IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BROADGATE INC.
830 Kirts Boulevard
Troy, Michigan, 48084

LOGIC PLANET, INC.
45 Brunswick Avenue
Edison, New Jersey 08817

DVR SOFTEK INC.
345 Plainfield Avenue
Edison, New Jersey 08817

TECHSERVE ALLIANCE
1420 King Street
Alexandria, Virginia 22314

AMERICAN STAFFING ASSOCIATION
277 South Washington Street
Alexandria, Virginia 22314

Plaintiffs

v.

UNITED STATES CITIZENSHIP AND
IMMIGRATION SERVICES
20 Massachusetts Avenue, N.W., Suite 3300
Washington DC 20529-2100

ALEJANDRO MAYORKAS
Director, USCIS
20 Massachusetts Avenue, N.W., Suite 3300
Washington DC 20529-2100

DEPARTMENT OF HOMELAND SECURITY
301 7th Street, S.W.
Washington, DC 20407-0001

JANET NAPOLITANO
Secretary of Homeland Security
301 7th Street, S.W.
Washington, DC 20407-0001

Defendants.

COMPLAINT

I. PRELIMINARY STATEMENT

1. For more than forty years, United States staffing companies, most of which are small businesses, have been providing temporary and long-term engineers, health care professionals, and others in specialty occupations to the federal government, government contractors, manufacturers, schools, universities and non-profit organizations. Many of these trained professionals come to the United States on a temporary visa because there are an insufficient number of United States citizens in that profession and geographic location. The United States Citizenship and Immigration Services ("USCIS" or the "Service") has changed existing law governing these visa applications for professionals without notice and comment rulemaking. This change significantly, adversely and immediately affected and will continue to affect this entire business sector. Under 8 U.S.C. § 1101(a)(15)(H)(i)(b) (from which the H-1B visa program draws its name), aliens may enter the United States under an H-1B visa to perform services in a "specialty occupation." Under the H-1B program, an employer, acting as a sponsor, may petition the Service for an H-1B visa on behalf of a beneficiary, *i.e.*, alien employee. *Id.* In its regulations, the Service has delineated various factors to be used in assessing whether there is a viable employer-employee relationship. An employer-employee relationship exists when a company may "hire, pay, fire, supervise, or otherwise control the work of any such employee." 8 C.F.R. § 214.2(h)(4)(ii). This INA "control test" consists of four explicit factors--hire, pay, fire, supervise--and differs from the common law test and the economic realities test. On January 8, 2010, USCIS issued a memorandum that explicitly changed existing law regarding the factors that the Service would use in assessing whether to approve an H-1B specialty occupation classification. The memorandum declares that companies, such as the non-association plaintiffs, that place H-1B

nonimmigrants at third party worksites automatically lack the necessary control over their employees to qualify as valid employers and can no longer petition for an H-1B visa on behalf of their employees even though they have authority to hire, pay, fire, and supervise their employees. Based on this memorandum or "guidance," the Service has denied and will continue to deny renewal H-1B visa applications to those with specialty occupations, such as software engineers and nurses, sponsored by staffing and consulting firms. Since the memorandum changes an existing regulation by reading out the phrase "hire, fire, pay, or supervise," and effectively inserts the words "solely" or "exclusively", it limits agency discretion on its face and as applied, amends an existing legislative rule, and affects those outside the government, the memorandum is a legislative rule and therefore, should have been issued by the Secretary of Homeland Security following notice-and-comment rulemaking and a certification under the Regulatory Flexibility Act. Neither occurred and thus, the memorandum is an invalid rule that must be vacated. Further, the memorandum is inconsistent with and not authorized by the organic legislation, and was issued by an official without the authority to issue rules.

II. JURISDICTION AND VENUE

2. This court has subject matter jurisdiction over this action pursuant to:

   a. 28 U.S.C. § 1331, which confers original jurisdiction over all civil suits arising under the Constitution and the laws of the United States, and 28 U.S.C. § 2201 (authorizing declaratory relief), 5 U.S.C. § 601 *et seq.* (Regulatory Flexibility Act), and 5 U.S.C. § 701 *et seq.* (judicial review provisions of the Administrative Procedure Act).

   b. Venue is proper pursuant to 28 U.S.C. § 1391(e).

III. PARTIES

A. Plaintiffs

3. Plaintiff Broadgate Inc. ("Broadgate") is a software development and information technology service firm established in 2006, under the laws of Michigan, with its principal place of business in Troy, Michigan. Broadgate is a small business within the meaning of the Small Business Act and Regulatory Flexibility Act. Broadgate, operating pursuant to contract, provides SAP and other software programming and analysis to thirty-six client corporations operating in fifteen states. Broadgate, like other United States corporations, is unable to locate qualified United States citizens or permanent residents with the requisite skills to provide IT staffing/consulting services. As a result, Broadgate has had to look to a pool of non-U.S. citizens and permanent residents to locate qualified software engineers and analysts. As of this date, Broadgate employs approximately 46 software engineers, developers, and analysts, 21 of whom (45 percent) hold H-1B visas. Broadgate hires these engineers and analysts as W-2 employees, pays each on average about $60,000 per year, provides health insurance, vacation and other benefits, supervises each employee, and sponsors their H-1B visa applications and triennial renewals. Prior to filing its H-1B petitions, Broadgate files Labor Condition Applications ("LCA") with the U.S. Department of Labor which certifies the LCA, assuring there would be no adverse affect on wages or working conditions of U.S. workers caused by the use of H-1B temporary workers. Recently and especially following the issuance of the January 8, 2010 memorandum, its first renewal application this year was denied and future applications will be denied because the memorandum instructs Service employees that third-party employers, such as Broadgate, are no longer

