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THE LCA IN THE AGE OF TELECOMMUTING

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An H-1B employee has a job with a company based in New Jersey. Her job can, however, be performed remotely from virtually anywhere in the United States or the world. So long as she has good internet access, she can sign in to her employer's server and perform her work as if she were in the office. She usually works at her office, but has decided to work from home in Pennsylvania for two months. When her boyfriend's mother, who lives in California, becomes ill, she and her boyfriend go out to care for her, staying for six weeks. She then goes on a cruise in US waters, still telecommuting to work. She has no work-related duties in Pennsylvania or California (or out in US waters during the cruise), such as working with clients there, and will be effectively telecommuting to the New Jersey office. What would her employer need to do in order to comply with the Department of Labor's regulations for H-1B workers, specifically with regard to the Labor Condition Application (LCA) rules?

As a background, the LCA is to an H-1B worker like a leash is to a dog. The LCA ensures that notice is provided to US workers about the fact that an H-1B worker is being sought, the occupational classification, the wages offered, the period of employment, locations at which the H-1B worker will be employed, and that the LCA and accompanying documents are available for public inspection. See 20 CFR § 655.734.

Telecommuting (or "telework" as labeled by the US government) has become more and more prevalent. (See studies here, http://tinyurl.com/6jcc7ww.) Telecommuting employees raise important questions and issues in the immigration context, especially with regard to the Labor Condition Application required for H-1B nonimmigrant workers.

The first issue raised under the facts above is whether a new LCA is required for each location, and if so, whether the posting should be done in the employee's home and in her boyfriend's mother's home.

These situations raise interesting concerns about how (and where) work is "actually" performed (as stated in the regulations) in a global economy increasingly characterized by telecommuting. Can it be argued that because the employee is logging into the employer's system in New Jersey, the work is actually being performed in New Jersey? Not likely given the structure of the regulatory scheme, but it is something that should be considered in the global economy.

The laws governing the LCA and H-1B processes are out-dated. They do not recognize, and in fact guidance issued by USCIS in 2010, available at http://tiny.cc/z3ZU8, makes clear that some government agencies view with skepticism, the global economy and the increasing frequency of telecommuting.

The LCA and the attestations an employer makes when submitting one were developed as a means to protect wages and working conditions, and to ensure that US workers are made aware of the hiring of H-1B professionals (which makes the concept of posting an LCA in someone's home or vacation hotel room somewhat absurd). The regulatory scheme is largely location-oriented. Violation of the regulatory framework may result in fines, debarment from participation in the LCA (and thus H-1B) process, and further investigations. Thus, even where a company pays the required wage for any location and has no intent of violating the procedures, a failure to comply with the specific technical requirements, even where compliance seems absurd, may result in penalties.

USCIS has become more location-oriented in its analysis of H-1B petitions. USCIS now examines worksite issues more closely and, with the recently issued Form I-129, has begun to request greater detail on worksites and itineraries for all H-1B petitions. The agency's interest stems in part from its concern with the existence of a proper employer-employee relationship to support an H-1B petition. (For more information, see From Problem to Springboard: Tips on Using the Neufeld Memorandum in Support of H-1B Petitions, available at http://tinyurl.com/33t7fkz.) Such a relationship is defined in part by where an employee is working and whether the employer has control over the

employee's work at that location. The companies currently subjected to the highest scrutiny are those that place workers at end client sites (i.e., work locations not controlled by the petitioning employer) to perform services/work. But the concerns raised in that category may spread to other circumstances, such as the employee telecommuting from home.

The definitions addressing where an H-1B employee works were developed originally with a focus on the worker's actual physical location, assuming that the job duties would need to be performed in a particular location. Gathering statistics and issuing prevailing wage determinations require pinpointing a particular city or geographic area. The entire prevailing wage framework is place-based. 20 CFR 655.715 provides the following definitions:

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H–1B nonimmigrant is or will be employed. ...

Place of employment means the worksite or physical location where the work actually is performed by the H–1B, H–1B1, or E–3 nonimmigrant.

