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

WHEN AN AMENDED H-1B PETITION IS NOT REQUIRED EVEN AFTER MATTER OF SIMEIO SOLUTIONS

Posted on May 4, 2015 by Cyrus Mehta

By Cyrus D. Mehta

The AAO decision in *Matter of Simeio Solutions, LLC*, *26* I&N Dec. 542 (AAO 2015) has already caused headaches as it will make it more costly and burdensome for employers who hire H-1B workers. An overview of the AAO decision can be found at AAO Firmly Tethers H-1B Workers To The LCA Like A Dog Is To A Leash. In *Matter of Simeio*, the AAO concluded that changes in the beneficiary's places of employment, resulting in the obtaining of a new Labor Condition Application (LCA) constituted a material change to the terms and conditions of employment as specified in the original petition, thus necessitating the filing of an amended petition.

Every time an H-1B worker moves to a location not covered in the LCA, the employer will have to file an amended petition. The filing of an amended H-1B petition will incur additional costs for an employer. At an April 30, 2015 DHS Ombudsman call on the AAO decision, it was estimated that if an employer moves 50 workers three times a year, that would be 150 amended petitions resulting in half a million dollars in legal fees and costs. It will also give a right to the USCIS to adjudicate the H-1B petition as no deference is given to a prior approval when there is a material change in the employment. It is also a fact that the USCIS Vermont Service Center and California Service Center do not always apply consistent standards when adjudicating H-1B petitions. If the Vermont Service Center approved an H-1B petition, and the worker will be assigned to a work location within the jurisdiction of the California Service Center, there is a likelihood that the amended H-1B petition will be adjudicated under a stricter standard, resulting in a Request for Evidence and even a denial.

Prior to *Simeio Solutions*, 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 The AAO has now explicitly stated in *Simeio Solutions*, footnote 7, that the Hernandez guidance has been superseded. Employers who relied on the prior guidance who file amended H-1B petitions to comply with *Simeio Solutions* should not be penalized for not previously filing an amended H-1B petition by deeming that the H-1B worker fell out of status.

When is an amended petition not legally required even after *Simeio Solutions*?

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. 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.

There is also nothing in the law and regulations that require an employer to first obtain an approval of the amended petition prior to placing a worker there. Footnote 11 in the *Simeio* decision suggests that the new LCA, along with the amended H-1B petition, must be submitted, before the beneficiary would be permitted to begin working in the new place of employment. It does not suggest that the amended H-1B petition has to be approved before the worker would be permitted to work. Still, there is an exception in the DOL regulations to immediately filing a new LCA, and by corollary an amended H-1B petition, even when an H-1B worker is moved to a new location. Employers may take advantage of the short term placement exception at 20 CFR 655.735. Under the short term placement exception, an employer may under certain circumstances place an H-1B worker at a new job location for up to 30 days, and in some cases 60 days (where the worker is still based at the original location), without obtaining a new LCA. Thus, when an employer needs to urgently transfer an H-1B worker to a new location, it can do so under the short term placement exception without needing to also immediately file an amended H-1B petition. This exception is limited, though, since if the H-1B worker is placed at the new location for more than the 30 or 60 days, the employer needs to obtain a new LCA and also file an amended H-1B petition. An employer also cannot use the short term placement exception if

there is already an existing LCA at that location.
While readers should review the short term placement rule in its entirety, an employer who wishes to take advantage of this rule must:

> *(i) Continue to pay such worker(s) the required wage (based on the prevailing wage at such worker's(s') permanent worksite, or the employer's actual wage, whichever is higher);*

> *(ii) Pay such worker(s) the actual cost of lodging (for both workdays and non-workdays); and*

> *(iii) Pay such worker(s) the actual cost of travel, meals and incidental or miscellaneous expenses (for both workdays and non-workdays).*

Finally, if an H-1B worker is placed at a location that is considered a non-worksite under 20 CFR 655.715, which does not trigger an LCA, the AAO decision is also inapplicable. Non-worksites include locations where employee developmental activity is conducted such as management conferences, staff seminars, etc. Non-worksites may also include locations where little time is spent by the employee at anyone location, and where the worker's job is "peripatetic in nature." They may also include situations where the H-1B worker's job is spent at one location but where the worker occasionally travels for short periods to other locations "on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations)." 20 CFR 655.715 provides the following examples of non-worksites, although readers are well advised to read the rule in its entirety:

> *A computer engineer sent out to customer locations to "troubleshoot" complaints regarding software malfunctions; a sales representative making calls on prospective customers or established customers within a "home office" sales territory; a manager monitoring the performance of out-stationed employees; an auditor providing advice or conducting reviews at customer facilities; a physical therapist providing services to patients in their homes within an area of employment; an individual making a court appearance; an individual lunching with a customer*

> *representative at a restaurant; or an individual conducting research at a library.*

The regulation also provides the following examples of "worksites" that would trigger a new LCA, and now under *Simeio*, an amended H-1B petition:

> *A computer engineer who works on projects or accounts at different locations for weeks or months at a time; a sales representative assigned on a continuing basis in an area away from his/her "home office;" an auditor who works for extended periods at the customer's offices; a physical therapist who "fills in" for full-time employees of health care facilities for extended periods; or a physical therapist who works for a contractor whose business is to provide staffing on an "as needed" basis at hospitals, nursing homes, or clinics.*

Employers will soon feel the brunt of the AAO decision as they start moving H-1B workers, which in some industries like IT, accounting and management consulting is the norm. The exceptions to filing an amended H-1B petition while useful are still limited. As employers feel overly burdened by the AAO decision, they may consider resorting to litigation as the AAO has created a new rule without going through the appropriate notice and comment procedure under the Administrative Procedure Act. 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. The AAO's invention of a new rule relating to the validity of the LCA is also ripe for litigation. Finally, an H-1B worker should not found to be in violation of status for failure to file an amended H-1B petition prior to *Simeio*. If the USCIS begins to retroactively apply *Simeio* so as to penalize employers and H-1B workers, this too would be ripe for federal court litigation.