"real" employers and therefore, no longer eligible to petition for visa renewals for the overwhelming majority of their employees who work off-site. If these renewal applications are not granted, Broadgate will no longer have a qualified work force, will be unable to remain in business and thus, will be imminently and irreparably harmed by the January 8, 2010 memorandum and the policy that it formalizes. Prior to this new USCIS policy, Broadgate had plans to expand its business to meet a growing demand. Those plans, however, have been held in abeyance in light of the new USCIS policy.

4. Plaintiff Logic Planet, Inc. is a global software development and information technology services firm, established in 2001, under the laws of New Jersey, with its principal place of business in Edison, New Jersey. Logic Planet is a small business within the meaning of the Small Business Act and Regulatory Flexibility Act. Logic Planet, operating pursuant to contract, provides computer consulting services to some of the nation's largest corporations. Logic Planet, like other United States corporations, is unable to locate qualified United States citizens or permanent residents with the requisite skills to provide IT staffing/consulting services. As a result, Logic Planet has had to look to a pool of non-U.S. citizens and permanent residents to locate qualified software engineers and analysts. As of this date, Logic Planet employs approximately 95 software engineers, developers, and analysts and SAP consultants, 89 of whom (93 percent) hold H-1B visas. Logic Planet hires these engineers and analysts as W-2 employees, pays each on average approximately $65,000 - $70, 000 per year, provides health insurance and vacation benefits to each, supervises each, and sponsors their H-1B visa applications and triennial renewals. Prior to filing its H-1B petitions, Logic Planet files Labor Condition Applications ("LCA") with the U.S. Department of Labor which certifies the LCA,

assuring there would be no adverse affect on wages or working conditions of U.S. workers caused by the use of H-1B temporary workers. In prior years, Logic Planet's sponsored renewal applications were routinely reviewed and approved by the Service. This year, however, following the issuance of the January 8, 2010 memorandum, its first two renewal applications were denied and future applications will be denied because the memorandum instructs Service employees that third-party employers, such as Logic Planet, are no longer "real" employers and therefore, no longer eligible to petition for visa renewals for the overwhelming majority of their employees who work off-site. If these renewal applications are not granted, Logic Planet will no longer have a qualified work force, will be unable to remain in business and thus, will be imminently and irreparably harmed by the January 8, 2010 memorandum.

5. Plaintiff DVR Softek Inc. ("DVR"), is a leading software development and information technology services firm, established in 2004, under the laws of New Jersey, with its principal place of business in Edison, New Jersey. DVR is a small business within the meaning of the Small Business Act and Regulatory Flexibility Act. DVR, operating pursuant to contract, provides computer consulting services, with emphasis on Systems Application Processing to some of the nation's major corporations. DVR, like most United States corporations, is unable to locate qualified United States citizens or permanent residents with the requisite skills to provide IT staffing/consulting services. As a result, DVR has had to look to a pool of non-U.S. citizens and permanent residents to locate qualified software engineers and analysts and as of this date, employs approximately 50 software engineers, developers, and analysts, 45 of whom (90 percent) hold H-1B visas. DVR hires these engineers and analysts as W-2 employees, pays each

on average about $60,000 per year, provides health insurance and vacation benefits to each, supervises each, and sponsors their H-1B visa applications and triennial renewals. Prior to filing its H-1B petitions, DVR filed LCAs with the U.S. Department of Labor which were approved, assuring there would be no adverse affect on wages or working conditions of U.S. workers caused by the use of H-1B temporary workers. In prior years, DVR's sponsored renewal applications were routinely reviewed and approved by the Service. This year, however, following the issuance of the January 8, 2010 memorandum, its first renewal application was denied and future new and renewal applications will be denied because the memorandum instructs Service that employers who place employees at third-party work sites, such as DVR, are no longer real employers and therefore, no longer eligible to petition for visa renewals for the overwhelming majority of their employees who work offsite. If these renewal applications are not granted, DVR will no longer have a qualified work force, will be unable to remain in business and thus, will be imminently and irreparably harmed by the January 8, 2010 memorandum.

6. Plaintiff TechServe Alliance, formerly the National Association of Computer Consultant Businesses, is not-for-profit corporation established under the laws of the District of Columbia with its principal place of business located 1420 King Street, Suite 610, Alexandra, VA 22314. Plaintiff TechServe Alliance is a small entity within the meaning of the Regulatory Flexibility Act as are most of its members. TechServe represents approximately 325 members, all of which are information technology services companies in the United States. Its member firms provide highly skilled computer professionals to clients who need IT services by placing their employees at client sites. All of its

members employ highly skilled and educated engineers and analysts and other IT professionals, many of whom work in the United States under an H-1B visa. Its members are adversely affected by the January 8, 2010 memorandum and the policy that it announces, and many of them are suffering or will imminently suffer irreparable harm, including terminating their businesses due to the lack of access to qualified employees.

