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AVOID THE CONFUSION: COMPLYING WITH THE SIMEIO DECISION ONE YEAR LATER

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Employers of roving H-1B employees have scratched their heads in confusion over the Administrative Appeals Office's April 9, 2015 decision, *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), discussed in detail in this blog here, here and here. This is because while the decision lays out the requirements for filing an amendment when an H-1B worker's worksite changes, but is mute on a variety of other situations that employers may face.

Briefly, the *Simeio* decision, formalized in a USCIS final guidance on July 14, 2016, requires H-1B employers to file an amended petition when there is a change in the H-1B employee's place of employment requiring a new LCA to be certified, with the following exceptions:

- When it is a move within the same "area of intended employment"
- When the move is a short term placement pursuant to 20 CFR 655.735
- When the move is to a non-worksite location, such as in cases where:
    - The H-1B employee is going to a location merely to participate in developmental activity, such as attending conferences or seminars;
    - The H-1B employee spends little time at any one location; or
    - The job is "peripatetic in nature" per 20 CFR 655.715.

The same final guidance from USCIS provided for a safe harbor period for employers to comply with the decision's rules so that for any moves made prior to the *Simeio* decision or that took place after April 9, 2015 but before August 19, 2015, employers would be able to file an amendment by January 15, 2016. But for any moves that take place after August 19, 2015 the employer must first file an amendment before the H-1B employee starts at the new worksite.

Now that it has been more than 1 year since the decision and at least six

months since the safe harbor due date in January 2016, it would be helpful to assess compliance in various situations including those where it may not be entirely clear whether an amendment pursuant to *Simeio* is required. To that end, here are some fact patterns where some H-1B employers may wonder whether precisely an amendment is warranted.

Fact Pattern #1: **Employee Edgar has been at worksite A since January 2015. Worksite A is in New York City. His employer ABC Company now wishes to assign him to a project for a new client located at worksite B, in Piscataway, NJ. Must ABC Company file an amendment?**

Here, the analysis turns on whether Piscataway, NJ and New York City are in the same "area of intended employment." According to the National Bureau of Statistics (BLS)'s definitions of Metropolitan Statistical Areas (MSAs) as designated by the Office of Management and Budget, Piscataway and New York City are indeed within the same MSA. But does this mean that they are within the same area of intended employment? It is not very clear. The Final Guidance provides as an example a change in worksite within the New York City metropolitan area as one that does not require an amendment. According to 20 CFR 655.1300, an area of intended employment is defined, within the regulations for an H-2A filing as:

> the geographic area within normal commuting distance of the place (worksite address) of the job opportunity for which certification is sought. 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., average commuting times, barriers to reaching the worksite, quality of the regional transportation network, etc.). If the place of intended employment is within a Metropolitan Statistical Area (MSA), including a multistate MSA, any place within the MSA is deemed to be within normal commuting distance of the place of intended employment. The borders of MSAs are not controlling in the identification of the normal commuting area; a location outside of an MSA may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA.

Based on the definition above, Piscataway and New York City would arguably be in the same area of intended employment as they are within the same multistate MSA. Here, the employer could reasonably decide not to file an

amendment, though it would have to post the LCA at the new worksite for the required ten days.

Fact Pattern #2: **Employee Edgar has been at worksite A since January 2015. Worksite A is in New York City. His employer ABC Company now wishes to assign him to a project for a new client located at worksite B, in Chicago, IL. However, he will only be there for about 24 days and then he will return to work at worksite A. Must ABC Company file an amendment?**

Since the new worksite is not within the same area of intended employment, ABC Company could file an amendment here. However, since Edgar would only be at the new client's site for 24 days, ABC Company could avail itself of the short-term placement option. Pursuant to 20 CFR 655.735, an employer may place an employee for up to 30 days at a worksite on a short-term placement (and in some cases 60 days where the employee is still based at the "home" worksite"). During the time spent at this worksite, the employee must be treated as a per diem employee, and the employer must pay all expenses such as housing and travel. If ABC Company decides to use the short-term placement option for Edgar, then it would not have to file an amendment. If it chooses not to use the short-term placement option, then ABC Company should file an amendment before Edgar travels to Chicago. Since it already is aware that after this short assignment Edgar will return to New York City, ABC Company ought to place both New York City and Chicago on the LCA and provide an itinerary in the H-1B petition.

Fact Pattern #3: **In the original petition, employee Edgar's place of employment was listed as ABC Company's headquarters located in New York City, a home office. Edgar's position is peripatetic in nature and he must travel to various client sites constantly. When he is not traveling, he may telecommute to employer ABC Company's headquarters from his home located in San Antonio, Texas. Must ABC Company file an amendment now?**

Here, it is not entirely clear whether an amendment is required. Edgar's position is peripatetic in nature and may fall into one of the exceptions under the *Simeio* rule. Moreover, when he is not traveling, he is telecommuting to ABC Company's headquarters. However, the LCA did not list his home office as his place of employment. *Simeio* is silent on telecommuting and instead only discusses actual changes in the work location. Here, ABC Company could file

an amendment in an abundance of caution, providing a certified LCA listing both New York City and Edgar's home as work locations, and explain that the ambiguity in the *Simeio* rules with regard to telecommuting warrants the favorable exercise of USCIS's discretion.

Fact Pattern #4: Employee Edgar is on a TN and his coworker Emily is on an E-3. They both work for ABC Company in New York City on the same project. ABC Company now needs them to transfer to a new project located in San Francisco, CA. Would ABC Company need to file an amendment?

