The Pirate's Code: The Neufeld Memo and the Employer/Employee Relationship

By Kathleen Campbell Walker[1]

Elizabeth: Wait! You have to take me to shore. According to the Code of the Order of the Brethren...
Barbossa: First, your return to shore was not part of our negotiations nor our agreement so I must do nothing. And secondly, you must be a pirate for the pirate's code to apply and you're not. And thirdly, the code is more what you'd call "guidelines" than actual rules. Welcome aboard the Black Pearl, Miss Turner.[2]

On August 13, 2010, U.S. District Judge for the District of Columbia, Gladys Kessler, issued a memorandum opinion in *Broadgate Inc. v. USCIS*[3] concluding that the memorandum issued on January 8, 2010 regarding the required employer/employee relationship in the H-1B nonimmigrant context by USCIS Service Center Operations Associate Director, Donald Neufeld[4], "establishes interpretative guidelines for the implementation of the Regulation, and does not bind USCIS adjudicators in their determination of Plaintiff's H-1B visa applications. In addition, the Court is satisfied that the Memorandum does not amend the Regulation by repudiating or being irreconcilable with it. The Memorandum therefore does not constitute a legislative rule."[5]

If the Neufeld Memorandum does not bind USCIS adjudicators, then why do we need an article about it? Judge Kessler went further to note in the *Broadgate* decision that "…the Memorandum does not determine, as a matter of law, the rights or obligations of H-1B visa applicants, the agency, or any other entity, and no discernible legal consequences flow from it."[6] I would argue that the Memorandum has resulted in a paradigm shift as to the USCIS interpretation of what constitutes a qualifying employer/employee relationship for H-1B purposes as well as the documentation necessary to establish this relationship to USCIS.[7] Basically, the agency has managed indeed to create a legislative rule via the issuance of this alleged guideline without compliance with the Administrative Procedure Act ("APA").[8] Where is the evidence of this alleged change? One indicia is located in the USCIS Ombudsman's Annual Report for 2010 published on June 30, 2010.[9] The Ombudsman's Annual Report states that H-1B requests for evidence ("RFE") from USCIS between fiscal year ("FY") 2008 and 2009 doubled with the Vermont Service Center ("VSC") moving from 14.1 to 29.3 percent and the California Service Center ("CSC") moving from 13.3 to 25 percent. This same pattern of increased RFEs was experienced in the L-1A intracompany transferee category during the same time frame.

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[2] From the movie, *Pirates of the Caribbean: The Curse of the Black Pearl* (2003) http://www.imdb.com/title/tt0325980/quotes?qt0416601 – used herein to compare the term, "guidelines," to the content of the January 8, 2010 Neufeld memo regarding the employee/employer relationship required in the H-1B petition context, which is the subject of the August 13, 2010 opinion of Judge Kessler ordering the dismissal of plaintiffs' complaint against the U.S. Citizenship and Immigration Services ("USCIS") in *Broadgate Inc., et al, v. USCIS*, (No. 09-cv-1423) (*see below*). Judge Kessler found that the Neufeld memo in question established "interpretative guidelines… and does not bind USCIS adjudicators in their determinations…" *published on* AILA Infonet Doc. No. 10060830 at p. 14 (*posted Aug.* 6, 2010)

[3] *Broadgate Inc. v. USCIS, No. 10-cv-941,* 2010 *U.S. Dist LEXIS* 82949, * (U.S. Dist. D.C. Aug. 13, 2010) (hereinafter referred to as the "Broadgate decision*").*

[4] USCIS Memorandum, D. Neufeld, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (Jan. 8, 2010), *published on* AILA Infonet at Doc. No. 10011363 (*posted* Jan. 13, 2010) (*herein referred to as the "*Neufeld Memorandum").

[5] *Id at *17.*

[6] *Id.* at *18-*19.

[7] *See Matter of Aphrodite*, 17 I&N Dec. 530 (BIA 1980).

