The *Neufeld* H-1B Memo: Legally Enforceable Policy Directive or Grounds for Law Suit?: A Position Paper by Rami D. Fakhoury[1] and Mark Levey[2]

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BACKGROUND

On January 8, 2010, USCIS issued a directive that is of importance to companies that utilize the H-1B program, particularly firms that place non-immigrant workers at client sites or have owners working on H-1B or L-1 visas. The memo to Service Center Directors was written by Donald Neufeld, Associate Director Service Center Operations, hereinafter, the "*Neufeld* memo" .[3]

The *Neufeld* memo outlines new guidance to USCIS officers at Service Centers processing H-1B applications, and also signals a new focus for the agency's efforts to regulate outsourcing and so-called Job Shops. It has also aroused concerns about what appears to be new restrictions on non-immigrant visas for upper managers who have an ownership interest in petitioning companies. The *Neufeld* memo is important to all H-1B employers because it lays out an expanded list of documents in several categories that companies will now have to provide with initial petitions for H-1B workers.

Significantly, the *Neufeld* Memo identifies a number of categories of outsourcing applications that the Service will approve and a list of documents that will be required. It also describes several scenarios involving types of cases Service Center examiners should not approve, and provides what the agency now claims to be a legal rationale for how they are to make these decisions.

In addition to heightened documentary demands, the memo instructs examiners how they should deal with the issue of employer "control" over the work of H-1B beneficiaries assigned at third-party client sites. While some of these issues are not new, this is a significant restatement of how USCIS will treat certain categories of applications, and a warning that the agency will be requiring all applicants to address and document issues related to control. Finally, and of greatest concern to some observers, it communicates that USCIS will also be more strictly enforcing rules against the self-employment of investors, the hiring of independent contractors, and will be looking at certain indicators that H-1B petitioners are

[3] *See,* Donald Neufeld, Associate Director, Service Center Operations, DHS, USCIS, HQ 70/6.2.8, AD10.24, Memorandum for 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)(Jan. 08, 2010), linked at: http://www.ilw.com/immigrationdaily/news/2010,0521-neufeld.pdf

actually employment agencies, and will deny those determined to be operating outside the traditional "employer- employee relationship."

The memo has raised questions about the legality of what some comments see as new USCIS policies restricting eligibility for non-immigrant visas, potentially in the L-1 as well as H-1B category, of upper managers with a proprietary interest in the petitioning firm. The American Immigration Lawyers Association (AILA) issued the following statement on that point, which calls on the agency to reverse the Neufeld directives that, according to AILA, violate "the intent of Congress in the INA as well as longstanding agency precedent and policy." The AILA response is below:

> "The Neufeld Memorandum, the AAO's recent non-precedent decision and the adjudications at the Service Centers that are applying these decisions to current filings seek to overturn over fifty years of consistent precedent and regulatory interpretation to categorically deny eligibility for benefits to an entire class. Moreover, this longstanding line of precedent decisions is entirely consistent with the intent of Congress, which has amended the INA numerous times since the first decision in *Matter of M*, but has never taken action to specifically exclude working owners as beneficiaries of employment-based nonimmigrant and immigrant petitions irrespective of the degree to which the working owner controlled the petitioning entity. AILA urges USCIS to immediately rescind the Neufeld Memorandum, and issue a new policy memorandum that clearly sets out the agency's official position on this issue, provides a correct interpretation of the *Darden, Clackamas* and *Yates* decisions, and upholds the intent of Congress in the INA as well as longstanding agency precedent and policy. AILA believes this memorandum should include all employer-sponsored immigrant and nonimmigrant visa petitions, state that under Yates the Service must not resort to the common law definition of employee, that it is the agency's position, based on Congressional intent and longstanding precedent, that working-owners are employees for all such petitions and that any required employer-employee relationship is satisfied where the petitioner is a U.S. legal entity." Letter to USCIS dated Jan. 26, 2010; AILA InfoNet Doc. No. 10012760.

ANALYSIS

A. Evidentiary Requirements Under Neufeld Imposed Without Meeting APA Requirements for Notice and Comment

While it does not articulate entirely new policy, the *Neufeld* memo continues and amplifies an alarming trend toward USCIS departure from lawful regulatory requirements under the Administrative Procedures Act (APA) that agencies publish significant policies with broad application that deviate from published rules and procedures.