Neither Edgar nor Emily are in H-1B status. *Simeio* only touches upon changes in worksite location for H-1B workers, and it does not discuss whether the rule extends to similar nonimmigrant temporary employment visas such as the TN and E-3. Furthermore, there would be nowhere that ABC Company could file an amendment since TNs and E-3s are applied for by the nonimmigrant at either port of entries or consular posts abroad. There is therefore no petition with USCIS that ABC Company could amend. Furthermore, in the case of a TN, no LCA is filed with the Department of Labor, and so the crux of the decision in *Simeio*, that a change in worksite location requiring a new certified LCA is a material change, has no bearing on a TN. Theoretically, however, if ABC Company had filed an extension of status for Emily through USCIS by filing the Form I-129, and then a change in worksite occurred, then ABC Company could choose to, in an abundance of caution, file an amendment in the spirit of the *Simeio* guidance.

Fact Pattern #5: Emily is on an H-1B and working for ABC Company. She is at a client site in Atlanta, Georgia and her employer's headquarters is in New York City. The LCA for the H-1B petition contained both Atlanta and New York City as places of employment. ABC Company wishes to move her from Atlanta to work from their headquarters. Must ABC Company file an amendment?

Here, both New York and Atlanta are on the original LCA. Even if there is a change in employment location from Atlanta to New York City, there would not be an amendment required under *Simeio* because no change warranted a new certified LCA and thus no material change occurred that requires an amended petition.

Fact Pattern #6: Esther is on an H-1B, and was working at a client site in

Minneapolis from November 2014 until May 2015 when she was transferred to a client site in Jacksonville, Florida. Prior to that transfer, her employer obtained a new LCA for Jacksonville, but did not file an amendment. Her employer now wishes to move her to a worksite in Philadelphia. Must ABC Company file an amendment?

Yes! ABC Company should have filed an amendment when Esther's worksite changed from Minneapolis to Jacksonville. This change occurred after the *Simeio* decision and therefore, ABC Company should have filed an amendment by January 15, 2016. Since it did not, it is not in compliance with the *Simeio* decision and may face fines and other sanctions for violating the new rule. ABC Company may investigate whether Esther's employment is peripatetic in nature or whether she was telecommuting in which case they may not have been required to file an amendment. With the new planned change in worksite to Philadelphia, ABC Company very likely will need to file an amendment before Esther moves to the new worksite. ABC Company should try to explain in its amended petition the reasons why an amendment had not been filed prior to Esther's move to Jacksonville, discuss any extraordinary circumstances that may have led to the failure of filing the amendment, and seek favorable discretion from the USCIS pursuant to 8 CFR 214.1(c)(4). If the extension of status is denied because Company ABC failed to file the amendment timely, then Esther could still leave the U.S. and undergo consular processing for her H-1B visa.

With regard to whether Esther may have accrued unlawful presence, we would argue that she did not since unlawful presence during a period of authorized stay only is triggered once the USCIS makes an adverse finding regarding her status. In this case, if USCIS were to deny the extension of status and make an adverse finding, the unlawful presence would only trigger from the adverse finding and not retroactively.

The above are just a few examples of scenarios that H-1B employers face that require them to analyze the best ways to comply with the *Simeio* decision. Because of the complex ways in which companies conduct business in the modern world, it is imperative that H-1B employers remain up-to-date on the latest rules with regard to compliance with H-1B employment, particularly for roving employees. It has been one year since the *Simeio* decision and the safe harbor period has expired. If employers anticipate that H-1B workers will need to change worksites in the future, it is helpful to perform due diligence and plan accordingly for the H-1B amendments that it will need to file. Some employers

prepare certified LCAs for various worksites in advance, so that when changes in worksites occur, the H-1B amendment can be filed quickly without waiting the usual 7 days for the LCA to be certified. If an LCA is prepared in advance, the employer must still comply with the attestation requirements relating to the anticipated worksite(s), including posting the LCA for 10 days at each worksite listed on the LCA. Employers should also be ready with the required documents to demonstrate its right to control the H-1B employee's employment (i.e. contracts, work orders, end client letters, etc.) and that there is sufficient H-1B work to be performed at the new site. Some employers may opt to plan an itinerary and appropriate LCA if it anticipates that a single H-1B employee may move several times within the H-1B validity period so that it would not have to file multiple amendments for the same employee. Lastly, employers that anticipate worksite changes lasting 60 days or less should examine whether it could opt for a short-term placement and budget accordingly for it.

Since the surprise decision was issued last year, it has been a costly and burdensome process for many H-1B employers who suddenly needed to file multiple amendments for their employees when before the decision new certified LCAs would suffice. It particularly hurts employers in the tech sector who rely on H-1Bs for employees who work on various projects throughout the year for different clients. The ruling also ignores the realities of business today - which is that, often, tech employers must provide consultants for projects very quickly or else risk losing the contract with the customer. Filing amendment after amendment cuts into companies' bottom line, ignores the modern methods of business in IT consulting, and overall has a negative effect on this bustling field of American technology. One sliver of a silver lining has been that employers who are subject to the super fee under Public Law 114-113 (employers who have 50 or more employees, 50% or more of whom are in H-1B or L-1 status; see our blog about this fee here) need not pay the $4000 super fee for amendments as the fee is only required for initial H-1Bs and H-1B transfer petitions. Still, it has indeed been a year of adjustments. Because it has indeed only been one year, no official statistics have been released about how USCIS has dealt with non-compliance with the *Simeio* decision. It remains unclear whether the USCIS or DOL will issue penalties or fees against employers who have failed to comply with *Simeio*, whether H-1B petitions will be revoked, and exactly how much discretion USCIS will wield when there had

been a good faith effort to file the amendment but it was not done timely.

(This blog is for informational purposes only and should not be considered as a substitute for legal advice.)