New USCIS Policy Memorandum Clarifies Employers' Obligations Before Relocating H-1B Employees

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Under H-1B regulations, an employer has to notify the United States Citizenship and Immigration Services (USCIS) of "material changes," through the filing of an amended or new H-1B petition. However, the regulations do not explicitly explain what constitutes a material change. Employers have generally relied on prior guidance from USCIS, which indicated that moving an H-1B employee to a new worksite did not constitute a material change if a new Labor Condition Application (LCA) was in place for the new worksite before the move. In April 2015, the Administrative Appeals Office (AAO) issued a precedent decision, *Matter of Simeio Solutions, LLC* (*Simeio*),on this issue. Now, as a result of this decision, USCIS has reversed itself and has issued a new policy memorandum on the actions needed before an employee is relocated.

As a result of USCIS' new guidance and the *Simeio* decision, the relocation of an H-1B employee that requires a new LCA now constitutes a "material change" and employers must, with few exceptions, notify USCIS **before** relocating the H-1B employee to the new worksite(s) by filing an amended or new H-1B petition.

What is the impact on employers going forward?

Employers must now file an amended or new petition with USCIS before relocating an employee to a new worksite(s). While the change will tack on a few extra days to the relocation process and require additional fees, the increased burden on employers should be minimal. Even under the prior guidance, employers still had to be vigilant in monitoring changes to H-1B positions in order to determine whether an amended or new H-1B petition was necessary. Ultimately, the policy memorandum further highlights the importance for company personnel overseeing immigration matters to act quickly when they learn about potential changes to an H-1B

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employee's position, especially if a worksite change is under consideration.

Also, it is important to note that while the amended or new H-1B petition has to be filed with USCIS before a worksite change can occur, the H-1B employee can work and may be able to travel while the petition is pending with USCIS. Thus, this change should generally not require premium processing.

What is the impact on employers that have relocated H-1B employees both before and after the AAO's precedent decision?

In the policy memorandum, USCIS outlined the ways in which employers can ensure they comply with the *Simeio* decision:

- **Worksite change occurring on or before April 15, 2015:** If the employer relocated an employee to a new worksite on or before April 15, 2015, the employer may be safe and may not have to take further action. Per the policy memorandum, USCIS will, in its discretion, "generally not pursue *new* adverse actions (e.g., denials or revocations) solely based upon a failure to file an amended or new petition regarding that move after July 21, 2015." However, the cautious employer has until January 15, 2016 to file an amended or new petition for relocations that occurred on or before April 15, 2015. Petitions filed during this safe harbor period will be considered on time.
- **Worksite change occurring between April 15, 2015 and August 19, 2015:** The employer has until January 15, 2016 to notify USCIS by filing an amended or new petition. If the employer fails to comply during the safe harbor period, the employer risks being the subject of adverse action and its H-1B employee may not maintain nonimmigrant status.
- **Worksite change occurring after August 19, 2015:** The employer must file an amended or new petition before the H-1B employee begins working at the new location.

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What exceptions exist to the new obligations imposed on employers seeking to relocate H-1B employees?

USCIS' new policy memorandum does discuss a few exceptions to the new, general rule. These exceptions are not new, but the policy memorandum serves to make clear that they remain untouched by the *Simeio* decision.

Employers do not have to file an amended or new petition with USCIS when:

- The H-1B employee is relocated to a worksite within the same "area of intended employment" and no other changes in the terms and conditions of employment occur that affect eligibility for H-1B classification. The regulations define the "area of intended employment" as the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is employed.
    - Please note that it is still necessary to post the existing LCA at the new worksite prior to relocating the employee.
- The H-1B employee is assigned on short-term placement at a new worksite, within certain parameters set out in the regulations.
- The H-1B employee travels to "non-worksite" locations, which may include conferences, seminars, business travel, etc.

For more information, please contact Dave Janklow, Peggy Shukairy, or any other attorney in Frost Brown Todd's Immigration Group.

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