First, there are things that have not significantly changed by issuance of the *Neufeld* memo. Under the APA, federal agencies and departments have flexibility in the way they can regulate. Agencies can make rules either through publication of binding regulations or by a case-by-case adjudications method. Both approaches to rule-making are perfectly acceptable pursuant to the Supreme Court's seminal 1947 *Chenery II* decision; that case sets out the original ground rules for such matters, allowing agencies a choice, but the decision also imposed limits on how rule-making may be done. For instance, under the *Chenery* principles, the agency may not issue case-by-case rulings that violate a previous published rule, and rulemaking by adjudication is only permitted to affect a small, specific class of applicants. Any rule that has more general application must be published under the APA "notice and comment" requirement. [5 U.S.C. Sec. 553] Unless and until the agency eventually publishes its new rule in *The Federal Register* it does not have force of law. Even the most deferential standard possible, embodied in the *Chevron* decision, mandates that agency decisions are not entitled to deference by the courts unless they hold the "force of law."[4] The burden is on the agency to establish the rationality of such an informal interpretation under an older *Skidmore* standard, "according to its persuasiveness."[5]

Recent decisions interpreting *Chevron* limit "Chevron deference" to agency rulings derived by APA § 553 formal "notice and comment" process, and withhold it from more informal types of agency decision-making by the agency. The vast majority of USCIS and DOL rulemaking is de facto rules and binding norms, not published regulations. The limits on the use of the informal approach in the context of immigration have been interpreted in a line of federal decisions as follows:

In *Raungswang v INS*, 591 F.2d 39 (9th Cir. 1978)[6] the Ninth Circuit held that legacy INS had abused its discretion in denying the investor visa petition by adding requirements without allowing for notice. In that case, the panel considered the appropriateness of new requirements imposed through adjudication by the Board of Immigration Appeals on investor visa immigrants beyond those expressly stated in the then pertaining regulations. The Circuit found informal rulemaking in that instance to be impermissible, applying the following analysis:

> We are aware that, as the INS argues, courts must give "great deference" and "controlling weight" to an agency's interpretation of its own regulations. E. g., United States v. Larionoff, 431

[4] See, *CHEVRON U.S.A., INC. V. NRDC,* 467 U. S. 837, 842-45 (1984) .

[5] See, *UNITED STATES V. MEAD CORP.*, 533 U.S. 218 (2001) 185 F.3d 1304, op. cit. , *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

[6] See, http://bulk.resource.org/courts.gov/c/F2/591/591.F2d.39.77-2375.html

U.S. 864, 872, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977); Udall v. Tallman, 380 U.S. 1, 16-17, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965). That doctrine is inapplicable, however, when the agency's interpretation " 'is plainly erroneous or inconsistent with the regulation.' " United States v. Larionoff, supra, 431 U.S. at 872, 97 S.Ct. at 2156 (quoting Bowles v. Seminole Rock Co., 325 U.S. 410, 414, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)). We have thus refused to defer to an agency construction that "is clearly contrary to the plain and sensible meaning of the regulation." Hart v. McLucas, 535 F.2d 516, 520 (9th Cir. 1976). What is clear in this case is that the interpretation of the INS is contrary to the plain language of the regulation, and that there was no reason for Mrs. Ruangswang to expect, when she sought to comply with the regulation, that the requirements for receiving an adjustment of status would be anything other than the objective criteria set forth in the 1973 regulation.

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Hence, under principles of agency interpretation, the Board's application of the law cannot be sustained. The objective criteria of the 1973 regulation were clearly met by Mrs. Ruangswang. There simply is no room for the agency to interpret the regulation so as to add another requirement.

There is a second element applied by the Circuit in the *Raungswang* analysis [18-22]. The court ruled INS may not make use of informal rulemaking through adjudications "to change course in midstream" where the departure from previous agency practice has an adverse consequence on a party, and where the party had reliance on the previous rule:

Our review of whether the proper law was applied, however, does not end when we determine that the added requirement is not justified by agency interpretation. We must still consider whether the Board may establish the standards that it sought to apply by the adjudicatory proceedings in this case and have them bind Mrs. Ruangswang.

