USCIS Issues Flawed Guidance On Filing Amended H-1B Petitions Post *Matter Of Simeio*; *Litigation May Provide Only Effective Relief From Proposed Sanctions And Penalties*

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As earlier reported, in *Matter of Simeio Solutions, LLC*, 26 I&N Dec. 542 (AAO 2015), USCIS adopted a change in policy requiring an H-1B employer to file an amended petition prior to assigning an H-1B employee to a worksite not listed in the original approved petition, if employment at the new geographic location would require the employer to obtain a new certified labor condition application. In a footnote to the decision, the USCIS Administrative Appeals Office insisted that the *Simeio Solutions* rule merely clarified, but did not depart from, the agency's longstanding interpretation of its H-1B amendment regulation. This statement is inaccurate.

Pertinent History of the H-1B Amendment Regulation

In June 1998, Legacy INS had published a proposed rule to amend the existing H-1B regulations to clarify the circumstances requiring filing an amended petition. In the preamble to the proposed rule published in the Federal Register, Legacy INS clarified that "where an employer is required, under relevant Labor Department regulations, to file a new Labor Condition application, such as following certain temporary or permanent transfers, the employer will also be required to file an amended petition." The proposed regulation was never finalized. There was much confusion regarding whether obtaining a new labor condition application with a geographic transfer necessitated filing an amended H-1B petition. In 2003, Lynn Shotwell, in her capacity as Executive Director of the American Council on International Personnel, Inc., requested an advisory opinion from the USCIS Business and Trade Branch, to eliminate the confusion. In response, former USCIS Business and Trade Branch Director Efren Hernandez III issued an advisory letter addressed to Ms. Shotwell stating that "an amended Form I-129 petition would not be required on the basis of [a] geographic move … as long as the LCA (Labor Condition Application) has been filed and certified for the new location prior to the move, the appropriate worksite posting has taken place, and the other wage and hour obligations are met." The 2003 Hernandez letter was broadly disseminated and served as the definitive guidance for employers and practitioners in managing employer compliance and maintenance of beneficiary status for geographic relocations – until publication of the *Matter of Simeio Solutions* precedent decision.

Analysis of the May 21, 2015 Guidance

On May 21, 2015, USCIS posted a web alert titled: "Guidance on When to File an Amended Petition after the *Simeio Solutions* Decision." According to the Guidance, *Simeio Solutions* teaches that when an H-1B employer is required "to certify a new Labor Condition Application for Nonimmigrant Workers (LCA) to the Department of Homeland Security" based on a material change in geographic location, it necessitates the filing of an amended H-1B petition. Under governing law and regulation, an employer files a LCA with the ***U.S. Department of Labor ("DOL")*** containing prescribed statutory attestations relating to wages, working conditions, notice, and recordkeeping. The Department of Labor **certifies** the LCA. At no point in the

process is the employer required to certify a new LCA to ***DHS*** as stated in the Guidance That the Guidance erroneously misstates the law governing the LCA certification process, as allegedly set forth in *Simeio Solutions*, suggests a basic misunderstanding of LCA process and procedure which may have contributed to an improvident decision on the part of the USCIS Commissioner, the Secretary of Homeland Security, and the Attorney General to certify *Simeio Solutions* as a precedent decision.

Besides misstating the underlying LCA scheme, the Guidance announces a 90-day delay in the enforcement of the *Simeio Solutions* petition rule and associated sanctions in order to permit employers to play "catch up" and to file amended petitions on behalf of H-1B workers transferred to a new work location requiring a new LCA on or prior to April 9, 2015, the date *Simeio Solutions* was published. During the 90-day period, USCIS promises not to take adverse action against an employer or its employees for failing to file an amended petition prior to May 21, 2015 (the date the guidance was first posted to the USCIS web site), **provided** the employer files any required H-1B amendment petition prior to August 19, 2015, and establishes that, in good faith, it relied upon prior non-binding agency correspondence in not filing to amend before relocating an H-1B worker. The Guidance warns that if an employer fails to file an amended petition for covered relocations by August 19, 2015, the employer will be out of compliance with USCIS regulations and policy regarding those petitions and subject to adverse action. Further, the Guidance warns that affected H-1B beneficiaries will be out of status and subject to adverse action.