[8] *5 U.S.C.S. § 551 et seq.*

[9] *USCIS Ombudsman Annual Report 2010 (June 30, 2010) published on* AILA Infonet at Doc. No. 10070860 (*posted* Jul. 8, 2010) (*hereinafter referred to as the Ombudsman's Annual Report").*

The USCIS Ombudsman theorized that the increase in RFEs was due to the following:

- Concerns about H-1B fraud, which led USCIS to issue internal guidance to adjudicators in 2008 authorizing their use of RFEs to resolve possible fraud,[10] and
- The January 2010 Neufeld Memorandum.[11]

As to the comments made in the report regarding the Neufeld Memorandum, the Ombudsman noted that the Memorandum encouraged USCIS adjudicators to issue an RFE when USCIS believes that the petitioner failed to establish eligibility for the benefit sought, including cases in which the petitioner failed to establish that a "valid employer-employee relationship exists and will continue throughout the duration of the beneficiary's employment with the employer."[12] In addition, the Neufeld Memorandum directly authorizes the use of RFEs in H-1B cases to determine if a *bona fide* employer-employee relationship exists using language to specifically state what is at issue and be tailored to request specific illustrative types of evidence from that petitioner as to the alleged deficiency in the petition.[13] The Ombudsman indicated that stakeholder complaints advised that the principles set forth in the Neufeld Memorandum were surfacing in RFEs in other categories such as the L intracompany transferee, the O extraordinary ability temporary worker, as well as in immigrant worker cases.[14] In addition, it appears that footnote 5 of the Neufeld Memorandum as to what USCIS describes as "Self Employed Beneficiaries" also has served to increase the level of review of petitions as to this related issue.[15]

On November 9, 2010, USCIS issued its formal response to the *Ombudsman's Annual Report.*[16] To address fraud concerns, USCIS outlined the Validation Instrument for Business Enterprises ("VIBE") program, which provides an adjudications tool for Immigration Services Officers ("ISOs"). VIBE will allegedly provide the following general information about a petitioning company or organization: business activities, financial standing, number of employees, relationships with other entities (including foreign affiliates), ownership, date of establishment, and current address. In September of 2009, USCIS awarded a contract to Dun and Bradstreet ("DUNS") to provide this service.[17] On March 27, 2010, USCIS held a stakeholders meeting to review the VIBE program.[18] AILA members have experienced frequent errors on various DUNS reports regarding corporate clients, which has increased VIBE related concerns. From the AILA USCIS liaison meeting on October 12, 2010, the committee reported that the VIBE program was being fast-tracked and that USCIS was developing a standard on when to issue an RFE or a Notice of Intent to Deny ("NOID") tied to potential errors.[19] The VIBE system has also been touted by USCIS as a method to "reduce the need for petitioners to submit certain documentation by providing the department with the means to verify the petitioners' information through an independent source, but

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[10] *Id.* at 43. *See* USCIS Fraud Report, "H-1B Benefit Fraud & Compliance Assessment" (Sept. 2008), *published on* AILA Infonet at Doc. No. 08100965 (*posted Oct. 9. 2008).* The assessment reported a 21 percent baseline fraud or technical violation(s) rate for H-1B petitions, with 13.4 percent identified as containing fraud ("defined as willful misrepresentation, falsification, or omission of a material fact"), and 7.3 percent of cases containing "technical violations." This assessment was based on a sample of 246 cases drawn from 96,827 petitions filed between October 1, 2005 and March 31, 2006. *See* Letter from Alejandro N. Mayorkas, USCIS Director, to Senator Charles Grassley (Nov. 10, 2009), *published on* AILA Infonet Doc. No. 09120161 (*posted Dec. 1, 2009).*

[11] *Ombudsman's Annual Report* at 44.

[12] *Neufeld Memorandum, supra* n.4, at 10.

[13] *Ombudsman's Annual Report* at 44.

[14] *Id.*

[15] *Id.*

[16] *USCIS Response to the Citizenship and Immigration Service Ombudsman's 2010 Annual Report* (Nov. 9, 2010)(*hereinafter referred to as the "USCIS Response") published on* AILA Infonet Doc. No. 10112460 (*posted Nov. 24, 2010).*

[17] *Id.* at 11.