Through a series of cases commencing with its second decision in SEC v. Chenery Corp. (Chenery II), 332 U.S. 194, 67 S.Ct. 1575, 91 L.Ed. 995 (1947), the United States Supreme Court has held that administrative agencies may properly use adjudication to "announc(e) and (apply) a new standard of conduct," Id. at 203, 67 S.Ct. at 1580. In NLRB v. Wyman-Gordon Co., 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), Justice Fortas, speaking for a plurality of four, stated that although the NLRB could not, in light of the Administrative Procedure Act, establish binding prospective rules by adjudication, it could establish a new standard of conduct that would be binding on the parties before it in any particular case, and that such adjudications could have stare decisis effect.

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More recently the Court again considered this question, and, relying heavily on the two former cases, held that the adjudicative forum can often be used to announce new principles applicable to the specific parties before the NLRB in particular cases, even if the principles involve a change from past policies. NLRB v. Bell Aerospace Co., 416 U.S. 267, 290-95, 94 S.Ct. 1757, 40 L.Ed.2d 134 (1974). The Court cautioned, however, that "there may be situations where the Board's reliance on adjudication would amount to an abuse of discretion or a violation of the Act . . . ."

> Id. at 294, 94 S.Ct. at 1771. The Court suggested that the "adverse consequences ensuing from . . . reliance (upon the NLRB's past decisions may be) so substantial that the Board should be precluded from reconsidering the issue in an adjudicative proceeding." Id. at 295, 94 S.Ct. at 1772. Adjudication might also be inappropriate where "some new liability" results from "past actions which were taken in good-faith reliance on Board pronouncements," or where "fines or damages" are involved. Id.
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> While the Court favors, whenever possible, the use of prospective quasi-legislative rule-making powers to formulate new standards rather than ad hoc adjudication, See, e. g., Chenery II, supra, 332 U.S. at 202, 67 S.Ct. 1575; NLRB v. Majestic Weaving Co., 355 F.2d 854, 860 (2d Cir. 1966), we have not received definitive limits on agency6 use of adjudicative proceedings to change course in midstream. We are, however, convinced that what the Board seeks to do in this case is beyond the bounds of that which is permissible under Bell. The adverse consequences voluntary departure at best, and deportation at worst are certainly substantial. In the sense that the requirement added to the 1973 regulation prevents an adjustment of status, there is some new liability. Finally, if there was good faith reliance on the 1973 regulation, Bell militates against allowance of the adjudication method.

Following *Ruangswang*, the 9th Circuit further limited the ability of INS to informally expand the reach of its regulations by adjudications in its subsequent ruling, *Patel v. INS.* As the Board of Immigration Appeals ruefully observed upon remand in *Matter of Patel*, 15 I&N Dec. 2842 (BIA, 1980)[7]:

> Subsequently, in *Matter of Wang,* 16 I&N Dec. 711 (BIA 1979), another case arising in the Ninth Circuit, we distinguished the Ninth Circuit's *Ruangswang* opinion holding that an alien who had made an investment more than a year after *Heitland* was decided had had adequate notice of its requirements and had to comply with them. However, the Ninth Circuit has recently rendered another decision which holds that the *Heitland* requirements cannot be added to the terms of the regulation even where there has been ample notice. *Patel* v. *INS,* 638 F.2d 1199 (9th Cir. 1980) Accordingly, since the present case arose in the Ninth Circuit, the *Heitland* requirements will not be applied in determining whether the respondent has established eligibility for classification as an investor. Consequently, on the basis of the immigration judge's finding that the respondent has satisfied the specific criteria set forth in 8 C.F.K. 212.8(b)(4), we conclude that the respondent is eligible for investor classification.

As the BIA notes, the *Patel* decision is very significant inasmuch as it holds that the element of lack of notice is not the sole ground upon which abuse of discretion may be found in such cases. Another impermissible practice, as the court finds in *Patel*, is the application as dicta of rules discarded from previous regulations that do not appear in those actually published as final regulations. The Circuit observes in the *Patel* ruling [9]:

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[7] See, http://www.justice.gov/eoir/vll/intdec/vol17/2842.pdf

> After the promulgation of this new regulation in 1973, the Board decided Heitland, supra, 14 I. & N. Dec. 563, a case arising under the "substantial amount of capital" requirement of the pre-1973 regulation. Heitland overruled previous Board interpretations of "substantial," and stated that the alien's investment "must tend to expand job opportunities and thus offset any adverse impact which the alien's employment may have on the market for jobs ...." 14 I. & N. Dec. at 567. Although Heitland was concerned only with the pre-1973 "substantial amount of capital" requirement, it stated in dicta that the recently-promulgated and facially-objective 1973 regulation must also be construed to require that the investment expand job opportunities. Id. at 566-67. Thus, by adjudication, the Board attempted to add a requirement to the 1973 regulation which had been expressly discarded during its rule-making proceedings.2

B. USCIS is presently engaged in precisely the same agency practice that *Patel* barred. Potential litigants are now adversely effected by the application by USCIS of dicta regarding heightened levels of evidence of control and "full itineraries" required of companies that outsource H-1B workers to third-part client sites.