7. Plaintiff American Staffing Association ("ASA"), established in 1966, is a not-for-profit corporation established under the laws of the District of Columbia with its principal place of business located at 277 South Washington Street, Suite 200, Alexandria, VA 22314. Plaintiff ASA is a small entity within the meaning of the Regulatory Flexibility Act, as are many of its members. ASA's approximately 800 members account for 85% of U.S. staffing industry sales. Its member firms provide temporary employees in a broad spectrum of occupations and professions, including by way of example physicians, dentists, nurses, hygienists, medical technicians, therapists, home health aides, custodial care workers, engineers, scientists, laboratory technicians, information technology consultants (*e.g.*, analysts, programmers, designers, installers, and other occupations involving computer sciences (hardware or software) or communications technology). Many of these professionals employed by ASA's member work in the United States under an H-1B visa. Its members are adversely affected by the January 8, 2010 memorandum and the policy that it announced, and many of them are suffering or will imminently suffer irreparable harm, including terminating their businesses due to the lack of qualified employees.

B. Defendants

8. Defendant USCIS is a division of the Defendant Department of Homeland Security and is responsible for adjudicating H-1B visa petitions filed by employers on behalf of employees ("beneficiaries") in specialty occupations. Defendant USCIS issued and is implementing the January 8, 2010 memorandum discussed above. Its headquarters is located in Washington, D.C.

9. Defendant Alejandro Mayorkas is the Director, Defendant USCIS and is being sued here in his official capacity only.

10. Defendant Department of Homeland Security is the federal agency charged with, *inter alia*, the administration and enforcement of federal immigration laws and is responsible for overseeing the operations of the Defendant USCIS. Defendant Department of Homeland Security is headquartered in Washington, D.C.

11. Defendant Janet Napolitano is the Secretary of Homeland Security. Defendant Napolitano is being sued in her official capacity only.

Background

12. H-1B visas are available for qualified foreign nationals working in "specialty occupations." *See* 8 U.S.C. § 1184(i). The H-1B is generally valid for an initial three year period and may be renewed for up to six years. A cap applies to H-1B visas. Only 65,000 new H-1B visas are issued in any fiscal year with an additional 20,000 available for individuals who earned a master's degree or higher from a United States institution of higher education. Visa applications may be submitted six months before the fiscal year begins (*i.e.*, beginning on April 1, 2010), and renewal applications may be submitted six

months before a visa is scheduled to expire. These applications must be submitted by a "United States employer." 8 C.F.R. § 214.2(h)(2)(i)(A). The term "United States employer" is defined as "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." 8 C.F.R. § 214.2(h)(4)(ii). The term "United States employer," as used in the Immigration and Nationality Act ("INA") or its implementing regulations, not only fails to exclude employers who place H-1B non-immigrants at third party worksite such as Plaintiffs Broadgate, Planet Logic, DVR, and the members of the Plaintiff associations, from its ambit, but expressly includes them as "contractors." This is consistent with other parts of the statutory and regulatory framework where, in three party employment arrangements, the term 'employer' is defined to mean "the independent contractor or contractor and not the person or entity using the contract labor." 8 C.F.R. § 274a.1(g).

13. The INA defines a specialty occupation as one that requires (a) theoretical and practical application of a body of highly specialized knowledge, and (b) attainment of bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation. *See* 8 U.S.C. § 1184(i)(1).

14. Federal regulations further define "specialty occupation" as "an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields 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 bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation." 8 C.F.R. § 214.2(h)(4)(ii).

15. In addition, prior to filing a petition for an H-1B visa, an employer applicant must file LCAs that are certified by the Department of Labor assuring that there is no adverse effect on wages or working conditions of U.S. workers in the applicable skills in the relevant geographic area.

16. Plaintiffs Broadgate, Logic Planet, DVR, and the members of the Plaintiff associations filed for and were granted H-1B visas for thousands of their foreign employees in such areas as engineering, business analysis, computer science, nursing, physical therapy and other specialty occupations as defined in the INA and its implementing regulations where qualified U.S. employees with the requisite skills and experience were not available.

17. At all relevant times, Plaintiffs Broadgate, Logic Planet, DVR, and members of the Plaintiff associations have been and are "employers" of their H-1B visa employees, as the term "employer" is defined in the Code of Federal Regulations, as noted above. Plaintiffs Broadgate, Logic Planet, DVR and members of the Plaintiff associations hire, pay, fire, supervise, provide benefits and provide direction to employees and have the right to control and in fact share control of the employee with the client.

18. On January 8, 2010, Defendant USCIS, through its Associate Director, Donald Neufeld, issued a memorandum to "Service Center Directors" ("Neufeld Memorandum") on "Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements." A copy of the Neufeld Memorandum is

available at <http://www.uscis.gov/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf> This memorandum was not issued pursuant to notice-and-comment rulemaking or formal rulemaking, was not signed by the Secretary or any official appointed by the President with the advice and consent of the Senate, does not evidence approval by the Office of Management and Budget, and was not reviewed or certified under the Regulatory Flexibility Act.

19. The Neufeld Memorandum replaces the criteria specified 8 C.F.R. § 214.2(h)(4)(ii) with eleven factors most of which focus on supervision. *See* Neufeld Memorandum at 3. The Neufeld Memorandum claims that no one factor is decisive and further claims that it does nothing more than continue the agency's reliance on the common law definition of the employer-employee relationship. *See id.* This is not accurate.

