U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Service Center Operations Directorate
Washington, DC 20529-2060

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U.S. Citizenship and Immigration Services

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Memorandum

TO: Service Center Directors

FROM: Donald Neufeld
Associate Director, Service Center Operations

SUBJECT: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements

Additions to Officer's Field Manual (AFM) Chapter 31.3(g)(15) (AFM Update AD 10-24)

I. Purpose

This memorandum is intended to provide guidance, in the context of H-1B petitions, 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.

II. Background

Section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant as an alien:

> who is coming temporarily to the United States to perform services...in a specialty occupation described in section 1184(i)(1)..., who meets the requirements of the occupation specified in section 1184(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under 1182(n)(1).

The Code of Federal Regulations (C.F.R.) provides that a "United States employer" shall file an [H-1B] petition. 8 C.F.R. 214.2(h)(2)(i)(A).

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

> United States employer means a person, firm, corporation, contractor, or other association, or organization in the United States which:
> (1) Engages a person to work within the United States;
> (2) Has an **employer-employee relationship** with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and
> (3) Has an Internal Revenue Service Tax identification number.

In support of an H-1B petition, a petitioner must not only establish that the beneficiary is coming to the United States temporarily to work in a specialty occupation but the petitioner must also satisfy the requirement of being a U.S. employer by establishing that a valid employer-employee relationship exists between the U.S. employer and the beneficiary throughout the requested H-1B validity period. To date, USCIS has relied on common law principles[1] and two leading Supreme Court cases in determining what constitutes an employer-employee relationship.[2]

The lack of guidance clearly defining what constitutes a valid employer-employee relationship as required by 8 C.F.R. 214.2(h)(4)(ii) has raised problems, in particular, with independent contractors, self-employed beneficiaries, and beneficiaries placed at third-party worksites. The placement of the beneficiary/employee at a work site that is not operated by the petitioner/employer (third-party placement), 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.

While some third-party placement arrangements meet the employer-employee relationship criteria, there are instances where the employer and beneficiary do not maintain such a relationship. Petitioner control over the beneficiary must be established when the beneficiary is placed into another employer's business, and expected to become a part of that business's regular operations. The requisite control may not exist in certain instances when the petitioner's business is to provide its employees to fill vacancies in businesses that contract with the petitioner for personnel needs. Such placements are likely to require close review in order to determine if the required relationship exists.

Furthermore, USCIS must ensure that the employer is in compliance with the Department of Labor regulations requiring that a petitioner file an LCA specific to each location where the

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[1] USCIS has also relied on the Department of Labor definition found at 20 C.F.R. 655.715 which states: *Employed, employed by the employer, or employment relationship* means the employment relationship as determined under the common law, under which the key determinant is the putative employer's right to control the means and manner in which the work is performed. Under the common law, "no shorthand formula or magic phrase * * * can be applied to find the answer * * *. [A]ll of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *NLRB* v. *United Ins. Co. of America,* 390 U.S. 254, 258 (1968).

[2] Nationwide Mutual Ins. Co. v. Darden, 503 U.S. 318, 322-323 (1992) (hereinafter Darden) and Clackamas Gastroenterology Assoc. v. Wells, 538 U.S. 440 (2003) (hereinafter Clackamas).

beneficiary will be working.[3] In some situations, the location of the petitioner's business may not be located in the same LCA jurisdiction as the place the beneficiary will be working.

III. Field Guidance

A. The Employer-Employee Relationship

An employer who seeks to sponsor a temporary worker in an H-1B specialty occupation is required to establish a valid employer-employee relationship. USCIS has interpreted this term to be the "conventional master-servant relationship as understood by common-law agency doctrine."[4] The common law test requires that all incidents of the relationship be assessed and weighed with no one factor being decisive. The Supreme Court has stated:

> *we consider the hiring party's* ***right to control the manner and means by which the product is accomplished****. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party, the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.*[5]

Therefore, USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[6] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

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[3] See 20 C.F.R. 655.730(c)(4)(v), 20 C.F.R. 655.730(c)(5) and 20 C.F.R. 655.730(d)(1)(ii)
[4] See Darden at 322-323.
[5] See Darden at 323-324 (Emphasis added.)
[6] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[7]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic location of the employer to

[7] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[8]

Self-Employed Beneficiaries

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee

[8] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[9] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[10]

[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.

[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at

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[9] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[10] In the past, the Administrative Appeals Office (AAO) has issued a limited number of unpublished decisions that addressed whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, similar to the 1979 decision in *Matter of Allan Gee, Inc.*, the AAO did not reach the question of how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." 17 I&N Dec. 296 (Reg. Comm. 1979). While it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee. Starting in 2007, the AAO has utilized the criteria discussed in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) and *Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. 440 (2003) to reach this pivotal analysis.

the client company, the beneficiary reports to a manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[11]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[12] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the

[11] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers**. However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

[12] See 8 C.F.R. 214.2(h)(9)(i).

employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[13] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the

[13] See 8 C.F.R. 214.2(h)(4)(ii).

petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;
- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[14]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

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[14] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.