What, in fact, appears to have happened is that portions of Proposed Regulations published in 1998, but never published as Final Regulations, have been selectively implemented in order to carry out the *Defensor* decision and a *de facto* policy of restricting H-1B outsourcing. This sort of selective implementation of proposed regulation is well outside the permissible limits of an agency's normal discretionary power to interpret its own regulations, and is *ultra vires*. Once the regulatory process has commenced by publication of proposed rules, these can only be adopted by publishing final or superceding regulation. Furthermore, application of such *de facto* rules or binding norms, where they conflict with existing law, regulation, agency rules or binding norms is an abuse of discretion, and they may not be relied upon in adjudications. They certainly deserve no deference by courts of review.

Meanwhile, both the and Patel cases remain good law and both are widely cited in subsequent cases across the circuits.

The stated purpose of the 1998 proposed regulations[8] was as follows:

> to amend the Immigration and Naturalization Service's (Service) regulations to accommodate the needs of certain United States employers with respect to the filing of new and amended petitions for H-1B nonimmigrant workers. This rule was written in response to a number of complaints received from certain industries which asserted that the current H regulations contain requirements with which some U.S. employers cannot comply. In addition, the current

[8] See, Federal Register/Vol. 63, No. 107/Thursday, June 4, 1998/Proposed Rules/pp. 30419-23, http://ftp.resource.org/gpo.gov/register/1998/1998_30421.pdf.

> regulations contain certain procedures which are burdensome to both the Service and to the public. Specifically, this rule proposes to amend the Service's regulation with regard to the submission of itineraries with certain H-1B petitions. [30421]

Specifically, those proposed rules laid out new regulatory provisions for H-1B petitions. A regulatory change was proposed regarding the potential placement of a beneficiary at multiple client sites, the regulatory change proposed at 214.2(h)(2)(i)(B) read:

> Services or training in more than one location.--(1) H-1B petitions. An H-1B petition which require services to be performed or training to be received in more than one location must include, to the extent possible, a complete itinerary with the dates and locations of the services or training to be performed. The petition must be filed with the Service Center having jurisdiction over the place where the petitioner is located. The address which the petitioner specifies as its location on the petition shall be where the petitioner is located for purposes of this paragraph. If the petitioner has not yet determined all of the locations where the beneficiary might be employed at the time of filing, the petitioner must provide an itinerary of all definite employment and provide a description of any proposed or possible employment for the period of time covered by the petition. Petitions filed by an agent must also comport with 8 CFR 214.2(h)(2)(i)(F).[30421-22]

Of course, proposed regulations have no real effect until published in final form, and this provision did not make it into the *Code of Federal Regulations*. See, APA, Secs. 552, 553. The actual regulation currently reads:

> 214(h)(2)(i)(B) Service or training in more than one location. A petition that requires services to be performed or training to be received in more than one location must include an itinerary with the dates and locations of the services or training and must be filed with USCIS as provided in the form instructions. The address that the petitioner specifies as its location on the Form I-129 shall be where the petitioner is located for purposes of this paragraph.

The requirement for submission of "a **complete** itinerary" for H-1B workers assigned to multiple worksites clearly did, however, become a de facto norm, but without the allowance for "to the extent possible" and without becoming regulation, as the APA would require. In the present matter, the Service is imposing a burden of evidence in excess of what is consistent with the regulations, and even exceeds what was in the proposed regulations.

Instead, a general statement of job duties and itinerary along the lines of those specified in the Aytes and Crocetti memos is no longer acceptable to the agency, as the present denial at issue makes manifest. Similarly gone by the wayside is the guidance offered in the Aytes memo regarding the factors that a Service Center adjudicator should consider in deciding the credibility of a petitioner's itinerary:

> The petitioner's past hiring should also be considered in determining whether the petitioner has met the itinerary requirement as discussed in the regulation. Certainly a

company's demonstrated past practice of employing H-1B nonimmigrants in conformity with the statute and regulation should be given significant weight in determining whether the itinerary requirement has been met. [Aytes memo, Ibid.][IBID.]

