Proving Existence Of A Job For H-1B (With Form)

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The government's current trend is to require proof that the job really exists, and it isn't as easy as it sounds.

ALL OF IMMIGRATION LAW is replete with conundrums, idiosyncrasies, and outright impossibilities. The confusion is further confounded by baseless, unreasonable demands from USCIS and related agencies. (These requests are made by U.S. Citizenship and Immigration Services (USCIS) and by U.S. Consulates. For ease of reference, I am naming USCIS throughout this article.) The current trend in H-1B petitions for professional workers is for the government to require evidence that the offered job indeed exists. In-house counsel and employers utilizing H-1B workers need to know what is ahead of them in applying for and obtaining an H-1B status or visa.

EXISTENCE OF IN-HOUSE AND PROJECT-BASED JOBS • There are typically only two possibilities in any job—either the employee works directly for the employer or the employee works for a third party on behalf of his or her employer (consulting). In both cases, the government wants us to prove that a job exists.

In-House Work (Project-Based or Ongoing)

Proving existence of an in-house job tends to be easier to do. USCIS usually wants the employer to prove

that the H-1B employee ("beneficiary") is or will be working at a position whose existence is beyond doubt. For project-based jobs, they commonly require the following information:

- A description of the project;
- The number of participants in the project and their roles;
- Where the beneficiary fits in the project—his or her role, detailed responsibilities, and where he or she fits in the hierarchy of workers;
- The percentage completion of the project, including project milestones and the anticipated date of completion;
- The anticipated duration of the need of the beneficiary. (Note that USCIS will approve an H-1B only for the duration of the anticipated work. If we can demonstrate only six months of need, we will get an approval for six months. The period can, of course, be extended based upon further need, but that means repeat expense);
- Sample documents related to the project (such as code excerpts for software projects or financial/operational analyses for management projects); and
- Whether or not a feasibility study of the project was performed.

Among the above seven requirements, in our experience, the most difficult to prove is a feasibility study. In at least 50 percent of the projects, there is no formal feasibility study. The project is either based upon a perceived in-house need (such as a Web-based billing system for employees and clients) or based upon the expert knowledge of some of the key members of the employer's workforce or management. In these cases, we have successfully documented the existence of a job and the need for it through pre-existing requisition slips, emails, memoranda, and similar documents. When necessary, we have supplemented with affidavits from the management and/or other employees implicated in the project. The one key is common sense. As long as we can show it makes sense in the context of an employer's business to hire an employee, we should be successful.

Proving the existence of a job is not difficult if there is a discrete project. The situation becomes more cumbersome if there is no discrete project or the beneficiary is expected to work on a routine or a newly created job. These are more challenging cases. Usually, we have been successful in such cases by providing existing advertisements, requisition slips, and when necessary, affidavits from management or human resources personnel. In cases where jobs are already in existence, USCIS accepts evidence of past practice of the employer, such as details regarding the work done by previous incumbents and evidence of ongoing need for that work to be done.

Consulting Jobs

The most difficult cases are those in which a beneficiary is hired by a consulting company and placed to work at the premises of an end-client. USCIS has made it almost a uniform policy to require a letter from the end-client containing three elements:

- A detailed description of the work the beneficiary will be doing;
- Attestation that there is no employer-employee relationship between the client and the beneficiary; and
- An attestation of how long the assignment will last.

The end-clients may often be hesitant to provide letters. In cases where letters are required, very few of the larger companies have established a practice of referring matters to immigration counsel. We have been called upon to answer questions from our clients who are consulting companies as well as those who are end-clients. It appears that the gravest concern from end-clients is that any representations

they make should not be construed to modify existing contractual obligations (or to create new ones) and they do not wish to get involved with the governmental processing. As to the former concern, protective language can and should be added to the letter being provided. And, there should be no fear of governmental involvement if matters are stated truthfully, clearly, and precisely. The letter should be carefully drafted. A Model letter with annotations to various noteworthy matters appears as the Appendix at the end of this article.

It is important to understand the context of applicable laws. USCIS apparently finds its authority for requiring proof of existence of a job inherent in the H-1B statute and regulations. H-1B status is reserved for "specialty occupations," which are those jobs that require a U.S. bachelor's degree. It is the view of the USCIS that it must be informed what a foreign worker is actually doing on a day-to-day basis. Otherwise a determination of whether or not the occupation qualifies for H-1B cannot be determined. This gives rise, in part, to the requirement that there must exist a definite, actual job.

