



BRIEFING - Feds blasted over H-1B restrictions for staffing

Craig Johnson, cjohnson@staffingindustry.com

Memo restricts staffing firms' ability to bring in foreign workers on H-1B visas

Experts say political pressure propelled memo

'Attack on the staffing industry's business model'

Lawsuit under consideration

Event

U.S. Citizenship and Immigration services heard complaints during a public hearing Thursday over a memorandum that restricts staffing firms' ability to bring in foreign workers on H-1B visas.

Separately, some organizations are considering a lawsuit against the agency over the memo.

Background and analysis

"We see this as a major threat -- it's an attack on the staffing industry's business model," said Mark Roberts, CEO of the TechServe Alliance, a collaboration of information technology services firms, clients, consultants and suppliers.

"We're evaluating moving forward with litigation against the agency," Roberts said. "The memorandum is an incorrect interpretation of law."

Employers use H-1B visas to bring in workers with college degrees who have special skills. The memo's restrictions would impact IT staffing firms as well as healthcare staffing firms, particularly those who bring in doctors and allied healthcare professionals.

The TechServe Alliance is working with other groups, including the American Staffing Association, Roberts said.

There have already been reports of workers being turned back at the border, and the memo has created a chilling effect among workers, he said.

And although the memo came out in January, difficulties began building earlier following a 2008 report on H-1B visa fraud and corresponding political pressure from Capitol Hill, Roberts said.

Early on, a USCIS checklist was inadvertently released publicly subjecting some staffing firms to greater scrutiny. The checklist stated H-1B requests from any IT staffing operation less than 10

years old and with less than \$10 million in revenue would automatically be referred to the fraud division, according to Roberts.

There also appeared greater intrusion into the relationship between staffing firms and buyers through requests for evidence by USCIS officials, Roberts said. The officials started demanding letters from staffing clients and even demanding to speak with clients, he said.

"You started to see this increasing hostility toward the IT staffing business model," Roberts said. That ultimately culminated in the memorandum.

The memo

Employers apply for H-1B visas on behalf of workers, and the memo provides examples of what represents an employer-employee relationship and what doesn't.

Two examples of what doesn't represent an employer-employee relationship include "third-party placement/'job shop'" and "independent contractors." The staffing firm business model doesn't qualify, according to the memo, because a staffing firm does not maintain control over an employee's daily tasks.

"They're basically saying the employer relationship rides on whether you control the actual day-to-day work activities of the employee," said Mike Hammond, an attorney with the Hammond Law Group LLC.

And that's at odds with other agencies' definition of the relationship, Hammond said. "There's not a single other federal agency or state agency that has found that there wasn't an employer-employee relationship in the staffing model."

The memo primarily impacts IT and healthcare staffing -- especially companies that provide allied health and physicians, Hammond said. Already, he said he has seen a denial in the case of an IT worker. And the memo would impact both new H-1B visas and those coming up for renewal.

Hammond said he was encouraged by Thursday's meeting, and said USCIS officials on hand actually appeared to be listening to the concerns.

Thursday's public hearing, held in Washington, attracted between 40 and 50 people in person and as many as 600 people called in on a conference line. Hammond, who attended the meeting in person, said the unusually large attendance shocked the officials.

"However, I'm still not convinced that without litigation anything dramatic is going to be done," he said. "There is an attitude at the (USCIS) service centers that staffing and the staffing model is bad."

There's also a lot of political pressure from Capital Hill from places such as Sen . Chuck Grassley's office, Hammond said.

Pressure

"My basic take is that the memorandum is plainly as a result of a lot of political pressures being put on USCIS," said Chris Musillo, an immigration attorney with MusilloUnkenholt Immigration Law. "It's clearly aimed at restricting the use of the H-1B...the memorandum that came out, and I think this unquestionably true, is fairly weakly grounded in law; and because of that I do think if it is challenged I think they USCIS would likely lose."

USCIS officials on Thursday indicated another public meeting on the memo could take place in March. And Musillo said the agency will likely query its local offices to see if there's a material change in the number of H-1B visa denials.

The agency may then pull the memo or keep it out there but not really rely on it, he said. A third possibility is that the agency gets sued.

Greg Siskind, an immigration attorney and founding partner of Siskind Susser, said the memo will have a definite chilling effect on staffing firms as well as "a chilling effect downstream where the prospective client site has heard about it."

Siskind said he has worked on one case where a healthcare staffing firm's hospital client became concerned after hearing about the memo.

In addition to an apparent inaccurate definition of an employer, the memo also doesn't appear to have gone through Administrative Procedures Act requirements properly or Paperwork Reduction Act requirements, he said.

The Paperwork Reduction Act aims to oversee government collection of information including preventing overly burdensome requests. However, Siskind said one request for information from a USCIS operative was for a hospital, a staffing firm client, to provide a list of every nurse that it has employed in its 75-year history.

Several speakers in Thursday's public hearing rose concerns against the memo.

"I think this memo is completely off basis with respect to its analysis of [staffing industry] employment structure," said Bruce Morrison, a former Connecticut congressman who was representing AMN Healthcare Services Inc.

The staffing industry "really deserves a separate look and a separate set of rules to follow," Morrison said.

Morrison said he wrote H-1B as a member of Congress.

Other speakers said restricting H-1Bs from staffing firms could simply cause large firms to shift work overseas.

Another said a number of IT staffing companies in New Jersey have closed down because of the memo. In addition, the speaker said H-1B visa holders pay taxes, their knowledge remains in this country and H-1B limitations may convince masters' degree students to not come to the U.S.

The speaker also asked whether refunds would be available in cases where H-1B visas are denied. Separately, Siskind said it can cost more than \$3,000 to file an H-1B petition.

Not all speakers or callers opposed the H-1B restrictions for staffing firms. One of those speaking in favor of the limitations said "employers want inexpensive, young blood," and said that although he had a doctorate in Radiation Biophysics, he was out of work.

Staffing Industry Analysts' perspective

For staffing firms relying on H-1B visas as a key recruitment tool, recent restrictions seemingly aimed at such firms will be a significant blow. Firms employing H-1B visas are most commonly found in the IT and healthcare segments, where U.S. skills shortage has driven such firms to seek talent abroad.

The fight on this is not over -- the industry will no doubt respond through lobbying efforts as well as potential lawsuits. However, the damage is likely already under way. Buyers nowadays are nervous (and legitimately so) regarding legal issues, so the hint of fed opposition to foreign workers through temp agencies will act as a current tax on such transactions even if the new restrictions are ultimately reversed down the road.

Additionally, skilled foreign workers are not quite as desperate as they used to be. Opportunities in their home countries are rapidly improving. Infighting within U.S. interests as to whether we really want talented people to come here is bound to diminish interest.

Staffing firm use of H1-B visas has been limited for years due to other issues. Now it will be further so.

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