C. Application of standards amounting to substantive agency rules without publication of final agency rules violates APA requirements.

The Administrative Procedure Act (APA) sets forth the requirements for "informal rulemaking," the process generally used by agencies to issue legislative rules. The informal rulemaking process, "notice-and-comment rulemaking," requires that DHS first issue a notice of proposed rulemaking (NPRM) and provide an opportunity for public comment on the proposal before it can issue a final rule. APA §§ 5 U.S.C. 553.

That process normally follows a three-step sequence of publication of proposed regulations, public comment, and finally publication of final agency regulations. However, publication of final rules is not mandatory if the agency finds good cause to adopt a rule without prior public participation. 5 U.S.C. 553(b)(3)(B). The good cause requirement is satisfied when prior public participation is impracticable, unnecessary, or contrary to the public interest. Where the agency determines that it will implement its interim rule as final regulations they must be "a logical outgrowth" of the Agency's interim rule.

Here, the petitioner does not object to the Agency's decision to not adopt its proposed 1998 amendments to the regulations at 214(h)(2)(i)(B). DHS may choose to not implement its proposed regulations if they are not published in final form. *See Am. Iron & Steel Inst. v. EPA,* 886 F.2d 390, 400 (D.C.Cir.1989) ("One logical outgrowth of a proposal is surely, as [an agency] says, to refrain from taking the proposed step."). However, USCIS in this case did more, and less —after taking the first step in its rulemaking, USCIS adopted only a select portion of it in such a way as to cherry-pick its original 1998 mandate, contradicting the original stated purpose "to accommodate the needs of certain United States employers with respect to the filing of new and amended petitions for H-1B nonimmigrant workers." Once a rules change is proposed, it may be completed or abandoned, but never partially implemented in such a way as to significantly alter the meaning of the original proposal. As the US Court of Appeals for the District of Columbia Circuit found in *Environmental Integrity Project v. EPA*, 425 F3d. 992 (October 7, 2003) at 16, this type of:

> "flip-flop complies with the APA only if preceded by adequate notice and opportunity for public comment. *Compare Alaska Prof'l Hunters Ass'n, Inc. v. FAA,* 177 F.3d 1030, 1034 (D.C.Cir.1999) ("When an agency has given its regulation a definitive interpretation, and later significantly revises that interpretation, the agency has in effect amended its rule, something it may not accomplish without notice and comment."), *and Paralyzed Veterans of Am. v. D.C. Arena L.P.,* 117 F.3d 579, 586 (D.C.Cir.1997) ("Once an agency gives its regulation an interpretation, it can only change that interpretation as it would formally modify the regulation itself: through the process of notice and comment rulemaking."), *with Hudson v. FAA,* 192 F.3d 1031, 1036

(D.C.Cir.1999) (stating agency may change its longstanding policies without notice and comment, so long as "there is no dispute as to the regulation's meaning"), *and Syncor Int'l Corp. v. Shalala,* 127 F.3d 90, 94 (D.C.Cir.1997) ("[I]nterpretative rules and policy statements are quite different agency instruments. An agency policy statement does not seek to impose or elaborate or interpret a legal norm. It merely represents an agency position with respect to how it will treat—typically enforce—the governing legal norm.").

If USCIS desires to modify or implement the 1998 rules in this instance, the requirement for a NPRM is mandatory - a requirement the agency itself recognized in its publication years ago of the Proposed Rules. The agency may not now plausibly argue that rulemakings are exempted as mere "interpretation" or for "good cause" ("impracticable, unnecessary, or contrary to the public interest;" e.g., for such things as "emergencies"). In this case, clearly USCIS cannot now, eleven years later, claim that there is an emergency, or that it would be contrary to the public interest to delay formal publication of the rule.

Similarly, a member of the public could not have anticipated that the 1998 proposal would result in the *de facto* rule, thus the APA requirements have not been satisfied. That proposal expressly allowed an exception for production of itineraries to "the extent possible." In fact, as the present matter illustrates, the agency is imposing on the petitioner an impossible or impractical burden for itineraries that detail unforeseeable future assignments. The *de facto* rules also defeat the purpose stated for the 1998 proposals, which were "written in response to a number of complaints received from certain industries which asserted that the current H regulations contain requirements with which some U.S. employers cannot comply." The *de facto* rule and current actual agency practice do not even suggest a course of action similar to the proposed rule and, therefore, the *de facto* rule could not have been anticipated by the public.

