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TO AMEND, OR NOT TO AMEND: THAT IS THE QUESTION FOR VISAS NOT ASSOCIATED WITH A LABOR CONDITION APPLICATION

Posted on February 22, 2021 by Cora-Ann Pestaina

As the COVID-19 pandemic unfortunately rages on, employers nationwide continue to seek ways to keep their businesses open and reduce costs while also protecting their nonimmigrant employees. This blog has addressed, here, here and here, some of the unique challenges facing employers of H-1B and other nonimmigrant workers. Employers have basically come to accept the fact that the H-1B worker is tethered to the LCA and there are several changes that could necessitate the filing of an amended petition. But while it is generally understood that other work visas such as the E-1, E-2, L-1, O and TN visas afford greater flexibility because they are not subject to the LCA, the lack of specific governmental guidance means that employers are still unsure of what steps they can and cannot take with regard to their workers in these visa categories. This blog discusses best practices for employers considering remote work, furloughs, reduction in hours of work or salary reductions for employees in nonimmigrant visa categories without wage requirements.

Change in Work Location

One requirement common to all visa types is that USCIS must be notified if there is a material change in the terms of employment. Over the past year, many employers have had to close headquarters and implement remote work policies. Because the E, L, O and TN visas do not require an LCA, they are not as location specific as the H-1B and they afford more flexibility regarding a change in the nonimmigrant employee's work location.

In the L-1 context, 8 C.F.R. § 214.2(1)(7)(i)(C) states that an employer should file an amended petition to reflect changes in approved relationships, additional

qualifying organizations under a blanket petition, change in capacity of employment (i.e. from a specialized knowledge position to a managerial position), or any information which would affect the beneficiary's eligibility under the Act. As long as the L-1 employee continues to perform the duties of the approved L-1, a change in work location, especially if only temporary, should not be considered sufficiently material to require the filing of an amendment. However, employers of nonimmigrant workers in L-1 status, and especially when the change in work location will be long-term, should consider the fact that L-1s are subject to USCIS site visits. The employer should consider whether it makes more sense to file the L-1 amendment in an effort to protect against the potential negative effect of a failed USCIS site visit to the initial L-1 worksite. This was exactly what happened in *Matter of W- Ltd.*, ID# 1735950 (AAO Nov. 20, 2018). This non-precedent decision involved an employer who relocated the L-1 employee without filing an amendment. Upon discovering, after a site visit, that the L-1 was no longer employed at the original worksite, USCIS issued a Notice of Intent to Revoke (NOIR) the approved L-1 petition. This was despite the fact that the officer was able to speak to the L-1 employee's supervisor at the worksite, interview the L-1 employee over the phone and collect additional information from the L-1 employee via email! The employer responded to the NOIR explaining the relocation and that the L-1 employee continued to perform in the same position. However, the L-1 was still revoked. USCIS stated that it was not evident that the beneficiary was currently employed in a managerial position pursuant to the terms and conditions of the approved petition. Upon appeal, the employer successfully argued that neither the statute, regulations, nor USCIS policy expressly require an L- I employer to file an amended petition in every instance where a beneficiary is transferred to a new worksite to perform similar duties for the same employer. The Administrative Appeals Office (AAO) agreed and held that the L-1 had been improperly revoked. While this decision is excellent it is still only a non-precedent decision and the AAO stated that such determinations must be made on a case-by-case basis. Employers considering permanently relocating their L-1 employees may wish to engage in a costs-benefits analysis to determine whether it would make more sense to simply file the amended petition rather than risk a failed site visit and a possible revocation which would likely have a negative impact on their business and on the L-1 employee who would not be able to continue to work and may even have to leave the US while the revocation is under appeal. If the L-1 obtained L-1 status based on a blanket

L-1 petition and will be relocated to an office location already listed in the approved blanket petition, then the L-1 amended petition would not be required.

The E, O and TN visas are not currently subject to site visits. As long as the other terms and conditions of employment remain the same, it is not likely that an employer would encounter any issues in implementing a switch to remote work.

Furloughs

A 'furlough' is a temporary leave of absence from employment duties, without pay. Employers continue to consider furloughs as a means to decrease spending as the pandemic continues. Generally, a nonimmigrant worker may request unpaid leave for personal reasons, such as to take care of a sick parent, and the employer may grant this leave as long as it is well documented in the employee's file, the period of absence is reasonable, and the employer-employee relationship is maintained throughout the leave. But a furlough is not a voluntary request for leave.