IV. Use

This memorandum is intended solely for the training and guidance of USCIS personnel in performing their duties relative to the adjudication of applications. 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.

V. Contact

Any questions regarding the memorandum should be directed through appropriate supervisory channels to the Business Employment Services Team in the Service Center Operations Directorate.

AFM UPDATES

Accordingly, the *AFM* is revised as follows:

1. Section (g)(15) of Chapter 31.3 of the *Officer's Field Manual* is added to read as follows:

31.3 H-1B Classification and Documentary Requirements

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(g) Adjudicative Issues

(15) Evidence of Employer-Employee Relationship

USCIS must look at a number of factors to determine whether a valid employer-employee relationship exists. Engaging a person to work in the United States is more than merely paying the wage or placing that person on the payroll. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer has a sufficient level of control over the employee. The petitioner must be able to establish that it has the **right to control**[1] over when, where, and how the beneficiary performs the job and USCIS will consider the following to make such a determination (with no one factor being decisive):

(1) Does the petitioner supervise the beneficiary and is such supervision off-site or on-site?
(2) If the supervision is off-site, how does the petitioner maintain such supervision, *i.e.* weekly calls, reporting back to main office routinely, or site visits by the petitioner?
(3) Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

[1] The *right* to control the beneficiary is different from *actual* control. An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary. The employer-employee relationship hinges on the *right* to control the beneficiary.

(4) Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?
(5) Does the petitioner hire, pay, and have the ability to fire the beneficiary?
(6) Does the petitioner evaluate the work-product of the beneficiary, i.e. progress/performance reviews?
(7) Does the petitioner claim the beneficiary for tax purposes?
(8) Does the petitioner provide the beneficiary any type of employee benefits?
(9) Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?
(10) Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?
(11) Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

The common law is flexible about how these factors are to be weighed. The petitioner will have met the relationship test, if, in the totality of the circumstances, a petitioner is able to present evidence to establish its right to control the beneficiary's employment. In assessing the requisite degree of control, the officer should be mindful of the nature of the petitioner's business and the type of work of the beneficiary. The petitioner must also be able to establish that the right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment term with the petitioner.

Valid employer-employee relationship would exist in the following scenarios:[2]

Traditional Employment

The beneficiary works at an office location owned/leased by the petitioner, the beneficiary reports directly to the petitioner on a daily basis, the petitioner sets the work schedule of the beneficiary, the beneficiary uses the petitioner's tools/instrumentalities to perform the duties of employment, and the petitioner directly reviews the work-product of the beneficiary. The petitioner claims the beneficiary for tax purposes and provides medical benefits to the beneficiary.
[Exercise of Actual Control Scenario]

Temporary/Occasional Off-Site Employment

The petitioner is an accounting firm with numerous clients. The beneficiary is an accountant. The beneficiary is required to travel to different client sites for auditing purposes. In performing such audits, the beneficiary must use established firm practices. If the beneficiary travels to an off-site location outside the geographic

[2] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

location of the employer to perform an audit, the petitioner provides food and lodging costs to the beneficiary. The beneficiary reports to a centralized office when not performing audits for clients and has an assigned office space. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Scenario]

Long-Term/Permanent Off-Site Employment

The petitioner is an architectural firm and the beneficiary is an architect. The petitioner has a contract with a client to build a structure in a location out of state from the petitioner's main offices. The petitioner will place its architects and other staff at the off-site location while the project is being completed. The contract between the petitioner and client states that the petitioner will manage its employees at the off-site location. The petitioner provides the instruments and tools used to complete the project, the beneficiary reports directly to the petitioner for assignments, and progress reviews of the beneficiary are completed by the petitioner. The underlying contract states that the petitioner has the right to ultimate control of the beneficiary's work.
[Right to Control Specified and Actual Control is Exercised]

Long Term Placement at a Third-Party Work Site

The petitioner is a computer software development company which has contracted with another, unrelated company to develop an in-house computer program to track its merchandise, using the petitioner's proprietary software and expertise. In order to complete this project, petitioner has contracted to place software engineers at the client's main warehouse where they will develop a computer system for the client using the petitioner's software designs. The beneficiary is a software engineer who has been offered employment to fulfill the needs of the contract in place between the petitioner and the client. The beneficiary performs his duties at the client company's facility. While the beneficiary is at the client company's facility, the beneficiary reports weekly to a manager who is employed by the petitioner. The beneficiary is paid by the petitioner and receives employee benefits from the petitioner.
[Right to Control Specified and Actual Control is Exercised]

The following scenarios would not present a valid employer-employee relationship:[3]

Self-Employed Beneficiaries

[3] These scenarios are meant to be illustrative examples and are not exhaustive. Officers may see a variety of situations and factors when reviewing an H-1B petition.