Furthermore, pursuant to the APA, the agency's decision has to be reasonable; and it must provide a basis for its decision and show how the rule will achieve its purpose. The APA notice-and-comment process recognizes that changes may be made to the proposed rule based on the public comments received, but the courts have required that any changes made in the final rule be of a type that could have been reasonably anticipated by the public – a logical outgrowth. If the "logical outgrowth test" is not met, the agency needs to provide a second notice with an opportunity for public comment on the changes.

The USCIS de facto rule violates APA §§ 551(5), 553(c), because it was not a "logical outgrowth" of the Agency's proposed interim rule and therefore did not comport with the requirements of notice-and-comment rulemaking. *See Sprint Corp. v. FCC,* 315 F.3d 369, 375-76 (D.C.Cir.2003); *Kooritzky v. Reich,* 17 F.3d 1509, 1513 (D.C.Cir.1994).

Once the comment period closes and the agency has reviewed the comments received and analyzed them, the agency has only three options: the agency may proceed with the rulemaking proposed, issue a new or modified proposal, or withdraw the proposal. It may not partially implement the delayed rule in such a way that it evades the "logical outgrowth test." Before issuing a final rule, the agency makes any

appropriate revisions to the various supporting analyses prepared for the NPRM. The final rule may be published in the *Federal Register* or personally served on affected interests.

Finally, the provisions contained in a final legislative rule cannot be made effective in less than 30 days after final publication, unless it is granting an exemption, relieving a restriction, or for "good cause," which includes such things as emergencies. Sometimes agencies will set implementation or compliance dates that are later than the effective date of the rule. This may be because the rule is being implemented in stages following its effective date, because the agency may want to allow compliance with the new rule before it is required, or for other reasons. None of these latter exceptions apply in this matter.

Furthermore, the agency's construction of its H-1B and L-1 rules fails the older *Skidmore* standard of deference test articulated as a four-factor test (which echoes *Chenery*), examining: (1) the thoroughness of the agency's investigation; (2) the validity of its reasoning; (3) the consistency of its interpretation over time; and (4) other persuasive powers of the agency.[9]

By no imaginable legal standard, therefore, do USCIS dicta such as its broad reliance on the *Defensor* decision[10] carry the force of law, and they further fail under other standards of deference. The articulation of the same unpublished rules in the *Neufeld* memo[11], while better reasoned, have the same fatal shortcoming. Even where better argued, the effect of certain key Service policies still discriminate against certain forms of technical consulting services predominantly offered by firms based in India and China. Restrictions on cross border services of this kind remains in violation of trade treaty commitments the U.S. has signed and ratified. The courts do not owe these dicta *Chevron* deference. [See, Sec ___] There is no legitimate doctrinal reason why the courts should or would choose to defer to such a procedurally defective construction by the agency, particularly since they violate law as well as constitutional rights . As this book will show at length, these dicta are neither rational nor consistent with Congressional intent. Finally, they violate the rights of U.S. firms who have a cognizable interest in benefits available under law, and guaranteed by Treaty. If USCIS does not move on its own to abandon or modify its stance on these and related issues, there is good reason to expect relief may be available in the courts.

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[9] See, CHRISTENSEN V. HARRIS COUNTY, 529 U.S. 576 (2000); op cit., *Ibid.*.

[10] See, ***Defensor** v Meissner* (2000, CA5 Miss) 201 F3d 384 .

[11] See, Donald Neufeld, Associate Director, Service Center Operations, DHS, USCIS, HQ 70/6.2.8, AD10.24, Memorandum for 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)(Jan. 08, 2010), linked at: http://www.ilw.com/immigrationdaily/news/2010,0521-neufeld.pdf

The main reason this sort of informal rulemaking has gone largely unchallenged in recent years is fear in an extraordinary era of draconian government power over foreign entities, an era that may be passing. After 9/11, employers and immigration lawyers groups were understandably and justifiably afraid that they, too, would be targeted for retaliatory action.