Section 214(i)(1) of the Immigration and Nationality Act (the Act), 8 U.S.C. §1184(i)(1), defines the term "specialty occupation" as an occupation that requires:

- Theoretical and practical application of a body of highly specialized knowledge; and
- Attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

Under 8 C.F.R. §214.2(h)(4)(ii):
"Specialty occupation means an occupation which requires theoretical and practical application of a body of highly specialized knowledge in field of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States."

Pursuant to 8 C.F.R. §214.2(h)(4)(iii)(A), to qualify as a specialty occupation, the position must meet one of the following criteria:

- A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Thus, USCIS believes that it has the inherent power to check into the specifics of the job actually being performed. In my view, the logic of this is far from reasonable, but it has been upheld by courts. In *Defensor v. Meissner,* 201 F. 3d 384 (5th Cir. 2000), the most-often cited case by USCIS (cited in over 1,000 cases), the court held that for the purpose of determining whether a proffered position is a specialty occupation, a petitioner acting as an employment contractor is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." (The characterization of "token employer" is logically and legally incorrect, but this case was not appealed and so that is what we need to contend

with.) The *Defensor* court further held that evidence of the client companies' job requirements is critical where the work is to be performed for entities other than the petitioner. According to the court the legacy Immigration and Naturalization Service had reasonably interpreted the statute and regulations as requiring the petitioner to produce evidence that a proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

Definiteness Of Employment

It is unclear where in law USCIS finds the requirement that an H-1B employment must not be speculative or conjectural. But the settled view of USCIS is that the H-1B employment must be definite. The regulations do address specificity when the employment is at various locations, but there is no clear pronouncement of definiteness when the employment will be at one site only.

Under the regulations, 8 C.F.R. §214.2(h)(4)(iii)(B), an H-1B petitioner (employer) is required to submit the following with an H-1B petition involving a specialty occupation:

- A certification from the Secretary of Labor that the petitioner has filed a labor condition application with the Secretary;
- A statement that it will comply with the terms of the labor condition application for the duration of the alien's authorized period of stay; and
- Evidence that the alien qualifies to perform services in the specialty occupation.

According to USCIS, without an itinerary, the petitioner cannot demonstrate compliance with the certified Labor Certification Application (LCA), which is specific to a geographical location(s). Although USCIS's own regulations require an itinerary (8 C.F.R. §214.2(h)(2)(i)(B)), the precedents uniformly base the denials on failure of LCA.

The earliest mention of definiteness of employment as a formal requirement for H-1B is found in a memorandum from Michael L. Aytes, Assistant Commissioner, INS Office of Adjudications, Interpretation of the Term "Itinerary" Found in 8 C.F.R. §214.2(h)(2)(i)(B) as it Relates to the H-1B Nonimmigrant Classification, HQ 70/6.2.8 (December 29, 1995). Assistant Commissioner Aytes in the cited 1995 memorandum said that, "[t]he purpose of this particular regulation is to [e]nsure that alien beneficiaries accorded H status have an actual job offer and are not coming to the United States for speculative employment." USCIS has used this memorandum as grounds for denying thousands of H-1B petitions when an itinerary was not definite. Interestingly, the same memorandum notes:

"Since the purpose of the regulation is merely to insure that the alien has an actual job in the United States, the itinerary requirement in the case of an H-1B petition can be met in any number of ways. For example, the locations listed by the United States employer on the supporting labor condition application may, in some cases, suffice as an itinerary. In addition, in the case of an H-1B petition filed by an employment contractor, a general statement of the alien's proposed or possible employment is acceptable since the regulation does not require that the employer provide the Service with the exact dates and places of employment. As long as the officer is convinced of the bona fides of the petitioner's intentions with respect to the alien's employment, the itinerary requirement has been met. The itinerary does not have to be so specific as to list each and every day of the alien's employment in the United States. Service officers are encouraged to use discretion in determining whether the petitioner has met the burden of establishing that it has an actual employment opportunity for the alien."

So, we are supposed to be exact, but not really. We have to be specific, but not too specific. This

memorandum provides some idea of what USCIS is supposed to look for, but obviously does not leave enough guidelines for their own adjudicators.