[18] *Id.* at 12. *See* USCIS PowerPoint on VIBE *published on AILA* Infonet Doc. No. 10051367 (*posted May 27, 2010).*

[19] See AILA USCIS Liaison Meeting notes from October 12, 2010 *published on* AILA Infonet Doc. No. 10111870 (*posted Nov. 18, 2010).*

acknowledged in its technical comments that the system will not necessarily reduce the burden of providing supporting documentation for petitioners in the immediate future."[20]

The H-1B 2011 GAO report noted that the Neufeld Memorandum was blamed by several executives from staffing firms for the expansion of the offshore locations for their work and a decision to cease the use of the H-1B category, because they cannot have a contract in place with their clients due to the short notice provided by their clients as to service needs.[21] The GAO report outlines that IT staffing companies had avoided restrictions in the L-1 category by describing themselves as IT solutions companies to address the "labor for hire" criticism as to their use of the L-1 category by selling a "product." In addition, the report notes that as to the use of the H-1B category by such companies, the Neufeld Memorandum had been issued to address whether there is a valid employer-employee relationship between a staffing company and an H-1B worker whom it sponsors, since the staffing company does not necessarily control the manner and means by which an H-1B nonimmigrant may work.[22]

In the USCIS Response, USCIS denied that the Neufeld Memorandum had "significantly impacted" RFE rates.[23] USCIS also clarified that, "The H-1B Memo is, on its terms, limited to H-1B adjudications and therefore is not intended to guide adjudications in other contexts, including the L-1 or O-1 nonimmigrant visa categories."[24] On January 6, 2011, however, AILA held a webcast on the impact of the Neufeld Memorandum on adjudications one year later during which AILA members participating in the interactive webcast reported mission creep of the Neufeld Memorandum in the L-1, O-1, and I-140 process for multinational managers and executives.[25] AILA requested the withdrawal of the Neufeld Memorandum in January and March of 2010 with extensive comments on the impact of the interpretation of the employer-employee relationship in the context of physicians, government contractors, H-1B entrepreneurs, and IT consulting companies.[26] On March 26, 2010, the USCIS Office of Public Engagement held a listening session for H-1B Healthcare Industry stakeholders regarding the impact of the Neufeld Memorandum, which documents related concerns as to the issue of "right of control," especially in states such as Texas and California, which do not allow a hospital to be a direct employer. This issue was also outlined the above-referenced AILA letters.[27] More recently, on December 27, 2010, the Vermont Service Center ("VSC") AILA liaison committee published a practice pointer as to evidentiary recommendations for H-1B extensions for beneficiaries at third-party worksites after a September 20, 2010 USCIS stakeholder call in which VSC advised that it could request evidence of all work performed during the previous H-1B approval period.[28] VSC had also confirmed that it would issue only one year approvals for a scope of work ("SOW") as to a third-party assignment for less than one year.[29]

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[20] GAO Report to Congressional Committees, "H-1B Visa Program Reforms Are Needed to Minimize the Risks and Costs of Current Program," at 65 *published on* AILA InfoNet Doc. No. 11011430 *(posted* Jan. 14, 2011) (*hereinafter referred to as the* H-1B 2011 GAO Report).

[21] *Id.* at 25. The IT staffing firm executives specifically noted that the Neufeld Memorandum had resulted in a different standard to define the employer-employee relationship under the H-1B regulations in practice.

[22] *Id.* at 56.

[23] USCIS Response, *supra* n. 16, at 7.

[24] *Id.*

[25] AILA Webinar, *Dealing with the Neufeld Memo Regarding H-1Bs One Year Later (January 6, 2011) Speakers and participants on the webinar noted that their documentation required to address the employer-employee relationship standards had impacted many different industry groups including healthcare and IT staffing firms among others.*

[26] See AILA Letter to USCIS Director Mayorkas and Chief Counsel Bacon dated March 19, 2010 *published on* AILA InfoNet Doc. No. 10031931 *(posted* Mar. 19, 2010) and AILA Letter to USCIS Chief Counsel, Ms. Roxana Bacon date January 26, 2010 *published on* AILA InfoNet Doc. No. 10012760 *(posted* Jan. 27, 2010).

[27] USCIS Executive Summary, "Listening Session – Impact of H-1B Memo on the Healthcare Industry," April 5, 2010 *published on* AILA InfoNet Doc. No. 10041971 *(posted* Apr. 19, 2010).

[28] AILA/VSC Practice Pointer: H-1B Extensions for Beneficiaries at Third-Party Worksites *published on* AILA InfoNet Doc. No. 10122751 *(posted* Dec. 27, 2010).

