

Mobility: immigration alert

March 2021

United States

H-1B rescinded memos and reconsiderations

Executive summary

On 12 March 2021, United States Citizenship Immigration Services (USCIS) announced that it may reopen adverse decisions on previously filed H-1B petitions, which were based on three policy memos that have since been rescinded. At its discretion, the USCIS will accept a motion to reopen (MTR), a decision based on one or more of the rescinded policy memos. In order to be considered, the employer must file the MTR before the end of the validity period requested either in the petition or the labor condition application, whichever is earlier.

Background and analysis

The three rescinded memos are as follows:

1. "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements," issued 8 January 2010
2. "Rescission of the 22 December 2000 'Guidance memo on H-1B computer related positions,'" issued 31 March 2017
3. "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites," issued 22 February 2018

The first memo, "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, including Third-Party Site Placements," focused around the employer-employee relationship required in an H-1B non-immigrant work visa petition. The memo clarified

the employer-employee relationship, particularly for independent contractors and beneficiaries placed at third-party worksites. Under this memo, the USCIS required a wide range of evidence, including a complete itinerary of services or engagements, contracts between the petitioner and a client, contractual agreements and statements of work, and the petitioner's organizational chart.

The second memo, "Rescission of the 22 December 2000 'Guidance memo on H-1B computer related positions'" focused on the H-1B qualification of computer programmers. The memo added a requirement for employers to provide additional, extensive evidence to demonstrate that a bachelor's degree in computer science (or a related field) was required in order to sponsor a computer programmer as an H-1B beneficiary. The result was an increase in requests for evidence and denials of this H-1B occupational category.

The third memo, "Contracts and Itineraries Requirements for H-1B Petitions involving Third-Party Worksites," focused around employees who will be deployed to third party worksites. The memo noted that proving the employer-employee relationship, a requirement in the H-1B context, is particularly strenuous for workers at off-site or third-party worksites. Under this memo, the USCIS required detailed documentation regarding work assignments, milestone tables, legal contracts, detailed statements of work, and letters signed by an authorized official of the end-client company.



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The first two memos were rescinded on 17 June 2020, while the third memo was rescinded on 3 February 2021, which means that new petitions need not meet the above requirements. Now, as of 12 March 2021, the USCIS has announced that it will further reconsider past decisions that were denied due to any of the now rescinded memos.

What this means

An employer who has received a denial of the H-1B petition based on any of the above memos may now file an MTR for a previously denied H-1B petition. This will be particularly useful for employees who are often deployed to client sites or work in a computer related field.

While the USCIS has indicated that it is willing to re-open and reconsider these determinations, the decision to re-open and adjudicate will be at the USCIS' discretion. It is important to note that employers must continue to provide sufficient evidentiary documentation to show that the employment is otherwise qualifying for H-1B purposes.

The takeaway for employers and affected H-1B employees is that they are now able to have previous denials reconsidered under the current policy regime. In addition, employers will save a substantial amount of time, resources and effort as a result of the new changes.

We will continue to monitor and review future developments. For additional information, or if you wish to discuss this further, please contact your EY Law LLP professional.

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