20. The Neufeld Memorandum also provides direction for those reviewing H-1B visa applications. It describes the characteristics of a typical computer consulting contractor which supplies its clients with its employees for specific staffing needs, on an as-needed basis and pursuant to contract. The beneficiary of the visa is the computer analyst assigned to work for a client to fill a core position at the client company, reporting to a manager for the client who determines the work assignments and completes progress reviews. No proprietary information of the petitioner is used to complete the work assignments. The beneficiary's end product is not related to the petitioner's line of business. The Neufeld Memorandum concludes that under these circumstances, "**Petitioner Has No Right to Control; No Exercise of Control**" and therefore "**would not present a valid employer-employee relationship**," even though the petitioner hires, pays, can fire, provides benefits, provides direction to the beneficiary and has the right to

control and shares control of the employee with the client. Neufeld Memorandum at 5, 6-7 (emphasis in original).

21. Since January 8, 2010, USCIS has been denying H-1B visa renewals and has denied renewals to members of the Plaintiff associations, including Plaintiffs Broadgate, Logic Planet, and DVR. These denials involve beneficiaries whose visa applications were previously approved under the regulatory criteria in use prior to the Neufeld Memorandum. Nothing about their status or employment changed in the intervening three years other than the issuance of the Neufeld Memorandum. A copy of the denial issued to Plaintiff Broadgate, redacted to maintain the privacy of the beneficiary, is attached as Exhibit 1.

22. On information and belief, Plaintiffs Broadgate, Logic Planet and DVR anticipate that their future petitions for H-1B visas will be denied pursuant to the policy dictated by the Neufeld Memorandum causing Plaintiffs immediate and irreparable harm, including their inability to continue operating their businesses and inability to expand. Plaintiff associations anticipate that similar results will pertain when its member companies file their H-1B visa and renewal applications on behalf of their beneficiary-employees.

CLAIMS

Count I

Violation of the Notice and Comment Requirements of the Administrative Procedure Act
(5 U.S.C. §§ 553, 706)

23. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1-22, above, as if fully set forth herein.

24. The Administrative Procedure Act ("APA"), 5 U.S.C. § 553, requires agencies such as the Defendants DHS and USCIS to promulgate regulations through informal rulemaking (*i.e.*, notice-and-comment), formal rulemaking, or negotiated rulemaking. A legislative rule or regulation is one that affects those outside of government, binds agency personnel, or modifies an existing regulation in the Code of Federal Regulations. The Neufeld Memorandum has all three characteristics and therefore, is a rule requiring notice and comment rulemaking.

25. The Neufeld Memorandum was not issued through notice and comment rulemaking, through formal rulemaking or through negotiated rulemaking.

26. The Defendants therefore failed to comply with requirements of the APA, Plaintiffs will be irreparably and immediately injured by the implementation of the Neufeld Memorandum and as result, the Neufeld Memorandum must be vacated and implementation enjoined.

Count II
Failure to Perform a Regulatory Flexibility Act Analysis
(5 U.S.C. § 601 *et seq.*)

27. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 – 26, above, as if fully set forth herein.

28. The Neufeld Memorandum will have a significant economic impact on a substantial number of small entities, including Plaintiffs Broadgate, Logic Planet and DVR, and Plaintiff associations' small business members. Plaintiffs and Plaintiff associations' members have lost and will continue to lose employees who are qualified for H-1B visas through the Plaintiffs or their members, as the case may be. The loss of such qualified

and lawful employees will impede productivity and profitability and interfere with normal and lawful business operations, and in the cases of Plaintiffs Broadgate, Logic Planet and DVR, will force them to cease operations. On information and belief, the economic impact on small entities will exceed $100 million per annum.

29. Under the Regulatory Flexibility Act ("RFA"), 5 U.S.C. § 601 *et seq.*, agencies are required to prepare and make available for public comment an analysis of a proposed rule's impact on small entities, such as the Plaintiffs. Despite the Neufeld Memorandum's significant economic impact on small entities and the fact that it is a legislative rule within the meaning of the APA, the Defendants failed to undertake a regulatory flexibility analysis, as required by law and therefore, violated the RFA.

30. As a result of the aforesaid violation, Plaintiffs and their small entity members will suffer imminent and irreparable injury if the Neufeld Memorandum is further implemented.

Count III
Excess of Regulatory and Statutory Authority
(8 C.F.R. § 214.2(h)(4)(ii) & 5 U.S.C. §§ 706(2)(A), (C))

31. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 – 30 above, as if fully set forth herein.

32. The Neufeld Memorandum is inconsistent with the INA's implementing regulations, 8 C.F.R. § 214.2(h)(4)(ii), because it alters the definition of the employee-employer relationship in two substantive ways. First, the regulatory definition highlights four explicit factors (*i.e.*, "hire, pay, fire, supervise") and includes a fifth catch-all (*i.e.*, "otherwise control the work of any such employee."). The Neufeld Memorandum effectively deletes three of the factors in the context of the IT staffing and consulting

industry and improperly inserts the words "exclusively' or "solely" in the definition. The Neufeld Memorandum, relying on *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992), adopts the common law definition of employer which includes twenty factors. However, under *Darden*, the common law definition applies only in the absence of a statutory or other legal definition. Here, the extant regulation expressly defines the term and therefore, *Darden* is not applicable on its face.