[29] *Id.*

As further evidence of the far reaching impact of the Neufeld Memorandum, the January 19, 2011 version of the I-129 form, which must be used as of December 23, 2010 for filings,[30] now has numerous changes tied to Neufeld Memo influences. Of course, including such indicators in a form, which is the equivalent of a regulation, raises additional issues as to the true "guideline" nature of the Neufeld Memorandum. Some of the relevant I-129 changes on this point are:

- P. 4 question 4 as to an itinerary being included with the petition and question 5 regarding whether the beneficiary will work off-site.
- P. 12 H supplement section 1 certification that the employer "will maintain a valid employer-employee relationship with the beneficiary at all times. If the beneficiary is assigned to a position in a new location I will obtain and post an LCA for that site prior to reassignment."[31]
- P. 19 H-1B Data Collection - Part D off-site questions. This section is extremely confusing. For example, if you answer no to question a. as to assignments off- site, questions b and c only apply if the applicant will be placed off-site.

It is also important to notice that the petitioner's signature block under Part 7 on p. 6 of the form now requires affirmation by the petitioner that it "recognizes the authority of USCIS to conduct audits of this petition using publicly available open source information." In addition, the signature block also requires recognition that "supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews." This statement of course reflects the increased activity of the USCIS Office of Fraud Detection and National Security ("FDNS") regarding immigration benefit fraud investigation[32] as well as the VIBE program described earlier.

Immigration lawyers constantly face the difficulty of explaining incredibly complex and evolving legal interpretations of standards to clients, and then attempting to translate facts into supporting arguments for approval by adjudicators. Personnel charts can change and potentially cause an L-1A manager to no longer qualify as a manager. Job duties can change and cause a TN to no longer be in a qualifying Annex 1603 job. The impact of worksite changes is more complex in the H-1B context. The AR-11 address notice requirement though is yet another consideration for counsel on employment condition/terms related issues. We need a best practices list recommendation of defensive lawyering options for immigration counsel to help try to reduce potential misrepresentation or malpractice claims in the current FDNS era. Some suggestions for consideration are as follows:

- Include a notice in all benefit application engagement letters warning as to the possibility of FDNS site visits. Outline the criminal penalties tied to benefit fraud in the notice and ask the employer's authorized representative to sign this notice as part of the engagement.
- Require the employer to sign an intake statement that all information provided to the lawyer in the process shall be true and accurate to the best of his or her knowledge and belief.
- Counsel the employer to contact counsel before any changes in the terms and conditions of employment and outline the risks of failure to provide this information.

[30] AILA Liaison Updates on USCIS Acceptance of New Form I-129 (Updated 12/20/2010) *published on* AILA InfoNet Doc. No. 10121649 *(posted* Dec. 20, 2010). Please note that part 6 of the new I-129 as to export controls does not have to be completed until February 20, 2011 at present. *published* on AILA InfoNet Doc. No. 10122231 (*posted* Dec. 22, 2010). This section applies to H-1B, L, and O-1A petitioners. Please refer to AILA Practice Pointer: The New Export Control Attestation Requirement on Form I-129 *published on* AILA InfoNet Doc. No. 10121531 *(posted* Dec. 15, 2010).

[31] Unfortunately, there is no reference to the exceptions to this requirement in the Department of Labor ("DOL") regulations provided, for example, as to short-term placements at worksites under 20 CFR §655.735(c).

[32] *See* DHS OIG report, "Review of the USCIS Benefit Fraud Referral Process," OIG-08-09 (April 2008).

- Remember that conscious avoidance can expose the lawyer as well as the client to potential criminal penalty.[33]
- If counsel advises the employer to notify the government of a material change and the client refuses, document this fact to the file, and potentially terminate representation depending on the case facts.
- Be slower to engage new clients and conduct your own Google and Lexis/Nexus people searches before proceeding to accept a new client petitioner.
- Document verbal communications to the file from the client and save all e-mail communications.
- Conduct staff training to create a heightened awareness of benefit fraud indicia.
- Do not be complacent if provided information that an employer has not been accurate in its representations to you as to a petition submitted under your name as legal counsel.
- Establish a protocol for employers to use if an FDNS officer or an FDNS contractor appears on site. Employers should have points of contact for benefit application inquiries to make sure that someone with knowledge is the respondent.
- Educate employers further on the legal elements of petition requirements. A memorandum outlining those elements and signed by the employer might be another avenue to consider.