Indeed, the immigration bar has started to fight back, as occurred in 2008, after the Labor Department moved to audit ***all*** of the PERM labor certifications filed by Fragomen, Del Rey, Bernsen & Loewy, a prominent and respected national immigration firm that is also the largest PERM filer with hundreds of pending cases. FDB&L is not shy about filing law suits against the government, and it often wins the cases it files, and, indeed, the Labor Department backed down. [12]

These flawed agency policies have done a great amount of economic damage, and there is a class of aggrieved parties with standing in the courts. Dozens, perhaps hundreds, of companies have suffered serious economic and reputational losses, particularly in targeted industries, such as Indian IT consulting and foreign-based financial firms that receive discriminatory treatment by USCIS and other agencies. Should there be class-action suit against the agencies on these and related issues, the class could be both sizable and formidable, including large multinationals and numerous small entities.

D. Persons who operate independently as consultants and those who direct companies in the U.S. on H-1B and L-1 visas should be particularly concerned about the *Neufeld* Memo

The *Neufeld* Memo concerns itself heavily with the side-issue of common law of agency and cites several Supreme Court decisions that deal with the distinction between agents and employers, employees and independent contractors, and executives and investors.

Persons who are self-employed and independent contractors may not self-petition in the H-1B and several other categories. In addition, USCIS restricts the use of agents as petitioners to a handful of occupational categories, such as fashion models, and often has used "control" as a basis to challenge the "employer-employee relationship" and deny H-1B and L-1 workers assigned to client sites. The renewed emphasis in the memo on factors such as documenting benefits and tax treatment of beneficiaries, employer provision of tools, and suggests that this is a developing area where the Service intends to more closely review petitions.

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[12] See, FRAGOMEN, DEL REY, BERNSEN & LOEWY, LLP v. CHAO et al. , DCDC, Case No. 1:2008cv01387 (August 8, 2008); related, Department of Labor, 'U.S. Department of Labor auditing all permanent labor certification applications filed by major immigration law firm,' June 2, 2008. http://www.dol.gov/opa/media/press/eta/eta20080752.htm.

The Neufeld memo specifically identifies its doctrine of control in a 1991 Supreme Court decision, *NATIONWIDE MUTUAL INSURANCE CO. ET AL.* v. *DARDEN* 503 U.S. 318 ... ("*Darden*"). The Court stated in *Darden* that since no one factor was decisive in determining the distinction between agent and employer, "all of the incidents of the employment relationship must be assessed and weighed." USCIS has taken that out of context to impose an excessive and unreasonable burden of documentation to establish the mandatory employer-employee relationship. However, USCIS is limited by its own regulations to the types of documents it can ordinarily demand to establish the qualifications of the beneficiary and to describe the nature of the proposed duties to those stated at 8 CFR 214.2(h)(2)(I)(B). [See, Appendix I, below] The Service appears to be exceeding its own regulations with regard to demands for evidence in H-1B cases.

Another case cited by Neufeld is *CLACKAMAS GASTROENTEROLOGY ASSOCIATES*, P. C. v. *WELLS* 538 U.S. 440. ("*Clackamas*"). That 2003 decision dealing with the Americans with Disabilities Act (ADA) examines the question of whether a Director-Shareholder in a professional corporation is, indeed, treated under common law as an "employee" of that firm, and that the "common law element of control is the principal guidepost to be followed whether director-shareholder physicians in this case should be counted as 'employees.'" This case is helpful and should be cited when the Service takes an overly-restrictive view in cases of proprietors petitioning as L-1, O-1 or EB-1-3 executives or managers. The elements that this decision cites as key to the employee relationship are:

> "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work
>
> "Whether and, if so, to what extent the organization supervises the individual's work
>
> "Whether the individual reports to someone higher in the organization
>
> "Whether and, if so, to what extent the individual is able to influence the organization
>
> "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts
>
> "Whether the individual shares in the profits, losses, and liabilities of the organization."

One should expect that in executive, manager and director cases that USCIS will now require additional documentation of these elements, the last one being held as a contra-indicator of employee status.

E. The Neufeld memo is an extension of the older basis for USCIS requiring the element of Control, which is not substantially rectified or changed by the Neufeld memo

Shortly after DHS took over legacy INS, examiners at USCIS Service Centers expanded the practice of issuing denials and Requests For Evidence (RFEs) in H-1B cases citing a Fifth Circuit case, ***Defensor*** *v Meissner* (2000, CA5 Miss) 201 F3d 384.

That panel decision, rendered against a Mississippi nurse placement agency, reached the overly-broad conclusion that employers in outsourcing industries are not "true employers" but are merely "token employers," and thus the stated job requirements of companies that place H-1B employees at client sites are "irrelevant."

