PUBLICATION

Immigration Update: USCIS Elaborates on When to File Amendment Under Simeio

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We previously provided an alert on the precedential decision *Matter of Simeio Solutions, LLC* and its holding that an H-1B amendment must be filed whenever a new Labor Condition Application (LCA) is required to change an H-1B employee's worksite.

(*See* http://immigration.bakerdonelson.com/changed-locations-require-new-h-1b-petition-not-just-lca/)

United States Citizenship and Immigration Services (USCIS) has now published further guidance designed to help employers comply with the ruling in *Simeio* and determine whether an H-1B amendment filing is necessary, specifically expanding on when filing a new H-1B amendment is *NOT* necessary.

H-1B Amendment (and new LCA filing) IS required:

- If an H-1B employee changed or will change to a new worksite location that is outside of the metropolitan statistical area(s) (MSAs) included on the LCA and covered by the initial approved H-1B petition. A new LCA must be filed and certified, including compliance with required posting, before the H-1B amendment can be filed. Once filed, the H-1B employee can begin working at the new worksite (i.e., waiting for approval of the H-1B amendment is not necessary).

H-1B Amendment IS NOT required:

- If an H-1B employee is moving to a new worksite within the same metropolitan statistical area (MSA) as what was previously included on the LCA. Before the H-1B employee can move, the original LCA needs to be posted at the new worksite. As with any LCA, the notice must remain posted for the full 10 business days.
- Under certain conditions, if the new worksite(s) would qualify as a "short-term placement" and the employee is temporarily placed for no more than 30 days, but if further requirements met could be up to 60 days in a calendar year (residence in area of permanent worksite, continued maintenance of office at permanent worksite and substantial time at permanent site in a one-year period). While at any short-term placement, the H-1B employer must continue to pay the prevailing wage of the area for the permanent worksite and must pay the H-1B worker for cost of lodging, travel, meals and incidental expenses for both workdays and non-workdays.
- If the transfer is to a "non-worksite location" (e.g. seminar location, employee development activities, management conferences) or is short-term "recurring but not excessive" travel, where H-1B employees spend little time at any one location (less than 10 consecutive workdays for any one visit).
- If the nature of the H-1B position is "peripatetic" by its very nature (e.g., travelling salespeople, in-home caregivers/therapists). These situations could involve a worker who is primarily based at one location, but occasionally travels for short periods (less than 10 consecutive workdays for any one visit) or a worker who frequently travels (salesperson) to multiple locations, but does not exceed five consecutive workdays for any one visit.

The above is only a brief overview of the categories and requirements. Each case and each position may have its own unique considerations and should be carefully reviewed with immigration counsel to determine at the initial hiring (if possible) what LCA(s) may be required to support an initial H-1B petition or a later amendment.

The USCIS guidance also provides a timeframe for bringing employers into compliance with *Simeio* and outlines actions needed:

- If an employer's H-1B employees were changing worksites outside of the previously approved MSAs listed on LCAs during the *Simeio* decision or made such transfers in worksites before the *Simeio* decision, these employers now have 90 days (until August 19, 2015) to file amended petitions for the affected employees without adverse action. If an employer's H-1B amendment petition to change the worksite is denied, but the original petition is still valid, the H-1B employee may return to the initially approved worksite as long as the H-1B employee can maintain valid nonimmigrant status at the original site. If the H-1B amendment is pending, an employer can still file a subsequent amendment to allow an H-1B employee to change worksites immediately, but each petition must separately meet the requirements for H-1B classification and extension.

There is a window of time during which USCIS will not penalize employers who in good faith relied on prior agency correspondence regarding when an H-1B amendment petition is required. This grace period ends **August 19, 2015.** Employers should carefully audit their LCA files to confirm that no further amendments are required to comply with the *Simeio* decision and contacting immigration counsel if it's unclear.

For the USCIS Guidance: http://www.uscis.gov/news/alerts/uscis-draft-guidance-when-file-amended-h-1b-petition-after-simeio-solutions-decision

H-1B Process Slows Down for Summer

Effective May 26, 2015, United States Citizenship and Immigration Services (USCIS) suspended premium processing for H-1B Extension of Stay petitions. This suspension is to remain in effect until July 27, 2015. Although premium (15-day) processing remains available for individuals changing status to H-1B or those requesting consular notification, this suspension could have significant impacts on those changing H-1B employers and requesting a simultaneous extension of their current H-1B status and those needing an expedited extension of status approval for other reasons unrelated to immigration (renewing a driver's license, buying a house, etc.). Portability rules allow an individual to change employers as soon as an H-1B petition is filed with USCIS and does not require waiting for an approval, but many individuals and employers prefer to have the H-1B *approved* before allowing the new employment to start.

If an individual has an H-1B expiring soon and cannot wait the full two-to-three months for an H-1B extension or H-1B Change of Employer (and extension) approval, some possible options include:

- File the petition requesting consular notification. If the employee departs the U.S. before the current H-1B expires and makes a new entry using the extended H-1B approval notice, this will allow the employee to obtain an extended I-94 record upon arrival. (Note: this may require obtaining a new H-1B visa while outside the U.S., unless exceptions apply).
- File the Change of Employer petition without requesting an extension of stay. Depending on how much time the individual has left on his or her H-1B, this could be a viable route to getting an H-1B change of employer petition approved using premium processing.

The suspension is in place until July 27, 2015, to allow USCIS to implement the H-4 employment authorization process, which began May 26, 2015.

(see prior H-4 employment alerts at: http://immigration.bakerdonelson.com/some-h4-spouses-of-h-1bs-can-apply-for-work-cards-beginning-may-26-2015/ and update at: http://www.bakerdonelson.com/immigration-corner-h-1b-cap-fy2016-and-aftermath-doing-business-for-multinational-managers-mye-verify-available-nationwide-05-19-2015/

For the full USCIS update on the premium processing suspension go to: http://www.uscis.gov/news/alerts/uscis-temporarily-suspends-premium-processing-extension-stay-h-1b-petitions

H-2BS Still Accepted for FY15

H-2B visa numbers are still available for the second half of the FY15 cap. As of June 5, 2015, USCIS has begun accepting additional FY15 cap petitions with employment start dates between April 1 and September 30, 2015. These petitions for temporary nonagricultural positions will continue to be accepted and considered in the order received until the FY15 numbers have been exhausted. USCIS began accepting H-2B filings for FY16 cap on June 3, 2015. If a petition requests a start date on or after October 1, 2015, it will be counted toward the FY16 cap.

For further information and H-2B filing instructions: http://www.uscis.gov/news/alerts/uscis-reopen-h-2b-cap-second-half-fiscal-year-2015