I-129 Documentation in the Post Neufeld Memorandum Era

A. The Eleven Factors – Guidelines

In determining the "right to control" definition of employment used in the Neufeld Memorandum, H-1B employers (and arguably others) must consider the following list of 11 questions:

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.,* are there weekly calls, routine reports back to the main office, 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?
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.*, are there 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?[34]

[33] Conscious avoidance happens when a person deliberately closes his eyes to avoid having knowledge that would otherwise be obvious to him. Deliberate ignorance does not establish innocence. *See U.S. v. Finkelstein, 229 F. 3d 90 (2d Cir. 2000).*

[34] Neufeld Memorandum, s*upra n. 4, at 3-4.*

The responses to the questions are viewed in a "totality of the circumstances" test by USCIS to determine if the requisite degree of control exists. USCIS also requires that the petitioner show that right to control the beneficiary's work will continue to exist throughout the duration of the beneficiary's employment with the petitioner.[35]

B. Scenarios Seen as Valid Employer/Employee Relationship

1. Traditional - work performed at location leased/owned by petitioner; beneficiary reports daily to the petitioner; petitioner sets work schedule; petitioner provides tools/supplies for work; petitioner directly reviews work-product; petitioner claims beneficiary for tax purposes; and provides medical benefits to beneficiary.

   Evidentiary implications – Present evidence that the petitioner owns or leases the locations where the beneficiary will work (e.g. deed to property where office is located showing ownership by petitioner or related company, letter confirming ownership by the property management company, copy of office lease, or letter describing lease agreement, including the validity period.) Note that if the petition indicates a certain number of employees, which seems impossible to house in the leased or owned office space, explain the locations for work performance further and document.[36]

2. Temporary/Occasional Off-Site Employment - beneficiary travels to client sites to perform audits; petitioner provides food and lodging costs, if beneficiary must travel out of the petitioner's geographic location to perform an audit; petitioner has a centralized office where beneficiary reports; beneficiary is assigned space in the centralized office when not performing audits off-site; beneficiary is paid by the petitioner; and beneficiary receives benefits from the petitioner. (example provided by USCIS – accounting firm with numerous clients)

   Evidentiary implications – contracts or other documentation showing that the beneficiary travels to multiple client sites rather than only working at one client site; contracts between the petitioner and client companies establishing that the petitioner continues to have the right to control the beneficiary while placed at the client site; letters from clients confirming that they have an ongoing relationship with the petitioner and that the petitioner regularly places individuals for a short time at the worksite; employment agreement and/or an assignment letter showing that the petitioner provides food and lodging to the beneficiary when the beneficiary is working off-site; and documentation that the beneficiary has assigned office space with the petitioner when not visiting client sites. This documentation can be included in the initial employment contract or an employment offer letter describing the nature and scope of employment, or other similar evidence; pay-stubs showing that the beneficiary is paid by the petitioner; and a description of the performance review process documenting that the petitioner, rather than the client, is directly reviewing the beneficiary's work-product.[37]

3. Long Term/Permanent Off-Site Employment - petitioner has contract indicating off-site location; contract states petitioner will manage its employees at off-site location; contract states petitioner has right to ultimate control of beneficiary's work; petitioner provides instruments and tools; beneficiary reports directly to petitioner; and petitioner does beneficiary's progress reviews. (example provided by USCIS – architectural firm with beneficiary being an architect)

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[35] *Id.* at 4.
[36] *See* L Drumm *et al*., "H-1Bs and Third-Party Worksites: I've a Feeling We're Not in Kansas Anymore, " AILA Immigration Practice Pointers 154 (2010-11 ed.).
[37] *Id.* at 159.