33. Second, the regulatory definition provides that an employer may include a "contractor." This is consistent with other parts of the statutory and regulatory framework where, in three party employment arrangements, the term 'employer' is defined to mean "the independent contractor or contractor and not the person or entity using the contract labor." 8 C.F.R. § 274a.1(g). The Neufeld Memorandum effectively excises the term "contractor," in the definition.

34. Third, the statute itself expressly contemplates that staffing entities, such as Plaintiffs, are proper petitioners for H-1B visas where they have obtained the appropriate LCAs. *See* 8 U.S.C. § 1182(n)(1)(F). The Neufeld Memorandum is inconsistent with the plain language of the statute.

35. The Neufeld Memorandum is agency action "not in accordance with law" and therefore, violates 5 U.S.C. § 706(2)(A). It is also in excess of the agency's "statutory jurisdiction, authority" or "statutory right," within the meaning of 5 U.S.C. § 706(2)(C).

Count IV
Arbitrary and Capricious
(5 U.S.C. § 706(2)(A) & (D))

36. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 – 35 above, as if fully set forth herein.

37. The Neufeld Memorandum is "arbitrary" or "capricious" agency action in violation of 5 U.S.C. § 706(2)(A) because it redefines the employer-employee relationship without justification or authority to eliminate an entire, lawful business sector without due process or an opportunity to comment.

38. USCIS is required to follow and apply its laws, rules and regulations uniformly and fairly. Regulations implementing the INA are to be promulgated through notice and comment rulemaking under the Administrative Procedure Act.

39. The Neufeld Memorandum, as applied, restricts the discretion of the USCIS in approving or denying H-1B visas. Employers like Broadgate, Logic Planet and DVR, who filed for and routinely received H-1B visas for their employees in the past, are now being denied renewals as a result of the Neufeld Memorandum. As such, the change in policy required notice and comment rulemaking. USCIS did not subject the redefinition of the employee-employer relationship to such notice and comment rulemaking.

40. That new policy of adjudicating H-1B visa petitions is arbitrary and capricious because it departs from and supplants the current regulatory and statutory requirements for a particular business segment without the benefit of notice, public hearing or good cause.

41. USCIS's conduct is ongoing and its effects are immediate. As a result of USCIS's application of the Neufeld Memorandum, Plaintiffs have been harmed and will continue to be harmed as a result of their inability to fulfill outstanding obligations to their current

clients who are relying on their ability to provide employees authorized to work under the H-1B program in the absence of available United States candidates. Plaintiffs' business model will be nullified if they are unable to recruit potential candidates, and if they lose those foreign candidates they have recruited and trained. The loss of employees and clients will imminently force Plaintiffs to close their businesses.

42. For this reason, use of the Neufeld Memorandum should be vacated and enjoined pursuant to 5 U.S.C. § 706(2)(A) and (D).

Count V
Arbitrary and Capricious and Not in Accordance with Law
(5 U.S.C. § 706(2)(A))

43. Plaintiffs incorporate by reference the allegations set forth in ¶¶ 1 – 42 above, as if fully set forth herein.

44. The Neufeld Memorandum was issued by an employee of USCIS who was not authorized by law to issue rules.

45. As such, the Neufeld Memorandum is void *ab initio* and should be vacated.

WHEREFORE, Plaintiffs pray that the Court:

1. Enter a preliminary injunction, pending a decision on the merits, enjoining the Defendants from implementing or using the Neufeld Memorandum's definition of the employer-employee relationship when considering H-1B visa applications from contractors that place professionals at third-party work sites;
2. Enter a declaratory judgment that the Neufeld Memorandum, including the policy that it announces, is invalid, a permanent injunction to prohibit Defendants from

implementing it or otherwise giving effect to it, and vacate the Neufeld Memorandum;

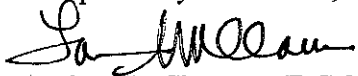
3. Enter a declaratory judgment that USCIS failed to undertake the required Regulatory Flexibility Act analysis and a permanent injunction to prohibit Defendants from implementing their policy or otherwise giving it effect until such time as the Defendant Napolitano discharges her responsibility under the Regulatory Flexibility Act to the satisfaction of the Court, and retain jurisdiction of this case to ensure compliance with the Regulatory Flexibility Act.

4. Require Defendants to immediately notify all field offices engaged in adjudication of H-1B petitions of this Court's order and order those offices to comply with this Court's order;

5. Award Plaintiffs their costs and expenses, including reasonable attorney's fees whether under the Equal Access to Justice Act or otherwise, and expert witness fees; and

6. Award such further and additional relief as is just and proper.

Respectfully Submitted,



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Counsel for Plaintiffs Broadgate Inc., Logic Planet, Inc., DVR Softek Inc., TechServe Alliance, and American Staffing Association

APPENDIX

U.S. Department of Homeland Security
P.O. Box 10129
Laguna Niguel, CA 92607-1012

U.S. Citizenship and Immigration Services

Date: MAY 18 2010

[redacted]
C/O: [redacted]

Refer to file no.: WAC-10-119-50429

NOTICE OF DECISION

This notice is in reference to the Form I-129, Petition for Nonimmigrant Worker, filed by [redacted] on behalf of [redacted] seeking specialty occupation worker classification under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act with concurrent request for extension of stay.