The petitioner is a fashion merchandising company that is owned by the beneficiary. The beneficiary is a fashion analyst. The beneficiary is the sole operator, manager, and employee of the petitioning company. The beneficiary cannot be fired by the petitioning company. There is no outside entity which can exercise control over the beneficiary.[4] The petitioner has not provided evidence that that the corporation, and not the beneficiary herself, will be controlling her work.[5]
[No Separation between Individual and Employing Entity; No Independent Control Exercised and No Right to Control Exists]

Independent Contractors

The beneficiary is a sales representative. The petitioner is a company that designs and manufactures skis. The beneficiary sells these skis for the petitioner and works on commission. The beneficiary also sells skis for other companies that design and manufacture skis that are independent of the petitioner. The petitioner does not claim the beneficiary as an employee for tax purposes. The petitioner does not control when, where, or how the beneficiary sells its or any other manufacturer's products. The petitioner does not set the work schedule of the beneficiary and does not conduct performance reviews of the beneficiary.
[Petitioner Has No Right to Control; No Exercise of Control]

Third-Party Placement/ "Job-Shop"

The petitioner is a computer consulting company. The petitioner has contracts with numerous outside companies in which it supplies these companies with employees to fulfill specific staffing needs. The specific positions are not outlined in the contract between the petitioner and the third-party company but are staffed on an as-needed basis. The beneficiary is a computer analyst. The beneficiary has been assigned to work for the third-party company to fill a core position to maintain the third-party company's payroll. Once placed at the client company, the beneficiary reports to a

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[4] USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. See Matter of Aphrodite, 17 I&N Dec. 530 (BIA 1980). However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may not be able to establish that a valid employment relationship exists in that the beneficiary, who is also the petitioner, cannot establish the requisite "control". See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

[5] The Administrative Appeals Office (AAO) of USCIS has issued an unpublished decision on the issue of whether a beneficiary may be "employed" by the petitioner even though she is the sole owner and operator of the enterprise. The unpublished decisions of the AAO correctly determined that corporations are separate and distinct from their stockholders and that a corporation may petition for, and hire, their principal stockholders as H-1B temporary employees. However, the unpublished AAO decision did not address how, or whether, petitioners must establish that such beneficiaries are bona fide "employees" of "United States employers" having an "employer-employee relationship." The AAO decision did not reach this pivotal analysis and thus, while it is correct that a petitioner may employ and seek H-1B classification for a beneficiary who happens to have a significant ownership interest in a petitioner, this does not automatically mean that the beneficiary is a bona fide employee.

manager who works for the third-party company. The beneficiary does not report to the petitioner for work assignments, and all work assignments are determined by the third-party company. The petitioner does not control how the beneficiary will complete daily tasks, and no propriety information of the petitioner is used by the beneficiary to complete any work assignments. The beneficiary's end-product, the payroll, is not in any way related to the petitioner's line of business, which is computer consulting. The beneficiary's progress reviews are completed by the client company, not the petitioner.
[Petitioner Has No Right to Control; No Exercise of Control]

The following is an example of a regulatory exception where the petitioner is not the employer:

Agents as Petitioners[6]

The petitioner is a reputable modeling agency that books models for various modeling jobs at different venues to include fashion houses and photo shoots. The beneficiary is a distinguished runway model. The petitioner and beneficiary have a contract between one another that includes such terms as to how the agency will advise, counsel, and promote the model for fashion runway shows. The contract between the petitioner and beneficiary states that the petitioner will receive a percentage of the beneficiary's fees when the beneficiary is booked for a runway show. When the beneficiary is booked for a runway show, the beneficiary can negotiate pay with the fashion house. The fashion house (actual employer) controls when, where, and how the model will perform her duties while engaged in the runway shows for the fashion house.
[Agent Has No Right to Control; Fashion House Has and Exercises Right to Control]

B. Documentation to Establish the Employer-Employee Relationship

Before approving H-1B nonimmigrant visa petitions, "the director shall consider all the evidence submitted and such other evidence as he or she may independently require to assist his or her adjudication."[7] In addition to all other regulatory requirements, including that the petitioner provide an LCA specific to each location where the beneficiary will be working, the petitioner must establish the employer-employee relationship described above. Such evidence should provide sufficient detail that the

[6] Under 8 C.F.R. 214.2(h)(2)(i)(F), it is also possible for an "agent" who may not be the actual employer of the H-1B temporary employee to file a petition on behalf of the actual employer and the beneficiary. The beneficiary must be one **who is traditionally self-employed or who uses agents to arrange short-term employment on their behalf with numerous employers.** However, as discussed below, the fact that a petition is filed by an agent does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.
[7] 8 C.F.R. 214.2(h)(9)(i)

employer and beneficiary are engaged in a valid employer-employee relationship. If it is determined that the employer will not have the right to control the employee in the manner described below, the petition may be denied for failure of the employer to satisfy the requirements of being a United States employer under 8 C.F.R. 214.2(h)(4)(ii).

