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H-1B Update – Is an Employer Required to file an H-1B Amendment Petition Due to a Change in Work Location which Occurred Prior to the Simeio Decision? Maybe Not!

August 5, 2015

USCIS, on July 21, 2015, issued final guidance as to the implementation of Matter of Simeio Solutions, LLC (Simeio). The Simeio decision requires employers to file an amended H-1B petition anytime an employee is moved to another geographical location, which requires the filing of a labor condition attestation.

Retroactive or Not!

Interim guidance published on May 27, 2015 would have required the filing of a new or amended petition retroactively, even for moves which took place prior to the Simeio decision dated April 9, 2015 but allowed employers a deadline of August 19, 2015 to file the required amendments.

The revised guidance announces that USCIS "***will not generally pursue revocations or denials*** based solely on employers" failure to file an amended H-1B petition for pre-April 9, 2015 moves, but would also not rescind any revocation actions that had already been implemented.

The deadline to file amended H-1B petitions to cure past failures to file was extended from August 19, 2015 to January 15, 2016.

The chart provided in the USCIS' guidance advises that if a petitioner's H-1B employee moved to a new place of employment not covered by an existing approved H-1B petition, then:

If before April 9, 2015, the petitioner may choose to file an amended or new petition by January 15, 2016. However, notices of intent to revoke, revocations, requests for evidence, notices of intent to deny or denials issued prior to July 21, 2015 remain in effect.

- If after April 9, 2015, or prior to August 19, 2015, the petitioner must file an amended or new petition by January 15, 2016.
- If after August 19, 2015, the petitioner must file an amended or new petition before an H-1B employee starts working at a new employment not covered by an existing, approved H-1B petition.

Changes of Work Location Before April 9, 2015 – What Do You Do?

The deliberately ambiguous language of the policy memorandum has left confusion in its wake.

USCIS did not say that it will not pursue new adverse actions for changes of worksite location which occurred prior to Simeio, it said it will "generally **not pursue new adverse actions**" [emphasis added]. What is the message of this language?

It would clearly seem to be the case that USCIS as a matter of policy desires that amended petitions be filed retroactively and seeks disingenuously to create an incentive to do so, but leaves the decision to employers, particularly those who would find it to be a compelling burden.

Employers, in consultation with their advisors, will have to do their own cost benefit analyses and determine what are their best interests.

Only When a Labor Condition Attestation is Required

It is important to remember that this amendment requirement retroactive and perspective only occurs when the Department of Labor regulations mandate the issuance of a new labor condition attestation, or the use of a labor condition attestation not included with the original H-1B filing.

Thus, a move within the same metropolitan statistical area (MSA), which requires a posting of the original labor condition attestation in the new work location, but does not require the filing of a new labor condition attestation does not trigger the amendment requirement. Also overlooked is the definition at 20 CFR § 655.715 of an "area of intended employment" as "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed." This may not necessarily correspond to the MSA and may even involve a location where there is a different prevailing wage!

In addition, certain short-term placements in other geographical locations may not trigger the labor condition attestation requirement and thus, the amendment requirement, pursuant to 20 CFR § 655.735.

So, should you amend those H-1B petitions for worksite location changes which occurred prior to April 9? Give it some thought. Consult with your Proskauer professional. You now have until January 15, 2016 to decide!