USCIS Guidance Foreshadows a Crackdown on Outplacements of H-1B Workers

Mar 08, 2018

Categories:

Publications

Authors:

Mary (Peggy) G. Shukairy

U.S. Citizenship and Immigration Services (USCIS) on February 22, 2018, issued a Policy Memorandum indicating increased scrutiny of the placement of H-1B employees at third-party worksites. The Memorandum is binding on all immigration officers who adjudicate H-1B petitions at USCIS. The Memorandum does not change existing law, but does portend increased time, energy, and documentation by employers seeking to place H-1B nonimmigrant employees at client worksites.

As background, U.S. immigration law permits employers to petition for foreign nationals to be classified as H-1B nonimmigrants, who are able to work in the U.S., if the employee will work in a specialty occupation and has the requisite qualifications for the specialty occupation. "Specialty occupation" means an occupation that requires the theoretical and practical application of a body of highly specialized knowledge, and which requires the attainment of at least a bachelor's degree in a specific field for entry into the occupation. Employers may place H-1B employees at third-party client worksites in certain circumstances. The February 22 Memorandum indicates USCIS will increase its scrutiny of the placement of H-1B employees with third-party clients in a variety of ways.

Employer-Employee Relationship

The company that petitions for H-1B status for a foreign national must at all times maintain an employer-employee relationship with the H-1B employee. The February 22 Memorandum reiterates that employer-employee relationships may become more attenuated when the H-1B employee is placed at a third-party worksite, and indicates USCIS will scrutinize such relationships more carefully. The February 22 Memorandum refers back to a prior USCIS Policy Memorandum published on January 8, 2010, which broadly requires

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

employers to exercise control over an H-1B employee's day-to-day activities in order to maintain a valid employer-employee relationship.

Per the 2010 Memorandum, an employer who places an H-1B employee at a client site to perform a specific project for the client, under the direction and control of the employer, is probably maintaining a valid employer-employee relationship. By contrast, an employer who places an H-1B employee with a client where the employee simply takes on an indefinite role within the client's business and receives day-to-day direction from the client's personnel, is probably not maintaining an employer-employee relationship. The February 22 Memorandum does not change USCIS' approach to employer-employee relationships, but it does indicate USCIS may now demand more evidence from employers on this point, including contracts with clients. This is especially so where the employer is not providing the H-1B employee to a client directly, but is instead doing so through one or more intermediary brokers, creating a chain of contracts that take the H-1B employee from the employer to the ultimate client.

Evidence of a Specific Assignment

In addition to evidence of the employer-employee relationship, the February 22 Memorandum clarifies what other evidence of a third-party placement USCIS will require from employers. The employer must prove (1) it has a specific, non-speculative work assignment at a third-party client site; (2) that the work performed by the H-1B employee at the client site qualifies as a specialty occupation; and (3) that there is a Labor Condition Application in place that corresponds to the work the H-1B employee will perform at the client site. Perhaps most importantly, the February 22 Memorandum states that statements by the employer establishing the above points, without additional corroborating evidence, will likely no longer be sufficient. In addition, contracts which only generally describe the work to be performed may be insufficient to describe the specific assignment of the H-1B employee.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

To that end, employers are encouraged to provide evidence of the actual work the H-1B employee will perform, such as milestone tables or brochures, detailed statements of work or work orders regarding work that will be performed by the H-1B employee, and/or letters from the end client describing the work the H-1B employee will perform. In addition, USCIS' February 22 Memorandum states that a statement of work or end client letter should include the qualifications required to perform the job duties, which is not something commonly found in statements of work nor something that the end client may be able to address. One problem, of course, is that contracts with clients are frequently confidential and/or contain trade secrets, and clients may not be willing to provide detailed statements of the work to be performed. The implication of the February 22 Memorandum is that H-1B petitions in such circumstances are now likely to be denied.

Detailed Itineraries

The February 22 Memorandum reiterates that existing regulations (8 C.F.R. § 214.2(h)(2)(i)(B)) require an employer to submit a detailed itinerary for any H-1B employment where services will be provided at more than one location. The itinerary "must include the dates and locations of the services to be provided." Although prior USCIS guidance permitted general statements to serve in place of such an itinerary, the February 22 Memorandum ends that practice and requires detailed itineraries be submitted, when applicable, from now on. Note that not every third-party placement automatically triggers the itinerary requirement, as an employer might be petitioning for an H-1B employee who will *only* work at a specific client site. In such a case, the H-1B employee is not performing services at more than one location, and so long as this is made clear, no itinerary should be necessary.

Maintenance of Status

In any petition filed by an employer to extend the H-1B status of an H-1B employee, the employer must show that the H-1B employee was at all times maintaining H-1B status and did nothing inconsistent with H-1B status. The February 22 Memorandum is

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

specific that all H-1B extension petitions for employees working at third-party client sites must include evidence that the employee's work at the third-party client site did, in fact, comply with the H-1B requirements, i.e., that the work qualified as a specialty occupation, that the H-1B employee was paid at least the applicable prevailing wage, and that the employer maintained a bona fide employer-employee relationship. This provision of the February 22 Memorandum, in conjunction with USCIS' decision in 2017 to no longer give any deference to prior adjudications, means employers should be thorough in providing documentation to support an extension of status petition, and should not take for granted that extensions will be perfunctorily approved.

Duration of H-1B Approvals

Lastly, the February 22 Memorandum indicates USCIS will be tailoring H-1B approval periods to the employer's specific assignment at the third-party client site, and will no longer grant three-year H-1B approvals as a matter of course. Specifically, the Memorandum states that the employer must establish that the qualifying H-1B assignment with a third-party client "will more likely than not continue to exist throughout the duration of the requested H-1B validity period," and that "USCIS will … generally limit the approval period to the length of time demonstrated that the [H-1B employee] will be placed in non-speculative work and that the petitioner will maintain the requisite employer-employee relationship …"

Conclusion

This Memorandum may mark a significant change in the placement of H-1B employees at third-party worksites. The more open-ended the work being done for the client, or the more the H-1B employee is placed through a chain of brokers, the more likely USCIS is to deny the H-1B petition. On the other hand, an H-1B petition covering placement for a specific, time limited project, while more likely to be approved, will likely only be approved for the duration of the project, necessitating more frequent H-1B extensions and the costs

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

that entails. Companies placing H-1B employees at client sites should not only be sure to engage experienced immigration counsel, but may also want to set expectations with clients about what evidence will be necessary to support the H-1B petition and set the parties up for success. If you have any questions about H-1B petitions or the impact of the February 22 Memorandum, please contact Peggy Shukairy, Matt Wagner or David Janklow in Frost Brown Todd's Labor and Employment Practice Group.

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons