PUBLICATION

Changed Locations Require New H-1B Petition, Not Just LCA

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The Attorney General has designated as "precedent" a decision of the USCIS Administrative Appeals Office (AAO) ruling that the change of a job's location outside the area covered by the original approved labor condition applications (LCAs) requires the filing a new H-1B petition to USCIS before it can take effect, so filing only a new LCA is not good enough.

For many years some companies have hoped that it was enough to file a new LCA for a new location of work when an H-1B worker needed to be moved to a new location not already covered by an LCA that was included in the original approved H-1B petition for that worker. They had taken some comfort in a well-publicized letter to that effect that had been sent in 2003 to a stakeholder by Efren Hernandez, at that time the Director of the USCIS Business and Trade Branch. Many officers in USCIS and ICE did not agree with that letter, which arguably ran contrary to regulations requiring a new filing in the event of a material change, but the existence of the letter made it hard to take tough enforcement against employers who followed it. Resolve in the agency has grown over time, and adjudicators started using the failure to file new H-1B petitions for moved workers as a basis to revoke H-1B petitions, particularly when the employer had engaged in other questionable practices.

USCIS has been quietly at war with the staffing industry for industrial technology, much of which is managed by people with strong connections to workers in India, in relation to practices involving the free movement of workers from one job location to another. This week, the Attorney General published as "precedent" a decision of the USCIS Administrative Appeals office that revoked the H-1B petition of an IT staffing employer for a worker who had moved among several locations with only new LCAs. Because by statute the Attorney General (AG) is the ultimate arbiter within the Executive Branch about the meaning of immigration laws, the AG's designation as precedent makes the decision binding on all immigration officers in the Department of Homeland Security as well as all Immigration Judges in the Department of Justice. An agency decision designated as precedent also tends to receive from federal courts the highest level of deference, the same as in a regulation following notice and comment rulemaking.

Thus, it appears the uncertainty is resolved, and employers had better file new H-1B petitions for any H-1B worker who will be moved to a new regular location for work. Technically the petition should be approved before the change takes effect, but a special rule for H-1B job changes probably makes it sufficient to have filed the new petition before the move rather than waiting on approval. An employer who already has moved a worker without a new petition should seriously consider filing promptly a new petition covering the location. In the process any other possible locations for transfer probably should be included, but employers should know that USCIS might push back on approval for locations that are only speculative, particularly in the IT industry.

The April 9, 2015 decision, Matter of SIMEIO SOLUTIONS, LLC, 26 I&N Dec. 542 (AAO 2015), is one of several AAO decisions designated this week by the AG. Designating AAO decisions as precedent is a quicker way of settling an interpretational issue than issuing a regulation, and USCIS and the Department of Justice may be looking for other issues to settle this way.