masuda funai

News & Types: Immigration Update

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Practices: Immigration

USCIS ISSUES GUIDANCE ON H-1B AMENDED PETITIONS FOR CHANGES IN WORKSITES

The US Citizenship and Immigration Services (USCIS) issued agency guidance clarifying the holding of an Administrative Appeal Office (AAO) precedential decision, Matter of Simeio Solutions, LLC, issued in April. The case held that a change in the employee's work location requiring a new Labor Condition Application (LCA) would constitute a material change in the conditions of the employment, thus requiring the employer to file an amended H-1B petition with the USCIS. This case presents nothing new. For several years now, the US California Service Center has been adjudicating cases in this way prompting many employers to take more conservative measures and instituting immigration policies in line with the new rule.

Matter of Simeio Solutions, LLC involved an H-1B employee that was not working at the work location listed on the H-1B petition. The USCIS discovered after a site visit that the employer had vacated the work location listed on the H-1B petition. After the USCIS issued a Notice of Intent to Revoke the H-1B petition, the employer submitted two new LCAs arguing that it had complied with its obligations under the LCA regulations since the employee was working at these new work locations for which it had obtained new LCAs. The AAO disagreed and held that this change in work location constituted a material change in the conditions of employment since the *employee was transferred to work locations that would require new LCAs and the new LCAs had not been submitted to the USCIS with an amended H-1B petition*. Thus, whenever a new LCA was required for a worksite not included in the original H-1B petition, an employer was obligated to file an amended H-1B petition before the employee began work at the new worksite. Employers had previously relied on a Letter from Efren Hernandez III, Director of Business and Trade Branch issued in 2003 which stated that there was no material change (and thus no requirement to file an amended H-1B petition) when an employee is moved to a worksite for which an employer has already obtained a certified LCA, even if that LCA had not been filed with the H-1B petition. The Letter concluded that the employer had already satisfied its obligations with respect to the LCA regulations at the time of filing the second LCA. Matter of Simeio Solutions, LLC invalidates and supersedes the Efren Hernandez Letter.

The USCIS' newly issued guidance outlines how Matter of Simeio Solutions LLC will be applied going forward. Employers have until August 19, 2015 to file H-1B amended petitions for a change in work location that occurred during or before the Matter of Simeio Solutions, LLC decision. The USCIS has clarified that it will not take adverse action against employers that relied upon the Efren Hernandez Letter or any other agency guidance and have not filed amended H-1B petitions by May 21, 2015 (the date of the USCIS' guidance) for

changes in work location that occurred before the case was decided. However, they must file amended H-1B petitions by August 19, 2015. If an amended H-1B petition is not filed by that date, **an employer will be in violation of the new rule and their employee will not be maintaining their H-1B status**. If an employer has an amended H-1B petition pending with the USCIS, the employer can file a second, third, etc. amended H-1B petition, in accordance with this guidance, even if other H-1B petitions remain pending. Every petition will be adjudicated on its own merits.

The case prompted many questions such as what is the scope of Matter of Simeio Solutions, LLC? The case only applies to H-1B petitions where the new work location is outside of the area of intended employment, in other words, the Metropolitan Statistical Area (MSA). If the new work location is in the same MSA as the work location indicated on the H-1B petition, there is no obligation to file a new LCA (since the wage data is identical) and therefore there is no material change. For example, an employer files an H-1B petition listing a Chicago, Illinois address. The employee is subsequently transferred to a worksite in Naperville, Illinois. Both cities are within the Chicagoland MSA, Chicago-Joliet-Naperville, and therefore, the employer is not required to file a new LCA (and thus an amended H-1B petition). If the employee were then transferred to Lake Forest, Illinois, which is in the Lake County – Kenosha County MSA, the employer would have to file a new LCA and thus an amended H-1B petition with the USCIS. An employer moving an employee within an MSA may not be required to file a new LCA and amended H-1B petition, however, it will have other obligations under the LCA (such as posting requirement). Further, the employer would not be able to use a pre-existing and already certified LCA for the Lake Forest, Illinois work location *because that LCA was not submitted with the initial H-1B petition and thus had not approved for that specific employee*.

There are still many situations where Matter of Simeio Solutions, LLC would not apply. This includes short-term placements and non-worksite locations. Employers should seek counsel to ensure that they are complying with the new rule and to help them understand when they need to file an amended H-1B petition.

Lastly, H-1B portability still applies and will continue to provide employers with flexibility in changing work locations. Therefore, as long as the employer and employee meet the portability requirements, the employee can begin work at the new worksite as soon as the amended H-1B petition is received by the USCIS. Employers may still experience delays since the LCA must be certified at the time it is filed with the amended H-1B petition. The Department of Labor takes approximately seven days to certify an LCA, therefore, employers that do not maintain certified LCAs for various work locations and for multiple employees would still experience a minimum delay of a week in filing the amended H-1B petition.

UPDATE ON EXPANDED DEFERRED ACTION FOR CHILDHOOD ARRIVALS (DACA) AND DEFERRED ACTION FOR PARENTS OF AMERICANS AND LAWFUL PERMANENT RESIDENTS (DAPA)

The U.S. Court of Appeals for the Fifth Circuit rejected the Department of Justice's request to lift an injunction for two new immigration programs that were set to start this year. In November 2014, President Obama announced a series of executive actions on immigration, one of which was the expansion of the Deferred Action for Childhood Arrivals (DACA) program and the implementation of a new program called Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA). In December 2014, 26 states filed a lawsuit in the Southern District of Texas arguing that by issuing these directives, the President had violated the

Administrative Procedures Act and had overstepped his power. The court issued a preliminary injunction blocking the implementation of both programs until the case could be decided. The U.S. Department of Justice appealed the injunction to the U.S. Court of Appeals for the Fifth Circuit in New Orleans. Last week the Court of Appeals rejected the request to stay the injunction. Therefore, neither program will be implemented until the underlying case can be decided, a process which may take years of litigation.

The first program, expanded DACA, was set to be implemented in February 2015 when the US Citizenship and Immigration Services was to begin accepting applications. This expanded DACA would remove the age restriction from the original DACA program that was implemented in 2012 and allow undocumented individuals who have been continuously residing in the United States since January 1, 2010 to receive protection from removal and permission to apply for employment authorization. The original DACA program, among other requirements, contains an age restriction that the individual must have been under 31 years old as of June 15, 2012. The DAPA program was set to be implemented six months after the President's announcement and would grant the same benefits as the original DACA program, namely, protection from removal and the ability to apply for employment authorization to undocumented parents of U.S. citizens and Lawful Permanent Residents. The receipt of an employment authorization document has numerous benefits, such as the ability to obtain a social security card and potentially a driver's license or state identification, depending on the state of residence. The original DACA program that was implemented in 2012 remains in effect and those that are eligible can continue to renew this benefit.