The *Defensor* decision has, in turn, been taken by USCIS to justify imposition of excessive evidentiary burdens on outsourcing companies, particularly a requirement that consulting firms provide a copy of contracts with third-party clients and other normally privileged information to prove that the consulting work that will be done is and shall continue to be professional in nature. Quite predictably, in many cases, potential H-1B sponsors and their third-party clients, sensing potential compliance risks, refuse to produce such documents. The entirely foreseeable result has been a dramatic decline in the number of petitions for this type of case that have been filed in recent years, with major H-1B users exiting the U.S. market, moving operations offshore. That has produced a broad potential class of adversely effected parties, including firms that provided support and services to H-1B using companies.

With minor variations in wording, USCIS and the AAO have issued thousands of RFEs and denials that incorporate *Defensor* language.

F. The *Neufeld* Memo does not affect a potential litigant's ability to appeal an adverse H-1B decision

Release of *Neufeld* Memo is Reaffirmation of Status Quo and Not a New Published Regulation. Petitioners who have received denials based upon *Defensor* dicta or who may receive denials based in similar objectionable grounds under the recent *Neufeld* memo may still appeal their decisions to the AAO or move to the Circuit courts for review and remand for re-adjudication consistent with law and regulation, bearing in mind the six-year statute of limitation for suits against federal agencies.[13].

[13] 28 U.S.C. § 2401(a) states that "every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Looking closely at the January 8, 2010 *Neufeld* memo, we find far more substantive similarities than differences with previous prevailing USCIS policy, particularly *Defensor* dicta, and most of the legal issues that arise from unlawful agency procedures in recent years still apply.

As we observed above, release of the memo does not amount to withdrawal of reliance upon *Defensor* or publication of a new agency regulation, and the courts will not necessarily show the *Neufeld* memo any particular deference.[14]

While it is a somewhat more coherent exposition of *de facto* policy than was the *Defensor* decision, it does not present much of an actual change or improvement in H-1B procedures and requirements from the petitioner's standpoint. Furthermore, the *Neufeld* Memo does not correct the USCIS practice of failing to publish regulations to reflect substantial and widely applied agency policy. Finally, while it is the latest expression of *de facto* policy and binding agency norms, the memo has no controlling effect upon the AAO or even the actual practices of Service Center examiners. The memo states it is only intended for guidance and may not be relied on for a benefit, but is codified in Adjudicators Field Manual (AFM), which is binding authority, so it clearly contradicts itself.[15] Nonetheless, it is most certainly not a rule published in *The Federal Register* that might be owed judicial deference under APA standards. USCIS has still not brought itself into conformity with APA "publish and comment" requirements for its departure from published H-1B regulations.

To recap appellate implications:

- the *Neufeld* Memo does not substantially correct improper previous agency practices in its instructions to USCIS examiners or with previous Service Center interpretation;
- It does not much change USCIS *de facto* procedures or binding norms that aggrieved some firms, and the prospects for litigation remain pretty much as they were previously when the Service relied upon the *Defensor* decision for support of substantially similar policies;
- Passages of the case authority cited appear to be taken out of context;

[14] One finds in a footnote attached to a Supreme Court decision cited at page 2. of the *Neufeld* memo an interesting reference that may inadvertently point directly to the very limited degree of deference that Courts will show agency guidelines of this type. See, CLACKAMAS GASTROENTEROLOGY ASSOCIATES, P. C. v. WELLS 538 U.S. 440, 449, Ftn. 9.

[15] This memo makes it clear that the Neufeld directives are intended for "training and instruction purposes only." In addition, USCIS binding policy memos bear a "P" in the title, which this does not.

- The memo is an attempt to bypass rule making procedures under the Administrative Procedures Act (APA);
- The Memo does not appear to follow the plain language in the regulations, which is higher binding authority;
- The memo is clearly directed at IT companies with discriminatory intent and effect;
- The memo may embolden examiners to flout regulations, and treat H-1B s with inappropriately elevated standards in a manner similar to National Interest Waivers, O-1s, EB-1 extraordinary ability alien petitions;
- The memo states it is only intended for guidance and may not be relied on for a benefit, but is codified in AFM, which is binding authority, so clearly contradicts itself.
- Finally, the memo distinguishes between the Right of Control and Actual Control, and requires a showing of both. Nonetheless, the regulations state the petitioner only has to show a Right of Control to establish an "employer-employee relationship."