New USCIS Policy Clips Entrepreneurs, Consultants and Staffing Firms

By Angelo A. Paparelli and Ted J. Chiappari*

In the recovering but still feeble U.S. economy, a few bright lights shine as beacons of hope and promise.

According to the U.S. Bureau of Labor Statistics (BLS), jobs in the consulting industry (comprised of management, scientific, and technical consulting services), are projected to grow 83% in the decade ending in 2018.[1] The BLS also projects that by 2018 positions in the employment-services industry (encompassing temporary and permanent positions in management, business, and financial occupations) are slated to increase by more than 27% and professional jobs (including healthcare) will expand by 23%.[2]

Another time-tested and still promising vehicle for job creation, as President Obama has recently noted, is small-business entrepreneurship:

> Over the past 15 years, small businesses have created roughly 65 percent of all new jobs in America. . . . These are also companies that drive innovation, producing 13 times more patents per employee than large companies. And it's worth remembering, every once in a while a small business becomes a big business — and changes the world.[3]

Why then is U.S. Citizenship and Immigration Services (USCIS), a federal bureau within the Department of Homeland Security (DHS), clipping the wings off future job growth? USCIS has done just that by issuing a memorandum that announces a new set of demanding, burdensome and commercially unreasonable requirements for an employer to prove to the agency's satisfaction that the petitioning business will have a valid employer-employee relationship with the foreign workers it proposes to hire.

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[1] U.S. Department of Labor Bureau of Labor Statistics (BLS), Career Guide to Industries, "Management, Scientific, and Technical Consulting Services," 2010-11 Edition, accessible at: http://www.bls.gov/oco/cg/cgs037.htm (all links in this article last accessed on Feb. , 2010).

[2] *Ibid*., "Employment Services," Table 1, Employment of Wage and Salary Workers in Employment Services by Occupation, 2008 and Projected Change, 2008-2018, accessible at: http://www.bls.gov/oco/cg/cgs039.htm.

[3] "Remarks by the President on Job Creation and Economic Growth," delivered at The Brookings Institution, Washington, D.C., December 8, 2009. See http://www.whitehouse.gov/the-press-office/remarks-president-job-creation-and-economic-growth.

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The policy reason for this benighted approach will not be found in the USCIS's January 8, 2010 Memorandum issued by its Associate Director, Donald Neufeld (the Memorandum).[4] Rather, that document purports to provide a principled legal analysis of the requirement under the H-1B visa category (reserved for "specialty-occupation" workers) to demonstrate an employer-employee relationship between the petitioning entity and the sponsored foreign citizen. The practical effect of the Memorandum, however, will probably not be limited to the H-1B visa category. Based on recent decisions of the USCIS Administrative Appeals Office (AAO), the legal rationale supporting the memorandum has been extended to other employment-based immigrant and nonimmigrant classifications.[5]

If allowed to stand, the Memorandum and kindred AAO decisions will frustrate businesses in the consulting and staffing industries (and the enterprises they serve) as they try to achieve legitimate commercial objectives. The Memorandum will also hinder foreign citizens seeking jobs in the consulting and employment-services industries, or planning to establish their own businesses, from gaining the legal right to pursue their ambitions under U.S. immigration law.

The diversity and intensity of adverse impact caused by the Memorandum and similar AAO decisions are alarming. The harshest effects will be felt by (a) foreign entrepreneurs who hold majority or greater ownership of a U.S.-based corporate entity, and (b) temporary and permanent staffing businesses. These classes, in most instances, will receive USCIS denials of their petitions requesting employment-based immigration benefits on the claim by USCIS that there is insufficient proof of an employer-employee relationship between the petitioner and the proposed H-1B worker.

The petitions of foreign entrepreneurs (i.e., working owners) will likely be denied because USCIS Immigration Officers, prompted by the Memorandum and AAO decisions of similar provenance, will pierce the corporate veil and decline to distinguish the employer (a legal entity or juridical person) from its employee (the working owner, a natural person) on the theory that no one within the corporate entity – other than the working owner – is in a position to to exercise control over the owner's work or terminate his/her employment.[6] USCIS will generally deny employment-based petitions of staffing

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[4] Memorandum to Service Center Directors, "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)," HQ 70/6.2.8 (Donald Neufeld, Associate Director, Service Center Operations, January 8, 2010) (the Neufeld Memorandum).

[5] *See*, e.g., the non-precedent decision, *In Re [Anonymous]*, Administrative Appeals Office (May 1, 2009, LIN 06 235 52206), accessible at: http://tinyurl.com/ydkmumt, and critiqued in Angelo A. Paparelli's blog posting, "When Will They Ever Learn? -- Immigration Denial Thrives Perniciously at USCIS," Dec. 10, 2009, available at: http://www.nationofimmigrators.com/?p=300.