Since there has been no communication to the contrary from USCIS, a furlough can only be interpreted in one way and that is to effectively place the nonimmigrant worker employee out of status. An employer who wants to implement furloughs but maintain the ability of the E, L-1, O or TN worker to return to work at the end of the furlough period, could take advantage of the fact that employees in these nonimmigrant statuses, under 8 CFR 214.1(l)(2) are allowed a grace period of 60 days upon a cessation of their employment. Specifically, these nonimmigrant workers shall not be considered to have failed to maintain nonimmigrant status solely on the basis of a cessation of the employment on which their nonimmigrant classification was based, for up to 60 consecutive days. The grace period could be shortened if worker's remaining nonimmigrant status validity period is less than 60 days. In this case, the grace period will end when the status expires. If the employee is rehired, under the same working conditions described in their nonimmigrant visa petition, before the end of their grace period, then they could go back to business as usual. A nonimmigrant worker may only be granted this grace period once during each authorized validity period. Accordingly, an employer could only utilize this furlough strategy once during the employee's validity period without jeopardizing the employee's nonimmigrant status and maintaining the ability to

rehire the employee.

Reduction in the Number of Hours Worked

A reduction in the number of hours worked, switching from full-time to part-time employment, could be considered a material change necessitating the filing of an amended petition. Because the E, L-1, O and TN visas are not tied to an LCA, it may be possible for the employer to reduce the nonimmigrant employee's work hours especially if that change will only be temporary. While it could be argued that the switch to part-time employment is not material, the issue must be analyzed on a case by case basis to ensure that all other terms and conditions of the nonimmigrant worker's employment will remain the same especially if the change will be long-term. For example, if there are some job duties that will no longer be performed, perhaps because the company downsized, best practices may necessitate the filing of an amended petition to describe the new part-time position.

Salary Reduction

Once again, because there is no LCA and therefore, no prevailing wage requirement attached to the E, L-1, O and TN visas, a reduction in salary may be permissible as long as the other terms and conditions of employment continue to be fulfilled. The facts of each case ought to be carefully examined. If the L-1 nonimmigrant worker will continue to work in their executive, managerial or specialized knowledge capacity, a reduction in salary, especially when company-wide, should likely have no effect on L-1 status. Cyrus Mehta discussed the effect of salary reductions here and pointed out that while it is quite settled that the L-1 worker's employment is not necessarily determinative upon the amount or existence of a salary, the question of whether the L-1 worker's salary is commensurate with his or her executive, managerial or specialized knowledge position is one that should be carefully considered, especially if that change is significant. For example, a substantial salary reduction, such as halving of the original salary, may be significant enough to warrant an amended L-1 petition. Again, this must be assessed on a case by case basis. If the L-1 worker continues to perform in the same capacity, and continues to be compensated from overseas, then it may still be defensible to not file an amendment. Further, employers should be careful not to offer a wage that violates the minimum wage under the Fair Labor Standards Act. USCIS is prohibited from approving such an L-1 petition under its adopted

decision, Matter of I Corp, Adopted Decision 2017-02 (AAO April 12, 2017).

For an E-2 investor, a reduction in salary is permissible as long as the E-2 enterprise does not become marginal. An enterprise is marginal if it does not have the present or future capacity to generate income to provide for more than a minimal living for the E-2 investor and family. An enterprise that continues to employ workers other than the investor and his or her family is not marginal. Similar to the above discussion in the L-1 context, employers of E-1/E-2 employees in managerial, executive, essential or specialized positions should always consider whether a new, lower salary is still commensurate with the nature of the E-2 position.

In the end, it is worth reiterating that every case must be examined on its own merits. While great flexibilities may exist with regard to what could be considered a material change in E, L, O and TN contexts, that doesn't mean that the government won't ask questions later. A careful costs-benefits analysis may lead to the conclusion that it is safest to file an amended petition rather than being forced to later defend current decisions. Having said that, the costs-benefits analysis must include the fact that USCIS rescinded its policy of requiring officers to defer to prior determinations in petitions for extension of nonimmigrant status. This policy has not yet been rescinded by the Biden administration. Employers must consider whether the bigger risk lies in filing an amended petition only to have it be denied for new reasons that were not at issue when the initial petition was approved or in not filing the amendment and leaving the matter open to potential questions or an NOIR in the future.