Evidentiary implications – (Example provided in context of private employer with government contract for work at a government facility) a copy of an offer letter stating the beneficiary will work on the specific government research contract; a press release on the contract award stating that the project would last a certain time frame; a copy of the contract award letter; relevant sections of the final contract covering: job titles (that matched the offer letter), services to be performed, and the facility's research mission; an LCA prepared *exclusively* for the research facility worksite; and a website page printout indicating the exact work address of the research facility (that matched the LCA).[38]

4. Long Term Placement at Third Party Worksite - petitioner has a contract with a third-party client; contract requires use of petitioner's proprietary product and/or knowledge; contract requires placement of petitioner's employee(s) at client's worksite; petitioner's employee(s) will perform contractually stipulated services using petitioner's proprietary product and/or knowledge; beneficiary has been offered employment by petitioner to satisfy the terms of petitioner's contract with client; beneficiary performs duties at client's facility; at client's facility, beneficiary reports regularly to a manager employed by petitioner; beneficiary is paid by petitioner; and beneficiary receives benefits from petitioner.

   Evidentiary implications – complete itinerary of services or engagements including dates of each service or engagement, names and addresses of actual employers, and names and addresses of venues where work to be performed; signed employment agreement between petitioner and beneficiary detailing employment terms; copy of employment offer letter; copies of relevant portions of valid contracts between petitioner and client showing right of petitioner to control employees placed at site; copy of signed contracts, SOWs, work orders, or other communications between the petitioner and the authorized point of contact at the work location of the ultimate end-client company where the work will be performed stating job duties, hours worked, salary, etc.; copy of position description; description of the performance review process; and copy of petitioner's organization chart showing supervisory chain as to beneficiary.[39]

C. Examples of Insufficient Right of Control[40]

1. Self-Employed Beneficiaries - Beneficiary cannot be fired by petitioning company and there is no outside entity exercising control over the beneficiary. There is no evidence that a board of directors can control or direct the beneficiary.

2. Independent Contractors – Petitioner does not control when, where, or how the beneficiary performs duties and does not claim the beneficiary as an employee for tax purposes. (e.g.1099 tax form used)

3. Third-Party Placement/"Job Shop" – Specific positions not outlined in contract between petitioner and third-party company but are staffed on as needed basis. Beneficiary does not report to petitioner and petitioner does not control when, where, or how beneficiary performs duties. Progress reviews not completed by petitioner and instead by client company.

4. Agents as Petitioners- Fashion House exception when beneficiary negotiates pay with Fashion House and house controls when, where, and how beneficiary performs duties.

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[38] *Id. at 160.*
[39] Neufeld Memorandum, *supra n. 4, at 8- 9.*
[40] *Id.* at 5 – 7.

D. H-1B Extension Documentation[41]

Petitioners must show that a valid employer-employee relationship was maintained with a beneficiary throughout the H-1B approval period. In addition, the petitioner must show that the petitioner did not violate any of the other terms of its prior H-1B petition. The documentation examples listed by USCIS to exhibit compliance include the following (a combination of the items listed or other similar evidence is acceptable):

- Copies of the beneficiary's pay records (e.g. 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, website text, news copy, photographs of prototypes, etc.). Note: The materials must clearly substantiate the author and date created.
- Copy of dated performance review(s)
- Copy of any employment history records, including, but not limited to, documentation showing date of hire and dates of job change, (*i.e.*, promotions, demotions, transfers, layoffs, and pay changes with effective dates)

The Future and Recent Changes

Certainly, the story is not over for the continuous changes to the H-1B category as it continues as a scapegoat target for the ills of business immigration during an economic downturn. The weaknesses in the H-1B category though regarding actual acts of fraud or misrepresentation should have been addressed many years ago to strengthen public trust in the process. The H-1B 2011 GAO Report has a useful appendix, which outlines many key legal changes in the H-1B category. This appendix is attached as Exhibit A for historical reference. One of the most recent changes increased filing fees as of August 14, 2010 for initial H-1B cases by $2,000 for petitioners who employ 50 or more employees in the U.S. AND when 50 percent of the employees are in H-1B, L-1A, or L-1B status. This fee is in addition to the base processing fee, the existing Fraud Prevention and Detection Fee, and any American Competiveness and Workforce Improvement Act of 1998 ("ACWIA") fee as well as any premium processing fee.[42]

In addition, USCIS has indicated that it intends to publish a proposed rule to create a mandatory, internet-based electronic registration process for U.S. employers seeking to file H-1B petitions to eliminate the need for U.S. prospective H-1B employers from completing full H-1B petitions without any certainty that an H-1B cap number will be assigned.[43] Hopefully, this process can be expanded to create an electronic file on H-1B employers so that they can upload relevant company data without resubmitting this information with each H-1B petition in the future. Thus, employer petitioners could eventually have their own tracking

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[41] *Id.* at 9.