Partly, because of such ill-defined parameters USCIS often pushes the boundaries of their discretion too far. Here is an example of an unreasonable inquiry our office received in April 2009. In this case, USCIS wants the consulting company to prove that their end-clients are legitimate businesses and to produce tax returns of the end-client and letters signed by the top executive of the end-client:

"Submit evidence that clearly substantiates that the petitioner or petitioner's client's are legitimate business entities and employers. Evidence should include copies of the client's most recent signed Federal Tax Return and quarterly wage reports for the last quarter. If the clients are publicly traded companies, provide a copy of their most recent annual report and a letter from the president of the company explaining what business they have with the petitioner. If the client is a government agency, provide the contract number and the name of the company that has the primary contract."

The only way to deal with this type of overreaching is to clearly address it on the record. I have no problem with legitimate inquiries, but why should we be required to produce a letter from the "president" of the end-client or their tax returns? Thankfully, in most cases, unreasonable inquiries are recognized as such by the agencies—eventually. But we do have to be prepared to take matters to court if necessary. (Taking USCIS to court is problematic for two reasons. First, in order for us to exhaust administrative remedies, we need to wait several months for the administrative appeal to be denied. Second, the Real ID Act (Specifically, 8 U.S.C. §1252) has placed discretionary decisions of USCIS beyond judicial review except where issues of law or constitutional violations are alleged. There is a great deal of inconsistency regarding this jurisdictional bar among various federal judicial circuits. We need to look at the judicial mandates of the forum to see the possibility of relying upon exceptions to exhaustion and jurisdictional issues.) Accordingly, when we respond to an inquiry that is clearly overreaching, we add some language to ensure our rights are protected if litigation is necessary. For example:

"As stated on the record, this request is ultra vires in that it [give reason such as illegal, beyond delegated authority, unduly burdensome, etc.]. Nevertheless, time being of the essence, the petitioner hereby responds as hereunder in order to obtain expedient adjudication. This response may in no way be considered a waiver or abrogation of any rights or submissions that the petitioner may have in appeal or litigation."

CONCLUSION • Despite difficult and nebulous legal principles and even more difficult agencies, we continue to receive approvals. But, it is important that all employers and their representatives be prepared to deal with the issues that arise in erstwhile simple applications. Careful preparation, documentation, and understanding of the law are indispensable now, more than ever.

APPENDIX
Model Letter From End-Client to USCIS, Verification Of Work And Anticipated Duration (With Annotations)

[End-Client's Corporate Letterhead]
[Date]
[USCIS][1]

Re: Verification of work and anticipated duration[2]

Dear Sir or Madam:

This letter is being provided at the request of [Prime Contractor][3] to verify the facts stated herein. All representations made are strictly for submission to the immigration authorities. No legal or equitable rights are created, modified or abrogated by this letter.

Mr./Ms. XYZ[4] is anticipated to contribute to our work in the capacity of a contracted Software Engineer. He/she will be performing the following work: [Detailed job description][5]

Mr./Ms. XYZ will not be our employee. As long as he/she follows our standard workplace policies, we will have no responsibility to dictate how he/she performs his/her job duties. We will also not be responsible for hiring, discharge, promotion, demotion, remuneration or any other incidents of his employment.[6]

Currently, we have issued a work order for 6 months but we anticipate the need for his/her services to go beyond that time to approximately 3-4 years. For emphasis, we note here again, this statement is merely an expression of intent and is not a contractually or equitably binding commitment.

[End-Client]

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1 To whom should the letter be addressed? In our view, this letter can and should be addressed directly to USCIS. We do not believe this creates any more involvement for the end-client than what already exists because an H-1B worker is employed at their premises. If, however, end-clients are inclined to address the letter to their prime contractor, that should work equally well.

2 Accuracy is important. The reference/subject field should be narrowly stated to summarize the content of the letter. For instance, stating something like "Verification of employment," in the subject is inaccurate. The beneficiary will not be an employee of the end-client.

3 It is important to state at whose request the letter was drafted. Often, larger end-clients work through several layers of sub-contractors. Typically, their privacy of contract extends only to the prime contractor.

4 Usually, end-clients interview a candidate who will work on their project to ensure his or her technical proficiency. In cases where a candidate has not been identified, this letter can be suitably modified to describe the open contract position instead of referring to a potential incumbent.

5 This description should be the same or similar to the job description provided to USCIS.

6 Pursuant to 8 C.F.R. §214.2(h)(4)(ii), 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.