[6] For an extensive critique of the January 8, 2010 USCIS Memorandum and recent AAO decisions, *see*: January 26, 2010, Letter of AILA-USCIS HQ Liaison Committee, American Immigration Lawyers Association (AILA)to Roxana Bacon, USCIS Chief Counsel, accessible at: http://tinyurl.com/yzawcam:

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companies because in the view of USCIS (a) the staffing business is perceived to have ceded to its customer the right to control the work to be performed and (b) the customer exercises *de facto* control of the staffing company's putative "employee."

The staffing industry disputes the USCIS's assertions, says Edward A. Lenz, Senior Vice President, Public Affairs & General Counsel of the American Staffing Association:

> There are all sorts of infirmities in the [January 8, 2010 USCIS] Memorandum not the least of which is the agency's failure to apply the very regulation it cites, which specifies the relevant factors for establishing an employer-employee relationship, i.e., whether the petitioner can "hire, pay, fire, supervise, or otherwise control the work" of the H-1B employee.
>
> USCIS has effectively mounted a frontal attack on our entire business model. Not only is the memorandum issued in violation of the Administrative Procedures Act [APA], but it is also substantively wrong on the law governing the employer-employee relationship. The example given in the guidance is deeply flawed because it ignores most of the employer attributes of businesses in the staffing industry. Staffing firms recruit, screen, hire and fire workers, pay wages and payroll taxes and provide benefits (statutory and otherwise, including health care, unemployment and workers compensation insurance and 401(k) matches). These firms also have and exercise the right to discipline and reassign. None of these attributes are taken into account in the USCIS guidance. The [January 8, 2010 USCIS] memorandum thus wrongfully stacks the deck against the staffing industry and against its legitimate and long-recognized designation as an employer.

While working owners and staffing firms face the greatest obstacles, other legitimate enterprises whose personnel are seconded to third-party sites[7], in particular, all manner of

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> [R]ecent USCIS Administrative Appeals Office decisions and USCIS Service Center adjudications, as well as the . . . [January 8 USCIS] Memorandum, . . . misapply the reasoning of Supreme Court cases . . . to reach the conclusion that individuals with controlling or substantial interests in a petitioning U.S. company or its foreign parent company cannot — in most cases — be a beneficiary of a nonimmigrant (e.g., L-1, H-1B and O-1) or immigrant employment-based petition. We strongly believe that this USCIS position departs from longstanding binding precedent, ignores the plain language of the Immigration and Nationality Act (INA) and its implementing regulations, thwarts Congressional intent respecting the purpose of the INA, and leads to absurd results.

See also, Angelo A. Paparelli's blog posting, "Please Tweet Me an H-1B," Jan. 15, 2010, available at http://www.nationofimmigrators.com/?p=305.

[7] For a general discussion of immigration law considerations arising with the placement of personnel at third-party sites, see: Angelo A. Paparelli, "Yes, We Have No Employees: The U.S. Immigration Consequences of Corporate Outsourcing and Secondment," American Bar Association, Section of International Law and Practice, Annual Conference (Aug. 9, 1994), accessible at: http://tinyurl.com/ybzbu8q.

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consulting businesses, will also be burdened by the latest Memorandum and AAO decisions.

Effective January 8, 2010, the date of the Memorandum, USCIS's Immigration Officers will demand of every entity petitioning to place an H-1B worker at a third-party location a welter of corporate, financial and contractual documents, in addition to the itinerary of all work locations that has long been required by regulation.[8]

The memorandum requires different documents depending on whether the nonimmigrant visa petition seeks initial permission to classify a worker under the H-1B visa category or requests an extension of H-1B classification. In the case of initial petitions, the petitioner must "establish that the employer has the right to control the [H-1B] beneficiary's [off-site] work, including the ability to hire, fire and supervise" and "also be responsible for the overall direction of [his or her] work." The petitioner must also show that all of these required elements of proof "will continue to exist throughout the duration of the requested H-1B validity period."

This continuity-for-the-duration requirement is particularly troubling. According to reports from numerous immigration practitioners and employers, the failure to convince USCIS that there will be tangible work for the maximum three-year period of initial H-1B petition validity allowed by regulation, e.g., by submitting a contract between the petitioner and an off-site customer with less than a three-year term, will cause the agency to short-change the employer and employee on the period of approved H-1B petition approval and nonimmigrant status. For example, a contract with an 18-month term of performance may lead USCIS to grant only a year and a half of H-1B petition and status validity – an expensive proposition when the filing of a second petition to capture that additional time can cost the employer an additional $2,070 to $2,820 in government filing fees and Premium Processing Service fees (depending on the number of total workers employed by the petitioner).