[42] USCIS Implements H-1B and L-1 Fee Increase According to P.L. 111-230 *published on* AILA Infonet Doc. No. 101100767 (*posted* Oct. 7, 2010). AILA posted a liaison practice tip on this fee to clarify that the definition of "employer" for P.L. 111-230 purposes is the one found at 8 CFR §214.2(h)(4)(ii) and not the one used for a single employer to assess H-1B dependency under 20 CFR Part 655, Subpart H. *See AILA Practice Tip: Determining Applicability of P.L. 111-230 Fees published on* AILA Infonet Doc. No. 10120861 (*posted* Dec. 8, 2010). Further, according to a October 27, 2010 CSC stakeholders meeting, USCIS recommended that those filing H-1B petitions potentially subject to the P.L. 111-230 fee should include a statement regarding the application of the fee to the petition until the I-129 form was revised to include this information. The Jan. 19, 2011 revision of the I-129 has these questions on the H-1B Data Collection portion of the I-129 in Part A, question 1.e.

[43] USCIS to Propose Registration Requirement for H-1B petitions Subject to Numerical Limitations *published on* AILA Infonet Doc. No. 10122831 (*posted* Dec. 28, 2010).

number for filings purposes with agencies related to immigration benefits across all relevant agencies to reduce the administrative burden on the agency and the employer and to improve oversight and efficiency of adjudications.

The newest H-1B complexity on the block remains to be implemented. As noted above, completing part 6 of the new I-129 as to export control compliance has been delayed until February 20, 2011.[44] The new I-129 form requires employers to attest under penalty of perjury that the foreign beneficiary will not be exposed to covered technologies without first obtaining the applicable, if any, export license. This provision will require consideration of whether technology and technical data are controlled for release to foreign persons under the Export Administration Regulations ("EAR") Commerce Control List ("CCL") and the International Traffic in Arms Regulations ("ITAR") U.S. Munitions List ("USML"). The Department of Commerce's Bureau of Industry and Security ("BIS") administers the EAR, while the Department of State's Directorate of Defense Trade Controls ("DDTC") administers the ITAR. BIS is responsible for issuing "deemed export" licenses for the release to foreign persons of EAR controlled technology; while DDTC is responsible for issuing export licenses and authorizations for the release of ITAR controlled technical data to foreign nationals in the United States. Information about the EAR and how to apply for a "deemed export" license from BIS can be found at www.bis.doc.gov. Data about EAR's requirements pertaining to the release of controlled technology to foreign persons is at www.bis.doc.gov/deemedexports. Finally, information about the ITAR and how to apply for an export license from DDTC can be found at www.pmddtc.state.gov. ITAR's requirements pertaining to the release of controlled technical data can be found at http://www.pmddtc.state.gov/faqs/license_foreignpersons.html.[45] The BIS web site has a series of six training modules called the, "Essentials of Export Controls." The training modules can be downloaded in.pdf format.

With the constant state of flux in regulatory requirements in the H-1B and L-1 categories, it is a miracle that any employer can be fully compliant. Clarity facilitates compliance and until we create clear and simple rules instead of mere convoluted guidelines, our business immigration landscape will continue to be dysfunctional and difficult for relevant agencies to oversee and implement as well as for good faith employers to comply without at least consulting an oracle, or perhaps, …a magical compass.

[44] Published on AILA InfoNet Doc. No. 10122231 (posted Dec. 22, 2010). This section applies to H-1B, H-1B1, L-1, and O-1A petitioners. Please refer to AILA Practice Pointer: The New Export Control Attestation Requirement on Form I-129 *published on* AILA InfoNet Doc. No. 10121531 *(posted* Dec. 15, 2010).

[45] AILA Practice Pointer: The New Export Control Attestation Requirement on Form I-129 *published on* AILA InfoNet Doc. No. 10121531 *(posted* Dec. 15, 2010).