These definitions are vague and do seem to leave room to argue that an H-1B worker who can be anywhere but works through the employer's location via the internet (thus the work arguably "actually is performed" at the employer's location), is always within "normal commuting distance" so long as the employee has proper internet access. If all that the worker needs is a computer and an internet connection to perform the work, then it would be most logical to post the LCA where the employer's server is located! To go back to our hypothetical and show how absurd it can be, imagine our H-1B telecommuter embarking on a voyage on a cruise ship for more than 30 days from San Francisco, CA to Anchorage, Alaska. Each time the ship enters a location, which is not within commuting distance from the original location posted on the LCA, a new LCA will need to be posted on the cruise ship. So, her employer, who is a stickler about compliance, posts an LCA with a San Francisco, CA location, which is where the ship starts its voyage. By the time, the cruise ship sails up the waters adjoining Oregon and Washington, new LCAs will need to be obtained and posted on the cruise ship. Once the cruise ship is in Canada, we can assume that the DOL's LCA regulations do not apply in foreign territories, but with the DOL you can never tell as it passionately attempts to expansively interpret its rules. Once the ship reaches Alaska, more rounds of LCA's will need

to be posted (as Alaska is a huge territory) until its final destination in Anchorage, Alaska.

Nevertheless, using the employer's address even where the employee telecommutes because the work is being done virtually at the employer's location has not been tested. This problem does not arise in the PERM labor certification process with roving employees, because an employer can obviate the problem by using headquarters as the base from which to conduct recruitment. See Cora-Ann Pestaina's article PERM and the Roving Employee, available at http://tinyurl.com/64dhcv5. A DOL auditor who reviews a company's LCA public access files may not accept this 21st century application of the policies and definitions. Therefore, however absurd it may sound, it might still be advisable to file an LCA for the worker who telecommutes, and have the worker post the LCA in two conspicuous locations in his or her home or the location from which he or she is telecommuting. In the alternative, the LCA notice provision may be satisfied by an electronic posting directed to employees in the relevant occupation classification. Pursuant to 20 CFR 655.734(a)(ii)(B), such electronic posting may be accomplished:

by any means ordinarily uses to communicate with its workers about job vacancies or promotion opportunities, including through its "home page" or "electronic bulletin board" to employees who have, as a practical matter, direct access to these resources; or through e-mail or an actively circulated electronic message such as the employer's newsletter. Where affected employees at the place of employment are not on the "intranet" which provides direct access to the home page or other electronic site but do have computer access readily available, the employer may provide notice to such workers by direct electronic communication such as e-mail (i.e., a single, personal e-mail message to each such employee) or by arranging to have the notice appear for 10 days on an intranet which includes the affected employees (e.g., contractor arranges to have notice on customer's intranet accessible to affected employees).

The benefit of electronic posting is that it may protect an employer in situations where the employee is working remotely from various locations (not office sites, but locations such as a relative's home or vacation spot) for more than 30 days per year, based on the argument that the electronic posting covers all potential locations. There are some general problems with electronic notification – it does not obviate the need to obtain a new LCA when the H-1B

telecommutes, nor does it obviate the need to pick an address to indicate on the LCA. Electronic posting only obviates the absurd situation of having an employee post the LCA in his or her home. Furthermore, the rules governing electronic posting are quite vague and thus fraught with risk. The rules do not make clear who has to be notified – all employees everywhere and anywhere who fall within the same "occupational classification" (and the rules do not indicate how narrowly or broadly that should be interpreted) or only those in the "area of intended employment." Where is that in an economy increasingly characterized by telecommuting?

The DOL's framework is location-focused, and gives no clear guidance on whether the work a telecommuting employee does is "actually is performed" at the employer's address as listed on the LCA, and not where the telecommuting employee is located. What is clear is that one who works remotely for less than 30 days (or in some limited circumstances, up to 60 days, see 20 CFR 655.735((c)) in a one year period need not have a new LCA to cover that employee's new location.

Even if the DOL has not taken a position on the issue, it is hoped that the DOL auditor who wishes to rigidly apply this 20th century rule on work locations in the 21st century may exercise discretion in not imposing a penalty if the employer has complied in every other aspect. The DOL auditor may decide that given the lack of clarity in this area, the employer took a good faith position. However, to ensure against such risks, employers may wish to prepare a new LCA indicating the address from which the individual will be telecommuting, and have the individual post the LCA in two locations at that address. Until the regulations catch up with reality in the 21st century, this would be the appropriate course of action.