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US IMMIGRATION & NATIONALITY LAW

USCIS ISSUES BURDENSOME RFES TARGETING COMPUTER CONSULTING COMPANIES

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by
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Recently, the USCIS started issuing a slew of Requests for Evidence ("RFEs"), specifically targeting computer consulting companies, even companies that are well established. RFEs are issued after an employer files an H-1B petition on behalf of a foreign employee. These lengthy and detailed RFEs, some 4 to 5 pages long, are issued where a new employer files either a new H-1B petition or an H-1B extension or where the same employer requests continuation of previously approved employment without change in employer. The RFEs have become a source of confusion and frustration for Petitioners and immigration practitioners alike who are unable to comprehend why the submitted documentation is not sufficiently persuasive on a particular issue.

It appears that the USCIS has issued these RFEs in an effort to combat what it perceives as a high incidence of H-1B fraud particularly with regard to computer consulting companies. Although a legitimate business model, the USCIS is wary of "job shops" where the petitioning employer is not thought of as the actual employer and has no responsibility over the employment, which is controlled by the entity where the H-1B worker is ultimately assigned. On the other hand, such an entity may still pay the H-1B worker's salary and assign him or her to other clients. In its September 2008 H-1B Benefit Fraud & Compliance Assessment, the USCIS examined 246 cases drawn from a total population of 96,827 approved, denied or pending I-129 petitions filed between October 1, 2005 and March 31, 2006, most of which were filed on behalf of beneficiaries who already held H-1B visas. The USCIS determined that 13.4% (33 cases) represented fraud and 7.3% (18 cases) represented a technical

violation. The size of the survey and its methodology has been criticized by the Alliance of Business Immigration Lawyers (see November 2008 IMMIGRATION UPDATE).

These RFEs force the Petitioner to obtain all documents requested, however voluminous and overly burdensome. An RFE may request that the Petitioner provide copies of all Forms I-797s, Approval Notices, issued by the Service since the year 2000. In other instances, the RFE may contain a request such as *"provide a statement from a financial officer of your organization which establishes your ability to pay the offered wage."* It would appear that the adjudicators are sometimes confused as to what requests are appropriate for the H-1B visa petition.

While the USCIS reserves the right to issue RFEs as its adjudicators see fit, understandably, these burdensome RFEs are cause for great concern especially in light of previous USCIS guidance on the issuance of RFEs. A 2005 USCIS Memo by William Yates[1] providing guidance to adjudicators, states that an RFE is most appropriate when a particular piece or pieces of necessary evidence are missing and that it is unacceptable to issue an RFE for a broad range of evidence - a "broad brush" RFE - which overburdens customers, over-documents the file and wastes examination resources through the review of unnecessary, duplicative or irrelevant documents. Similarly, a 2007 Neufeld Memo[2] states that the adjudicator must determine what evidence is lacking and request that evidence, but not "fish" for evidence. The Neufeld Memo and the Adjudicator's Field Manual (AFM) specifically instruct the adjudicator to first seek to obtain information from USCIS records and from other sources *before* requesting that the Petitioner provide the information.

These issues were recently raised at the liaison meeting between the American Immigration Lawyers Association ("AILA") and the Vermont Service Center ("VSC") on October 23, 2008. The VSC did not admit that these RFEs were overly burdensome.[3] The VSC acknowledged that a list of requested documents in an RFE should be prefaced by the issue to be proven. The VSC stated that RFEs may focus on (1) the specialty work to be performed in consideration of the basic occupational job description provided; (2) for whom the specialty work will be directly performed, and/or (3) where the specialty work will be performed. On the issue of the tone of the RFEs, the VSC noncommittally stated that while the language may appear mandatory, the items requested by the

USCIS are all items that should be reasonably attainable by the Petitioner.

AILA also raised the same issues in an AILA/USCIS liaison meeting on October 28, 2008 and asked that the USCIS remind examiners that RFEs need to have a specific focus and that it is not normally appropriate to "dump" the entire template in a RFE. In response, the USCIS stated that the onus is on the Petitioner to present all required initial evidence when requesting an immigration benefit and that adjudicators are encouraged to articulate the deficiencies in the requests for immigration benefits.[4] The USCIS also stated that a Petitioner can articulate in its response to an RFE the reasons why it believes that the RFE is overly broad.

Hence, it appears that the USCIS will, at least for the time being, continue to issue these lengthy RFEs to computer consulting companies filing H-1B petitions. This is true even with established computer consulting companies who previously had no problems with their H-1B filings. In anticipation of such an RFE, the computer consulting company's only option is to make every effort to pre-empt the RFE by providing as much information as possible when filing the H-1B petition, or at least be prepared to submit the information if it gets an RFE.

Practitioners could consider doing the following:

- Describe the nature of the Petitioner's business in extensive detail and provide a company organizational chart with names and job titles and a copy of the company brochure or other press materials;
- Provide proof of Petitioner's Federal Employer Identification Number (FEIN);
- Describe in detail why the company requires the services of an individual in the Beneficiary's position;
- Provide a detailed job description including percentages of time spent for each duty the Beneficiary will perform;
- Provide copies of Petitioner's employment contract with the Beneficiary or a summary of the terms of an oral contract;
- Provide copies of Petitioner's service contracts clearly stating the end users to prove that the Beneficiary will indeed be employed in the capacity stated on the petition;
- Ensure that the Labor Condition Application ("LCA") covers *all* areas of the Beneficiary's employment;

- Provide a copy of Petitioner's most recent tax return as proof of the Petitioner's overall ability to offer work in a specialty occupation; and
- Take standard photographs of the Petitioner's premises and provide with each petition.

If the Beneficiary will work on in-house projects:

- Clearly describe the Petitioner's market, product, track record in software development and proof of resources to maintain software development; and
- Describe the Beneficiary's training and expertise in extensive detail and the in house project on which s/he will work;

While one can certainly grasp the USCIS' need to ensure the integrity of the H-1B visa, hopefully, through the efforts of AILA and through a Petitioner's own forceful response to an RFE, the USCIS will seek to educate its adjudicators to issue, only when necessary, a detailed RFE specific to the Petitioner. At a very minimum, a Petitioner's response to one such burdensome RFE should preclude the issuance of other identical RFEs with respect to similar H-1B petitions filed by Petitioner. In the meantime, it appears that those seeking an approved H-1B petition in the computer consulting industry have no choice but to comply with the USCIS' requests.

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[1] Interoffice Memorandum, William R. Yates, Associate Director, Operations,

Requests for Evidence (RFE) and Notices of Intent to Deny (NOID), HQOPRD 70/2, February 16, 2005. This Memo is posted on AILA Infonet at Doc. No. 05021810.

[2] Interoffice Memorandum, Donald Neufeld, Acting Associate Director, Domestic Operations, *Removal of the Standardized Request for Evidence Processing Timeframe Final Rule, 8 C.F.R. 103.2(b), Significant Revision to the Adjudicator's Field Manual (AFM) Chapters 10.5(a), (b); New Appendix 10-9 (AFM Update AD07-05),* HQ 70/11, 70/12, AFM Update AD07-05, June 1, 2007. This Memo is posted on AILA Infonet at Doc. No. 07062171.

[3] *See* AILA Liaison/VSC Meeting Minutes (10/23/08), posted *on* AILA InfoNet at Doc. No. 08103066.

[4] *See* AILA Liaison/USCIS Meeting Minutes (10/28/08), posted *on* AILA InfoNet at Doc. No. 08110767.