required under 8 CFR 214.2(h)(2)(i)(B). USCIS now rescinds the Itinerary Memo and this PM will supersede any guidance from that memo.

- (4) On January 8, 2010, USCIS issued a memorandum entitled “Determining the Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements” (Employer-Employee Memo).

The Employer-Employee Memo provides 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. When a beneficiary is placed into another employer’s business, the petitioner must establish that it continues to maintain an employer-employee relationship with the beneficiary. USCIS looks at a number of factors to determine whether a valid relationship exists, including whether the petitioner controls when, where, and how the beneficiary performs the job. Finally, the Employer-Employee Memo clarifies that the petitioner must submit an itinerary in compliance with current regulation at 8 CFR 214.2(h)(2)(i)(B), if the beneficiary will be performing services in more than one location. *See also Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542, 548 n.9 (AAO 2015).

This PM is intended to be read together with the Employer-Employee Memo and as a complement to that policy.

USCIS' Mission to Protect the Interests of U.S. Workers

USCIS administers the nation's lawful immigration system, safeguarding its integrity and promise by efficiently and fairly adjudicating requests for immigration benefits while protecting Americans, securing the homeland, and honoring our values. Employment-based petitioners who circumvent the worker protections outlined in the nation's immigration laws not only injure U.S. workers (e.g., their wages and job opportunities), but also the foreign workers for whom they are petitioning.

Policy

USCIS has broad statutory and regulatory authority to maintain the integrity of the H-1B program. To establish eligibility for an H-1B petition involving a third-party worksite, the petitioner must establish by a preponderance of the evidence that, among other things:

- 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; and
- The employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.¹

USCIS acknowledges that third-party arrangements may be a legitimate and frequently used business model. These arrangements typically involve a third-party end-client who solicits service providers to deliver a product or fill a position at their worksite. In some cases, the H-1B petitioner may place the beneficiary directly with the client, establishing a *petitioner-client* relationship. In other cases, one or more subcontractors, commonly referred to as vendors, may serve as intermediaries between the end-client and the H-1B petitioner.² Ultimately, through a series of legal agreements, the petitioner will provide the H-1B worker to the end-client through a *petitioner-vendor(s)-client* relationship. Scenarios involving a third-party worksite generally make it more difficult to assess whether the petitioner has established that the beneficiary will actually be employed in a specialty occupation or that the requisite employer-employee relationship will exist. The difficulty of this assessment is increased in situations where there are

¹ To determine whether an employer-employee relationship exists, adjudicators should see the Employer-Employee Memo, published on January 8, 2010, for guidance.

² The "vendor" concept is frequently referenced in H-1B petitions that involve the information technology (IT) industry. While the terms are not precisely defined, petitions commonly refer to "primary vendors," who have an established or preferred relationship with a client, or "implementing vendors," who bid on an IT project with a client and then implement the contract using their own staff. Primary or implementing vendors may turn to secondary vendors to fill staffing needs on individual projects. *See, e.g., Acclaim Systems, Inc. v. Infosys*, No. Civ.A. 13-7336, 2016 WL 974136 at *2 (E.D. Pa. Mar. 11, 2016). As a result, the ultimate client project may be staffed by a team of H-1B beneficiaries who were petitioned for by different, unrelated employers.

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one or more intermediary vendors and where the relationship between the petitioner and the end-client is more attenuated than a direct *petitioner-client* relationship.

Based on the agency's experience in administering the H-1B program, USCIS recognizes that significant employer violations—such as paying less than the required wage, benching employees (not paying workers the required wage while they wait for projects or work) and having employees perform non-specialty occupation jobs—may be more likely to occur when petitioners place employees at third-party worksites. Therefore, in order to protect the wages and working conditions of both U.S. and H-1B nonimmigrant workers and prevent fraud or abuse, USCIS policy should ensure that officers properly interpret and apply the statutory and regulatory requirements that apply to H-1B petitions involving third-party worksites.

Consistent with these overarching goals, this policy memorandum provides clarifying guidance regarding the contracts and itineraries that petitioners submit in third-party worksite cases:

Contracts as evidence to demonstrate the beneficiary will be employed in a specialty occupation.

When a beneficiary will be placed at one or more third-party worksites, the petitioner must demonstrate that it has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition. The petitioner will need to show that:

- The petitioner has a specific work assignment in place for the beneficiary;
- The petition is properly supported by a Labor Condition Application (LCA) that corresponds to such work; and
- The actual work to be performed by the H-1B beneficiary will be in a specialty occupation based on the work requirements imposed by the end-client who uses the beneficiary's services. *See Defensor v. Meissner*, 201 F.3d 384, 387 (5th Cir. 2000).

USCIS notes that H-1B petitions do not establish a worker's eligibility for H-1B classification if they are based on speculative employment or do not establish the actual work the H-1B beneficiary will perform at the third-party worksite. Petitioners who regularly place their workers at third-party worksites often submit uncorroborated statements describing the role the H-1B beneficiary will perform at the third-party worksite. Such statements by the petitioner, without additional corroborating evidence, are often insufficient to establish by a preponderance of the evidence that the H-1B beneficiary will actually perform specialty occupation work.

For such third-party, off-site arrangements, additional corroborating evidence, such as contracts and work orders, may substantiate a petitioner's claim of actual work in a specialty occupation. In all instances, the petitioner's burden of proof is to establish that the H-1B beneficiary will be employed in a specialty occupation and that the petition is properly supported by an LCA that corresponds to the actual work the beneficiary will perform. If the petitioner does not submit corroborating evidence or otherwise demonstrate that there is a specific work assignment for the H-1B beneficiary, USCIS may deny the petition.