The immigration authorities did not always think it necessary for businesses to prove in advance the existence of a three-year inventory of assured work for the H-1B worker to perform:

> It has been the experience of the Service [the predecessor agency, Immigration and Naturalization Service] that many bona fide businesses which provide contract workers to certain industries under the H–1B classification have experienced difficulty in providing complete and detailed itineraries due to the unique employment practices of such industries. . . .[C]ompanies which are in the business of contracting out physical therapists or computer professionals often get requests from customers to fill a position with as little as 1 day advance notice. . . . Under the current regulation, however, such an employer is required to submit with its petition a complete itinerary listing all of the locations where the contract

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[8] As required by 8 CFR § 214.2(h)(2)(i)(B), the itinerary must list "the dates and locations of the services," in cases where H-1B services are "to be performed . . . in more than one location."

> workers will be employed. The regulation as now written, therefore, does not fully reflect current legitimate business practices.[9]

The memorandum never explains why USCIS now insists on the submission of extensive proof of all existing contractual assignments for the duration of requested H-1B petition validity and correspondingly limits the period of H-1B employment to the temporal term of the contract(s), even though the legacy agency, INS, considered the itinerary requirement as having failed to "fully reflect current legitimate business practices."

Moreover, the new USCIS penchant to approve shorter periods of H-1B petition validity (as a means of preventing an employer from reserving the availability of the workers beyond that required for fulfillment of existing contracts) is disturbing. Congress has already addressed the issue by giving the U.S. Department of Labor authority to investigate and punish employers who fail to pay required H-1B wages during periods of non-productive time.[10] In addition, there has been no change in the Immigration and Nationality Act or USCIS regulation to suggest that USCIS should now deviate from its longstanding practice of granting the maximum period of H-1B petition validity. Until the Memorandum took effect, prior agency practice had been to grant the maximum period requested when approving an H-1B petition, up to three years, as long as a business met the definition of an employer under the regulations and provided a representation under penalty of perjury that sufficient work exists or would likely be secured in new business to occupy the H-1B nonimmigrant for the requested period.

Worse yet, upon the filing of an employer's request to extend a previously approved H-1B petition and the worker's period of employment authorization, the Memorandum instructs Immigration Officers to deny these requests if the employer "failed to maintain a valid employer-employee relationship with the [H-1B] beneficiary throughout the initial approval period, or violated any other terms of its prior H-1B petition . . . 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)."

The potential that an existing H-1B worker might be denied continued employment authorization by virtue of a *post-hoc* determination that the employer failed to maintain the employer-employee relationship or committed some other H-1B violation is heightened by other late-breaking developments. USCIS recently added as standard boilerplate on every H-1B approval notice a warning of supplemental procedures the agency has adopted for the purpose of ferreting out immigration violations:

> NOTICE: Although this application/petition has been approved, DHS reserves the right to verify the information submitted in this application, petition, and/or supporting documentation to ensure conformity with applicable laws, rules, regulations, and other authorities. Methods used for verifying information may include, but are not limited to, the review of public information and records, contact by correspondence, the Internet, or

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[9] INS Proposed Rule, "Petitioning Requirements for the H Nonimmigrant Classification," Supplementary Information, 63 Federal Register 30419 (June 4, 1998).

[10] *See*, Immigration and Nationality Act § 212(n)(2)(C)(vii)(I) and § 212(n)(2)(D) [8 USC § 1182(n)(2)(C)(vii) and 8 USC § 1182(n)(2)(D)].

> telephone, and site inspections of businesses and residences. Information obtained during the course of verification will be used to determine whether revocation, rescission, and/or removal proceedings are appropriate. Applicants, petitioners, and representatives of record will be provided an opportunity to address derogatory information before any formal proceeding is initiated.

Even more ominous, on the heels of the USCIS's release of the Memorandum, the agency's Director, Alejandro Mayorkas, restructured his leadership team by elevating a unit known as Fraud Detection and National Security (FDNS) to the rank of a Directorate (which now reports to the Office of the Director). In his announcement of the change, Mr. Mayorkas noted:

> The realignment reflects the prioritization of certain critical Agency responsibilities, [including the] . . . creation of a Fraud Detection and National Security Directorate. This change reflects our prioritization of our anti-fraud and national security responsibilities and will bring greater focus to them.[11]

Clearly, without APA compliance or policy rationale, USCIS has mounted a major offensive against foreign entrepreneurs and consulting and staffing firms, whose H-1B petitions until recently the agency, and its predecessor, INS, had routinely approved. Unless USCIS is forced to reverse course by the federal courts (a possibility), by higher authorities in DHS or the Obama Administration (a slim prospect) or Congress (an improbability in the current climate), H-1B petitioners in these job-creating fields have little recourse except to try nonetheless to thrive despite the clipping they are likely to endure at the hands of USCIS.

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[11] Statement from USCIS Director Alejandro Mayorkas on the realignment of U.S. Citizenship and Immigration Services organizational structure, Jan. 11, 2010, accessible at: http://tinyurl.com/yag7wdn.

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