It is ordered by the Director of the California Service Center, United States Citizenship and Immigration Services ("USCIS"), that the extension of nonimmigrant status requested on behalf of the beneficiary be denied for the following reason:

> The nonimmigrant visa petition filed to extend classification of the beneficiary under section 101(a)(15)(H) of the Act has been denied.

The beneficiary may remain in the current nonimmigrant status until the expiration date indicated on Form I-94. Should the beneficiary fail to maintain nonimmigrant status, or said status expires, the beneficiary must depart the United States. If the beneficiary has any questions concerning immigration services and benefits, the beneficiary may telephone 1-800-375-5283 or for TTY 1-800-767-1833.

NOTE: If an appeal to the petition denial is filed and sustained, and if the beneficiary is otherwise eligible for the extension of stay, USCIS will, on its own motion, grant the requested extension of stay. THERE IS NO FEE REQUIRED FOR THIS ACTION.

Christina Poulos
Director

cc: Candie Tou Clement, Esq.

RECEIVED
MAY 24 2010
USCIS

Form I-541

www.uscis.gov

U.S. Department of Homeland Security
P.O. Box 10129
Laguna Niguel, CA 92607-1012

U.S. Citizenship and Immigration Services

Date: MAY 1 8 2010

[redacted]
C/O: [redacted]
[redacted]
[redacted]

Refer to file no: WAC1011950429

NOTICE OF DECISION

It is ordered by the Director of the California Service Center, United States Citizenship and Immigration Services ("USCIS"), that the Form I-129, Petition for a Nonimmigrant Worker, filed [redacted] be denied because:

SEE ATTACHMENT

The petitioner may, if he or she wishes, appeal the Director's decision using the enclosed Notice of Appeal to the Administrative Appeals Office ("AAO"), Form I-290B. The petitioner must submit such an appeal to **THIS OFFICE** with a filing fee of $585.00. Do NOT send the appeal directly to the AAO. If the petitioner does not file an appeal within the time allowed, this Decision is final.

A brief or other written statement in support of the appeal may be submitted with the Notice of Appeal. The Form I-290B must reach this office within thirty (30) calendar days from the date this notice is served (thirty-three (33) days if this notice is mailed).

Please direct any questions to the USCIS office nearest the petitioner's residence.

Christina Poulos
Director

cc: Candie Tou Clement, Esq.

The petitioner filed Form I-129, Petition for a Nonimmigrant Worker, on March 25, 2010 to classify the beneficiary as an alien employed in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the Act).

The petitioner, [redacted] is a [redacted] for-profit enterprise engaged in software development and consulting services with [redacted] employees and a gross annual income of [redacted]. It seeks to temporarily employ the beneficiary, [redacted] as a SAP analyst for a period of 3 years.

The first issue to be discussed is whether the petitioner has established that it has an employer-employee relationship with the beneficiary.

101(a)(15)(H)(i)(b) of the Immigration and Nationality Act ("Act" or "INA") defines an H-1B nonimmigrant as an alien:

> ...who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1)..., who meets the requirements for the occupation specified in section 214(i)(2)..., and with respect to whom the Secretary of Labor determines and certifies...that the intending employer has filed with the Secretary an application under section 212(n)(1).

Title 8 Code of Federal Regulations ("C.F.R.) 214.2(h)(2)(i)(A) provides that a "United States employer" shall file an [H-1B] petition.

The term "United States employer", in turn, is defined at 8 C.F.R. 214.2(h)(4)(ii) as follows:

> 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.

Neither the legacy Immigration and Naturalization Service (INS) nor this agency U.S. Citizenship and Immigration Services (USCIS) has defined the terms "employee," "employed," "employment," or "employer-employee relationship" by regulation for purposes of the H-1B visa classification, even though the regulation describes H-1B beneficiaries as "employees" who must have an employer-employee relationship" with a United States employer. Therefore, for purposes of the H-1B visa classification, these terms are undefined.

The United States Supreme Court has determined that where federal law fails to clearly define the term "employee," courts should conclude that the term was "intended to describe the conventional master-

servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-323 (1992) (hereinafter "*Darden*") (quoting *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989)). The Supreme Court stated:

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's **right to control the manner and means by which the product is accomplished.** Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. (Emphasis added)

Darden, 503 U.S. at 323-324; *see also Clackamas Gastroenterology Associates, P.C. v. Wells*, 538 U.S. at 440 (hereinafter "*Clackamas*"). As the common-law test contains "no shorthand formula or magic phrase that can be applied to find the answer, . . . all of the incidents of the relationship must be assessed and weighed with no one factor being decisive." *Darden*, 503 U.S. at 324 (quoting *NLRB v. United Ins. Co. of America*, 390 U.S. 254, 258 (1968)).

In this matter, the Act does not exhibit a legislative intent to extend the definition of "employer" in section 101(a)(15)(H)(i)(b) of the Act, "employment" in section 212(n)(1)(A)(i) of the Act, or "employee" in section 212(n)(2)(C)(vii) of the Act beyond the traditional common law definitions. Instead, in the context of the H-1B visa classification, the term "United States employer" was defined in the regulations to be more restrictive than the common law agency definition. A federal agency's reasonable interpretation of a statute whose administration is entrusted to it is to be accepted unless Congress has spoken directly on the issue. *See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984).