In addition to contracts between the petitioner and its client for that worksite, the petitioner may be able to demonstrate that the beneficiary has actual work assignment(s) in a specialty occupation by providing a combination of the following or similar types of evidence:³

- Evidence of actual work assignments, which may include technical documentation, milestone tables, marketing analysis, cost-benefit analysis, brochures, and funding documents.
- Copies of relevant, signed contractual agreements between the petitioner and all other companies involved in the beneficiary's placement, if the petitioner has not directly contracted with the third-party worksite.
- 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 statement 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.
- A letter signed by an authorized official of each ultimate end-client company where the beneficiary will actually work. The letter should provide information, such as a detailed description of the specialized duties the beneficiary will perform, the qualifications required to perform those duties, the duration of the job, salary or wages paid, hours worked, benefits, a detailed description of who will supervise the beneficiary and the beneficiary's duties, and any other related evidence.

Contracts as evidence to demonstrate the employer will maintain an employer-employee relationship with the beneficiary for the duration of the requested validity period.

As indicated in the Employer-Employee Memo, the placement of the beneficiary/employee at a third-party worksite, which is common in some industries, generally makes it more difficult to assess whether the requisite employer-employee relationship exists and will continue to exist. As the relationship between the petitioner and beneficiary becomes more attenuated through intermediary contractors, vendors, or brokers, there is a greater need for the petitioner to specifically trace how it will maintain an employer-employee relationship with the beneficiary. Evaluating the chain of contracts and/or legal agreements between the petitioner and the ultimate third-party worksite may help USCIS to determine whether the requisite employer-employee relationship exists and/or will exist.

³ Submission of a combination of evidence, such as contractual agreements accompanied by detailed statements of work, provides a more comprehensive view of the work available. Contractual agreements that merely set forth the general obligations of the parties to the agreement, and that do not provide specific information pertaining to the actual work to be performed, may be insufficient to establish that the beneficiary will be employed in a specialty occupation.

Itinerary as a regulatory requirement.

Title 8 CFR 214.2(h)(2)(i)(B) requires petitioners to file an itinerary with a petition that requires services to be performed in more than one location. The itinerary must include the dates and locations of the services to be provided. The prior Itinerary Memo's allowance of general statements, as opposed to exact dates and places of employment, seems to have been incorrectly interpreted by some adjudicators, and some members of the general public, as excusing the petitioner from having to submit an itinerary, as required by 8 CFR 214.2(h)(2)(i)(B).

There is no exemption from this regulatory requirement. An itinerary with the dates and locations of the services to be provided must be included in all petitions that require services to be performed in more than one location, such as multiple third-party worksites. The itinerary should detail when and where the beneficiary will be performing services. Adjudicators may deny the petition if the petitioner fails to provide an itinerary, either with the initial petition or in response to a Request for Evidence.⁴

Itinerary as evidence to demonstrate the beneficiary will be employed in a specialty occupation

As mentioned above, in instances when a beneficiary will be placed at one or more third-party worksites, the petitioner must demonstrate that it has specific and non-speculative qualifying assignments in a specialty occupation for the beneficiary for the entire time requested on the petition. Although the regulations only require that an itinerary contain the dates and locations of the services to be provided when the petition requires the beneficiary to work at multiple worksites, a more detailed itinerary can help to demonstrate that the petitioner has non-speculative employment, even when the beneficiary will only be working at one third-party worksite. For instance, it could help USCIS determine whether there are specific and non-speculative qualifying assignments if the petitioner submits a complete itinerary of services or engagements that specifies:

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

⁴ When requested evidence may contain trade secrets, for example, the petitioner could choose to redact or sanitize the relevant sections to provide an itinerary or document that is still sufficiently detailed and comprehensive, yet does not reveal sensitive commercial information. However, it is critical that the redacted document contain all information necessary for USCIS to adjudicate the petition. Although a petitioner may always refuse to submit confidential commercial information if it is deemed too sensitive, the petitioner must also satisfy the burden of proof and runs the risk of a denial. *Cf. Matter of Marques*, 16 I&N Dec. 314, 316 (BIA 1977).

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Validity period of approved petition

The petitioner must establish that the above elements will more likely than not continue to exist throughout the duration of the requested H-1B validity period. While an H-1B petition may be approved for up to three years, USCIS will, in its discretion, generally limit the approval period to the length of time demonstrated that the beneficiary will be placed in non-speculative work and that the petitioner will maintain the requisite employer-employee relationship, as documented by contracts, statements of work, and other similar types of evidence. 8 CFR 214.2(h)(9)(ii)(A) and (iii).

Extensions

In addition to the above elements that apply to all H-1B third-party worksite petitions, if an H-1B petitioner is applying to extend H-1B employment for a beneficiary who was placed at one or more third-party worksites during the course of past employment with the same petitioner, that petitioner should also establish that the H-1B requirements have been met for the entire prior approval period. This includes establishing that the beneficiary worked in the specialty occupation, that he or she was paid the required wage, and that the employer maintained the right to control the beneficiary's employment. If the petitioner did not comply with the terms and conditions of the original petition and did not file an amended petition on time, USCIS may have eligibility concerns about a subsequent petition filed to extend the beneficiary's employment.⁵

If the terms and conditions of the initial approval period were not met and the petitioner has demonstrated eligibility for the subsequent petition, the extension petition may be approved, but the extension of stay request may be denied. *See* 8 CFR 214.1(c)(4). This applies to petitions where the beneficiary will remain at the same worksite or be placed at a new worksite.

Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications and petitions. It is not intended to, does not, and may not be relied upon to create any right or benefit, substantive or procedural, enforceable at 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 or suggestions regarding this PM, they should direct them through their appropriate chains of command to the Office of Policy and Strategy.

⁵ For when to file an amended petition, please see USCIS Policy Memorandum, "USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC*," published July 21, 2015.