1. Initial Petition

The petitioner must clearly show that an employer-employee relationship will exist between the petitioner and beneficiary, and establish that the employer has the right to control the beneficiary's work, including the ability to hire, fire and supervise the beneficiary. The petitioner must also be responsible for the overall direction of the beneficiary's work.[8] Lastly, the petitioner should be able to establish that the above elements will continue to exist throughout the duration of the requested H-1B validity period. The petitioner can demonstrate an employer-employee relationship by providing a combination of the following or similar types of evidence:

- A complete itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;
- Copy of signed Employment Agreement between the petitioner and beneficiary detailing the terms and conditions of employment;
- Copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary;
- Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized) that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;
- Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as a detailed description of the duties the beneficiary will perform, the qualifications that are required to perform the job duties, salary or wages paid, hours worked, benefits, a brief description of who will supervise the beneficiary and their duties, and any other related evidence;
- Copy of position description or any other documentation that describes the skills required to perform the job offered, the source of the instrumentalities and tools

[8] See 8 C.F.R. 214.2(h)(4)(ii).

needed to perform the job, the product to be developed or the service to be provided, the location where the beneficiary will perform the duties, the duration of the relationship between the petitioner and beneficiary, whether the petitioner has the right to assign additional duties, the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary, whether the work to be performed is part of the regular business of the petitioner, the provision of employee benefits, and the tax treatment of the beneficiary in relation to the petitioner;

- A description of the performance review process; and/or
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain.

2. Extension Petitions[9]

An H-1B petitioner seeking to extend H-1B employment for a beneficiary must continue to establish that a valid employer-employee relationship exists. The petitioner can do so by providing evidence that the petitioner continues to have the right to control the work of the beneficiary, as described above.

The petitioner may also include a combination of the following or similar evidence to document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of Time Sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;
- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (i.e., copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created;
- Copy of dated performance review(s); and/or

[9] In this context, an extension petition refers to a petition filed by the same petitioner to extend H-1B status without a material change in the terms of employment.

- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, i.e. promotions, demotions, transfers, layoffs, and pay changes with effective dates.

If USCIS determines, while adjudicating the extension petition, that the petitioner failed to maintain a valid employer-employee relationship with the beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition, the extension petition may be denied unless there is a compelling reason to approve the new petition (e.g., the petitioner is able to demonstrate that it did not meet all the terms and conditions through no fault of its own). Such a limited exception will be made solely on a case-by-case basis.

USCIS requests the documentation described above to increase H-1B program compliance and curtail violations. As always, USCIS maintains the authority to do pre- or post-adjudication compliance review site visits for either initial or extension petitions.

C. Request for Evidence to Establish Employer-Employee Relationship

USCIS may issue a Request For Evidence (RFE) when USCIS believes that the petitioner has failed to establish eligibility for the benefit sought, including in cases where the petitioner has failed to establish that a valid employer-employee relationship exists and will continue to exist throughout the duration of the beneficiary's employment term with the employer. Such RFEs, however, must specifically state what is at issue (e.g. the petitioner has failed to establish through evidence that a valid employer-employee relationship exists) and be *tailored* to request specific illustrative types of evidence from the petitioner that goes directly to what USCIS deems as deficient. Officers should first carefully review all the evidence provided with the H-1B petition to determine which required elements have not been sufficiently established by the petitioner. The RFE should neither mandate that a specific type of evidence be provided, unless provided for by regulations (e.g. an itinerary of service dates and locations), nor should it request information that has already been provided in the petition. Officers should state what element the petitioner has failed to establish and provide examples of documentation that could be provided to establish H-1B eligibility.

D. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B)

Not only must a petitioner establish that a valid employer-employee relationship exists and will continue to exist throughout the validity period of the H-1B petition, the petitioner must continue to comply with 8 C.F.R. 214.2(h)(2)(i)(B) when a beneficiary is to be placed at more than one work location to perform services. To satisfy the requirements of 8 C.F.R. 214.2(h)(2)(i)(B), the petitioner must submit a complete

itinerary of services or engagements that specifies the dates of each service or engagement, the names and addresses of the actual employers, and the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested. Compliance with 8 C.F.R. 214.2(h)(2)(i)(B) assists USCIS in determining that the petitioner has concrete plans in place for a particular beneficiary, that the beneficiary is performing duties in a specialty occupation, and that the beneficiary is not being "benched" without pay between assignments.