CYRUS D. MEHTA & PARTNERS PLLC
US IMMIGRATION & NATIONALITY LAW

AAO FIRMLY TETHERS H-1B WORKERS TO AN LCA LIKE A DOG IS TO A LEASH

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In *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542 (AAO 2015), the AAO affirmed the Service Center Director's decision and revoked the petition's approval. Among other things, the Director had concluded that changes in the beneficiary's places of employment constituted a material change to the terms and conditions of employment as specified in the original petition. The changes included different metropolitan statistical areas from the original place of employment, which USCIS agents were unable to find. The AAO found that the petitioner should have filed an amended Form I-129 H-1B petition corresponding to a new labor condition application (LCA) that reflected these changes, but the petitioner failed to do so. The AAO noted that petitioners must immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility for H−1B status

In affirming the Director's decision, the AAO noted:

> *(1) A change in the place of employment of a beneficiary to a geographical area requiring a corresponding Labor Condition Application for Nonimmigrant Workers (LCA) be certified to the U.S. Department of Homeland Security with respect to that beneficiary may affect eligibility for H-1B status; it is therefore a material change for purposes of 8 CFR §§ 214.2(h)(2)(i)(E) and (11)(i)(A) (2014).*
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> *(2) When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H−1B petition with the corresponding LCA.*

In the not too distant past, employers relied on informal USCIS guidance

indicating that so long as a new LCA was obtained prior to placing an H-1B worker at a new worksite, an amended H-1B petition was not required. *See* Letter from Efren Hernandez III, Dir., Bus. And Trade Branch, USCIS, to Lynn Shotwell, Am. Council on int'l Pers., Inc. (October 23, 2003). The AAO has now explicitly stated in *Simeio Solutions*, footnote 7, that the Hernandez guidance has been superseded. Even prior to the guidance being formally superseded, employers were filing amended H-1B petitions as consular officers were recommending to the USCIS that the H-1B petition be revoked if a new LCA was obtained without an amendment of the H-1B petition. According to the AAO, "f an employer does not submit the LCA to USCIS in support of a new or amended H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security." The AAO cites INA 101(a)(15)(H)(i)(b), 8 CFR 214.2(h)(4)(i)B)(1) and 20 CFR 655.700(b) to support its position, but none of these provisions seem to suggest that an LCA obtained after an H-1B petition has already been submitted is not valid if it is "not certified to the Secretary of Homeland Security." The DOL certifies the LCA. There is no separate process where the DOL also has to certify the LCA to the Secretary of Homeland Security.

It is not so much the cost that troubles employers with respect to filing an amended H-1B petition. The USCIS has made it extremely onerous for employers to obtain H-1B petitions especially when an H-1B worker will be assigned to third party client sites. This is a legitimate business model that American companies across the board rely on to meet their IT needs, but the USICS requires an onerous demonstration that the petitioning company will still have a right to control the H-1B worker's employment. Each time the employer files an amendment, the USCIS will again make the employer demonstrate the employer-employee relationship through the issuance of a humongous Request for Evidence (RFE). The employer will thus risk a denial upon seeking an amendment, even though it received an H-1B approval initially on virtually the same facts.

H-1B workers in other industries such as healthcare also get re-assigned to different locations, such as physicians, nurses and physical therapists. They too will be over burdened by the need to file amended H-1B petitions each time they move to a new work location. One may also have to await the approval of the amendment before the H-1B worker can move to the new job location. The portability provision at INA 214(n) seems to apply only when an H-1B worker is

accepting "new employment" by a "prospective employer of a new petition."

Arguably, if an H-1B worker is being moved to a new job location within the same area of intended employment, a new LCA is not required and nor will an H-1B amendment be required. The original LCA should still be posted in the new work location within the same area of intended employment.

20 CFR 655.17 defines "area of intended employment":

> *Area of intended employmentmeans the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).*

So a move to a new job location within New York City would not trigger a new LCA, although the previously obtained LCA would need to be posted at the new work location. This could happen if an entire office moved from one location to another within NYC, or even if the H-1B worker moved from one client site to another within NYC.

The DOL Wage and Hour Division Fact Sheet # 62J at http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62j.htmalso confirms this:

If the employer requires the H-1B worker to move from one worksite to another worksite within a geographic area of intended employment, must

the employer obtain an LCA for each worksite within that area of intended employment?

No. The employer need not obtain a new LCA for another worksite within the geographic area of intended employment where the employer already has an existing LCA for that area. However, while the prevailing wage on the existing LCA applies to any worksite within the geographic area of intended employment, the notice to workers must be posted at each individual worksite, and the strike/lockout prohibition also applies to each individual worksite.

The AAO decision in *Simeio Solutions* further over regulates the H-1B visa, which is already subject to the most hyper-technical scrutiny. This in turn will deprive American companies of an efficient business model that has provided reliability to companies in the United States and throughout the industrialized world to obtain top-drawer talent quickly with flexibility and at affordable prices and scale that benefit end consumers and promote diversity of product development. This is what the oft-criticized "job shop" readily provides. By making possible a source of expertise that can be modified and redirected in response to changing demand, uncertain budgets, shifting corporate priorities and unpredictable fluctuations in the business cycle itself, the pejorative reference to them as "job shop" is, in reality, the engine of technological ingenuity on which progress in the global information age largely depends. Such a business model is also consistent with free trade, which the US promotes vehemently to other countries, but seems to restrict when it applies to service industries located in countries such as India that desire to do business in the US through their skilled personnel

The Hernandez guidance provided flexibility to employers whose H-1B workers frequently moved between client locations, while ensuring the integrity of the H-1B visa program. Employers were still required to obtain new LCAs based on the prevailing wage in the new area of employment, and also notify US workers. However, they were not required to file onerous H-1B amendments each time there was a move, and risk further arbitrary and capricious scrutiny. The AAO has removed this flexibility, and has further regulated the H-1B to such an extent that the LCA must now always firmly and securely tether an H-1B worker through an amended petition just like a dog is to his leash, although the latter may still be occasionally let loose to enjoy more freedom than an H-1B!