

Immigration Law Update

12/22/2015

Safe Harbor Period for H-1B Petitions Following Job Site Changes Ends January 15

Employers who have moved H-1B workers from one location to another may need to file new H-1B petitions, rather than rely on a prior approval. For moves that already occurred, the employer must file within the “safe harbor period,” before Friday, January 15. To adequately prepare, the employer needs to plan to file a new labor condition application (LCA) for the H-1B by January 6.

U.S. Citizenship and Immigration Services (USCIS) issued a new Policy Memorandum on July 21, 2015, stating that whenever an employer relocates an H-1B worker from one metropolitan statistical area (MSA) to another, the employer must file a new LCA with the Department of Labor (DOL) listing the job location and prevailing wage information, in addition to an amended H-1B petition with USCIS, before the relocation. If the employer does not file the new LCA and amended petition in advance, the H-1B will be denied or revoked.

This is a revision from prior USCIS policy, which allowed for the filing of amended petitions after relocation and notifying USCIS of the change. The policy shift stems from a decision by the Administrative Appeals Office (AAO), Matter of Simeio Solutions, 26 I&N Dec. 542, Interim Decision #3832 (AAO April 9, 2015). There, after an H-1B petition was approved and the beneficiary worked for the employer for approximately two months, he went home to India to obtain his H-1B visa from a U.S. consulate through the Department of State. The consular officer learned that the employer changed the work location and notified USCIS. Officers of USCIS conducted a site visit and discovered several discrepancies:

- The address listed as the place of employment was vacant.
- The company was using an employee’s home address as its office address.
- The company’s 40+ employees all worked from home or at client sites.
- The beneficiary no longer was working on the project or at the location specified in the original petition.
- The H-1B had been filed for work in California, but the beneficiary now was assigned to work at additional California locations and in New Jersey, as well. The new worksites are located in MSAs different from those listed on the original petition.

USCIS revoked the approved petition. On appeal, the AAO found that the job location move was the type of material change to the terms and conditions of employment about which USCIS should have been notified in advance.

The policy shift is retroactive, but USCIS has granted a safe harbor period allowing employers to file an amended or new petition by January 15, which USCIS will still consider timely.

Not every move requires an amended petition. The USCIS Policy Memorandum provides that an employer does not need a new LCA or a new or amended petition under the following circumstances:

- A move within the same MSA;
- Short-term placements at a new worksite for up to 30 days, and in some cases 60 days (where the employee is still based at the "home" worksite);
- Non-worksites locations, such as a location for management conferences or staff seminars; and/or
- Placement for a job that is "peripatetic in nature," with occasional travel 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).

Note, however, that any change in worksite location generally requires reposting the LCA on site.

The "safe harbor period" for Simeio-type amended or new H-1B petitions ends January 15. H-1B petitions must be accompanied by an LCA listing the wage and MSA. The DOL may take seven business days to process an LCA. Thus, to adequately prepare, the LCA should be filed no later than January 6, so that it may be included with the H-1B petition.

To avoid surprises related to job changes for H-1B workers, employers should contact qualified immigration law counsel.

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