Therefore, in considering whether or not one is an "employee" in an "employer-employee relationship" with a "United States employer" for purposes of H-1B nonimmigrant petitions, USCIS must focus on the common-law touchstone of "control." *Clackamas*, 538 U.S. at 450; *see also* 8 C.F.R. § 214.2(h)(4)(ii)(2) (defining a "United States employer" as one who "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 . . . ." (Emphasis added)).

Accordingly, the most crucial element of the H-1B employer-employee relationship is the right of control, that is, the right of one person to order and control another in the performance of work by the latter, and the right to direct the manner in which the work shall be done. It is essential that the "employer" shall have control and direction not only of the employment to which contracted employment relates, but also of all of its details and the method of performing the work.

The petitioner is a computer consulting company which, it appears, does not produce any software products of its own but rather contracts with numerous outside companies in order to supply these companies with employees to fulfill specific staffing needs or complete service contracts.

The duties proposed by the petitioner at the time the petition was filed indicate that, although the petitioner will act as the beneficiary's employer, it intends to place the beneficiary at work location(s) pursuant to consulting agreements with third-party, end-clients or users.

Subsequent to the filing of the petition, the petitioner was requested to provide additional evidence to establish that a valid employer-employee relationship will exist between the petitioner and the beneficiary, and that the employer has the right to control when, where, and how the beneficiary performs the work at the end-clients' location, including the ability to hire, fire, and supervise the beneficiary through the duration of the requested H-1B validity period.

USCIS provided a non-exhaustive list of items that could be used to satisfy the employer-employee relationship requirement. USCIS also informed the petitioner what the evidence should describe to determine if the employer has a sufficient level of control over the employee placed at a third-party location.

On May 07, 2010, the petitioner responded by submitting the following documentation:

- Copy of an Employment Agreement between the petitioner and beneficiary;
- An itinerary of services or engagements;
- Letter from end-client [redacted];
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisor chain;
- Copy of [redacted]'s website.

The record has been reviewed in its entirety to establish whether the petitioner has the right to control the beneficiary's employment at the third-party, end-client and it has been determined that the petitioner has not met the employer-employee relationship test for the following reasons:

In the end-client letter dated May 05, 2010, it states;

> [redacted] would be issuing work orders in thirty six (36) month increments. Based upon our requirements and our projected needs, [redacted] anticipates that it will have an ongoing need for these services, and continue to issue work orders for these services through April 2013.

Also, this letter states, "That is, on a contract-by-contract basis, [redacted] will be filling this role at the sole discretion of [redacted]

However, the petitioner did not provide any of these stated contractual agreements, work orders or Statements of Work (SOW) to establish that the beneficiary would work on the end-client [redacted] projects during his tenure with the petitioner. Additionally, the petitioner did not provide any service or contract agreements between the petitioner and [redacted]

Furthermore, the itinerary and website of the end-client submitted by the petitioner, is insufficient to establish an employer-employee relationship for the requested validity period because the itinerary does not;

- show an actual end-client but, rather, another firm which offers information and communications technology (ICT) and ITC solutions to multinational corporations and public institutions, which will further contract the beneficiary's services with other firms needing computer related positions to complete their projects;
- include the petitioner's and/or the end-client('s)(s') signatures;
- provide a comprehensive description of the beneficiary's duties;
- list the skills required to perform the job offered;
- indicate the source of the instrumentalities and tools needed to perform the job;
- describe the product to be developed or the service to be provided;
- indicate whether the petitioner has the right to assign additional duties;
- describe the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary;
- specify whether the work to be performed is part of the regular business of the petitioner;

Applying the *Darden* and *Clackamas* tests to this matter, the petitioner has not established that it will be a "United States employer" having an "employer-employee relationship" with the beneficiary as an H-1B temporary "employee."

The evidence is insufficient to establish that the petitioner has an adequate level of control over the beneficiary through its right to control the manner and means by which the product is accomplished, including when, where, and how the beneficiary performs the duties of the proffered position.

The second issue to be discussed is whether the position offered to the beneficiary qualifies as a specialty occupation.

When a petition is filed for classification as an H1B worker, the petitioner must show that the beneficiary will perform services in a specialty occupation. Section 101(a)(15)(H)(i)(b) of the Act provides, in part, for the classification of qualified nonimmigrant aliens who are coming temporarily to the United States to perform services in a specialty occupation:

> an alien...who is coming temporarily to the United States to perform services . . . in a specialty occupation described in section 214(i)(1)...with respect to whom the Secretary of Labor determines and certifies to the Attorney General that the intending employer has filed with the Secretary an application under section 212(n)(1)....

Section 214(i)(1) defines the term "specialty occupation" as one that requires:

> (A) theoretical and practical application of a body of highly specialized knowledge, and
>
> (B) 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.

8 C.F.R. 214.2(h)(4)(ii) defines a specialty occupation to mean:

> . . . an occupation which requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation in such fields 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:

> (1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
>
> (2) 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;
>
> (3) The employer normally requires a degree or its equivalent for the position; or
>
> (4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

When determining whether a particular job qualifies as a specialty occupation, USCIS does not use a title, by itself. The specific duties of the proffered position, combined with the nature of the petitioning entity's business operations are factors that USCIS considers. USCIS must examine the ultimate employment of the alien and determine whether the position qualifies as a specialty occupation. See *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000). The critical element is not the title of the position or an employer's self-imposed standards but whether the position actually requires the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree in the specific specialty as the minimum for entry into the occupation, as required by the Act.

