masuda funai

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Practices: Immigration

FINAL GUIDANCE ON EMPLOYER OBLIGATIONS FOR FILING H-1B AMENDED PETITIONS FOR CHANGES IN WORKSITES

The US Citizenship and Immigration Services (USCIS) finalized its guidance for H-1B employer in light of the precedential decision, Matter of Simeio Solutions, LLC, decided in April 2015. The following summarizes when an H-1B employer must file an amended H-1B petition when an H-1B worker changes worksites and the new worksite is outside of the area of intended employment:

Change in worksite occurring on or before April 9, 2015:

1. USCIS will not take any new adverse action for an employer's failure to file an amended petition after July 21, 2015. Adverse action includes: Notice of Intent to Revoke, Request for Evidence, Notice of Intent to Deny, Revocations and Denials.
2. USCIS will follow through on adverse actions that were already started or concluded before July 21, 2015.
3. Employers that have received a Notice of Intent to Revoke, that are still within the response period provided by the USCIS, and for which no other grounds for revocation exist, may file an amended H-1B petition to avoid the revocation.
4. Employers that have received a Request for Evidence or a Notice of Intent to Deny solely on the basis of not filing an amended petition for a change in worksites, where the initial H-1B petition included a certified Labor Condition Application ("LCA") for the new worksite, can provide a copy of the USCIS Final guidance and explain that their initially filed petition complies with safe harbor rules. However, in these situations, an employer cannot make any major changes to the petition. Doing so would require a new or amended H-1B filing.
5. USCIS has discretion to investigate other H-1B violations and to include the failure to file an amended petition in any adverse action that arises from other H-1B violations.
6. Employers that wish to file an amended petition, even if they are not required, may do so by January 15, 2016. These petitions will be covered by the "safe harbor period" and will be considered timely filed.

Change in worksite occurring from April 9, 2015 to August 19, 2015:

1. Employer must file an amended petition by January 15, 2016.
2. H-1B employers that do not file an amended petition by January 15, 2016 will be in violation of H-1B laws and risk the revocation or denial of their H-1B petition.
3. Failure to file the amended petition may also put the H-1B employee and any dependent family members at risk of adverse actions since they may be found to not be maintaining their H-1B/H-4 status.
4. Employers that have received a Notice of Intent to Revoke, that are still within the response period provided by the USCIS, and for which no other grounds for revocation exist, may file an amended petition to avoid the revocation.
5. Employers that have received a Request for Evidence or a Notice of Intent to Deny solely on the basis of not filing an amended petition for a change in worksites, where the initial H-1B petition included a certified LCA for the new worksite, can provide a copy of the USCIS Final guidance and explain that their initially filed petition meets the safe harbor rules of the guidance. However, in these situations, an employer cannot make any major changes to the petition. Doing so would require a new or amended H-1B filing.

Change in worksite occurring after August 19, 2015:

1. H-1B employer must file the H-1B amended petition with the USCIS before the H-1B worker is placed at the new worksite.

The USCIS also clarifies the following situations:

1. Denied Amended Petition, Original Petition Still Valid: when an amended petition is denied, the H-1B worker may return to the worksite indicated in the initial petition as long as the initial petition remains valid.
2. Amended or New Petition Still Pending: an H-1B employer may file a subsequent amended or new petition requesting a change in worksite before the subsequent amended/new petition is adjudicated. Each petition will be decided on its own merits. The denial of any interim petition will immediately jeopardize any subsequently filed petitions.

Employers are reminded that this guidance only applies to H-1B petitions where the new work location is outside of the area of intended employment. The area of intended employment is defined as the area within normal commuting distance to the location (which includes areas within the same Metropolitan Statistical Area ("MSA")). If the new work location is within normal commuting distance of the work location listed on the initial H-1B petition, there may be no obligation to file an amended H-1B petition.

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 normal commuting distance of each other and therefore, the employer may not be required to file a new LCA (and thus an amended H-1B petition). If the employee was instead transferred to Rockford, Illinois which is not within normal commuting distance of Chicago, the employer would have to file a new LCA and thus an amended H-1B petition with the

USCIS prior to the transfer. A change in work location to a new location within normal commuting distance may not prompt a new amended filing obligation, but an employer would still be required to comply with other LCA requirements (such as posting the Notice of Filing at the new worksite). Further, the employer would not be able to use a pre-existing and already certified LCA for the Rockford, Illinois work location because that LCA was not submitted with the initial H-1B petition and thus had not approved for that specific employee.

H-1B portability continues to apply 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.

There are still many situations where this guidance 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.