Each position must be evaluated based upon the nature and complexity of the actual job duties to be performed with that specific employer. In addition, the beneficiary's mere obtainment of a degree in a related area does not guarantee the position is a specialty occupation. Further, performing specialty occupation duties that are incidental to the primary functions is insufficient to establish that the duties to be performed qualify as a specialty occupation.

Although the petitioner is requesting to classify the beneficiary as an alien employed in a specialty occupation, the petitioner is not the entity that will be providing such duties to the beneficiary.

The petitioner is in the business of locating persons with computer related backgrounds and placing these individuals in positions with firms that use computer trained personnel to complete their projects. The petitioner negotiates contracts with various firms that pay a fee to the petitioner for each worker hired to complete their projects. The petitioner then pays the worker, in this case the alien, directly from an

account under its own name. However, the firm needing the computer related positions will determine the job duties to be performed.

The entity ultimately employing the alien or using the alien's services must submit a description of conditions of employment, such as contractual agreements, statements of work, work orders, service agreements, and/or letters from authorized officials of the ultimate client companies where the alien will work that describe, in detail, the duties that the alien will perform and the qualifications that are required to perform the job duties. From this evidence, USCIS will determine whether the duties require the theoretical and practical application of a body of highly specialized knowledge, and the attainment of a baccalaureate or higher degree, or its equivalent, in the specific specialty as the minimum for entry into the occupation as required by the Act.

Subsequent to the filing of the petition, USCIS requested that the petitioner provide additional evidence that included a list of suggested evidence to establish the actual duties to be performed by the beneficiary and that the position meets the standards to qualify as a specialty occupation.

In general, the petitioner was requested to provide contracts, statements of work, work orders, service agreements, or letters from end-client firms requiring computer related services of the beneficiary and any other evidence the petitioner deemed would establish sufficient specialty occupation work.

On May 07, 2010, the petitioner responded by submitting the following documentation:

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- An itinerary of services or engagements;
- Letter from end-client [redacted];
- Copy of petitioner's organizational chart, demonstrating beneficiary's supervisor chain;
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The record has been reviewed in its entirety to establish whether the petitioner has the right to control the beneficiary's employment at the third-party, end-client and it has been determined that the petitioner has not met the employer-employee relationship test for the following reasons:

In the end-client letter dated May 05, 2010, it states;

> [redacted] would be issuing work orders in thirty six (36) month increments. Based upon our requirements and our projected needs, [redacted] anticipates that it will have an ongoing need for these services, and continue to issue work orders for these services through April 2013.

Also, this letter states, "That is, on a contract-by-contract basis, [redacted] will be filling this role at the sole discretion of [redacted]

However, the petitioner did not provide any of these stated contractual agreements, work orders or Statements of Work (SOW) to establish that the beneficiary would work on the end-client [redacted] projects during his tenure with the petitioner. Additionally, the petitioner did not provide any service or contract agreements between the petitioner and [redacted]

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- indicate the source of the instrumentalities and tools needed to perform the job;
- describe the product to be developed or the service to be provided;
- indicate whether the petitioner has the right to assign additional duties;
- describe the extent of petitioner's discretion over when and how long the beneficiary will work, the method of payment, the petitioner's role in paying and hiring assistants to be utilized by the beneficiary;
- specify whether the work to be performed is part of the regular business of the petitioner;

While the beneficiary may in fact be tasked to work on a project according to the evidence provided by the petitioner, the very nature of the petitioner's consulting business indicates that eventually, the beneficiary would be outsourced to client sites to implement the specific project and/or assist clients with other technical issues. Absent additional work orders or agreements with end-clients, the in-house work claimed by the petitioner, which pertains to only one project, cannot be deemed representative of the beneficiary's entire schedule while in the United States. At best it serves as a representative sample of a project upon which the beneficiary will work until clients demand additional consulting services.

The present record fails to demonstrate the specific duties the beneficiary would perform under contract for the petitioner's clients. The court in *Defensor v. Meissner*, 201 F. 3d 384 (5th Cir. 2000) held that for purposes of determining whether a proffered position is a specialty occupation, a petitioner acting in a similar manner as the present petitioner is merely a "token employer," while the entity for which the services are to be performed is the "more relevant employer." The *Defensor* court recognized that evidence of the client companies' job requirements is critical where the work to be performed is for an entity other than the petitioner. Accordingly, the court held that the legacy Immigration and Naturalization Service (Service, now CIS) had reasonably interpreted the Act and regulations to require that a petitioner produce evidence that the proffered position qualifies as a specialty occupation on the basis of the requirements imposed by the entities using the beneficiary's services.

As such, the petitioner has not established that the duties of the proffered position for the beneficiary require a specialty occupation and that it has sufficient work for the requested period of intended employment. Therefore, the beneficiary is ineligible for classification as a specialty occupation worker.

As such, the petitioner has not established that the beneficiary is eligible for classification as an alien employed in a specialty occupation.

Pursuant to INA 291, the burden of proof in these proceedings rests solely with the petitioner. Here that

burden has not been met.

Consequently, the petition is hereby denied for the two above stated reasons, with each considered as an independent and alternative basis for denial.