The "good faith" proviso may prove problematic for many employers. Although USCIS does not refer to the 2003 Hernandez advisory letter directly, one assumes that that is the intended reference. If this is the case, to qualify for the 90-day safe harbor, an employer presumably must prove its compliance with all LCA attestation requirements, including filing, notice, required wage, working condition, and recordkeeping requirements – as referenced in the Hernandez letter. The LCA regulations are complex, and the process for demonstrating compliance could prove difficult, time consuming and costly, particularly for employers in the consulting industry who frequently transfer workers among client worksites as business demands. Further, the Guidance implies that a separate amended petition must be filed for each worksite transfer requiring a newly certified LCA following the date of petition approval. The Guidance does not state how the denial of the first of amended petitions will affect the adjudication of subsequent or successive amended petitions which is particularly important for consulting companies that routinely transfer their workers to new work locations. The Guidance merely states that if an amended petition is denied, the beneficiary may return to the worksite covered by the original petition, **provided** the original petition is still valid and the H-1B employee can maintain valid nonimmigrant status at the original worksite. However, this guarantee rings hollow because USCIS has been revoking H-1B petitions based on a failure to timely file an amended petition prior to transferring the worker to a geographic location requiring a new LCA. Without further clarification to the contrary, the Guidance could only be a bait and switch: directing employers to prepare and file multiple amended petitions prior to August 19, 2015 – at great expense given the LCA compliance proof requirements – any of which could lead to revocation of the original petition under the rule in *Simeio Solutions* – causing the entire exercise to be for naught.

Silver Lining in the May 21, 2015 Guidance

The courts may view USCIS's proposed delay in implementing the *Simeio Solutions* rule and associated sanctions for noncompliance to be a tacit admission by the agency that the new rule is **substantive or legislative** which would have required the agency to comply with the formal rulemaking process

established in the Administrative Procedure Act (APA). As such, USCIS also would be required to comply with the requirements of the Regulatory Flexibility Act, the Small Business Regulatory Fairness Enforcement Act of 1996, Section 3(f) of Executive Order 12866 (requiring review by the Executive Office of Management and Budget), and the Paperwork Reduction Act. The agency's failure to comply with the formal APA rulemaking process in 2015 is fairly remarkable given that (1) Legacy INS (USCIS's predecessor agency) itself complied with the requirements in promulgating the 1998 proposed rule governing filing H-1B amended petitions – which was abandoned prior to publication of a final rule; and (2) the 2003 Hernandez advisory letter negated the substance of the 1998 proposed and abandoned H-1B amended petition rule based on a geographic relocation that required a new LCA. Because the *Simeio Solutions* rule, as interpreted by the May 21, 2015 Guidance, threatens employers and employees with substantial **prospective** sanctions up to and including deportation of H-1B workers based on a failure to comply, the courts are likely to insist on compliance with the formal rulemaking process to ensure adequate public notice, comment and due process of law.

However, much more is at stake than sanctions for conduct post-dating announcement of the *Simeio Solutions* rule. Based on the agency's position that the regulatory interpretation announced in *Simeio Solutions* clarifies but does not change the agency's longstanding policy, USCIS proposes to apply the rule to impose sanctions and penalties upon employers and employees for violations pre-dating the decision after August 19, 2015. The threatened retroactive application of *Simeio Solutions* violates a longstanding principle prohibiting an agency from engaging in retroactive rulemaking under the APA or otherwise unless Congress has specifically authorized such action. Because neither USCIS nor its parent agency, the Department of Homeland Security, has been granted retroactive rulemaking authority by Congress, and because the temporary abeyance in enforcement announced under the Guidance raises more questions than it answers, employers adversely affected by the *Simeio Solutions* rule should give serious consideration to challenging the rule in the courts, either directly or through business trade associations.

Employers' Bottom Line: Although the USCIS Guidance is legally flawed, its announced 90-day delay in enforcement gives employers the opportunity to file amended petitions on behalf of H-1B workers transferred to a new work location requiring a new LCA, if they failed to do so when the employee was transferred. Employers who need to file amended petitions, or believe they may be required to do so, should consult with experienced immigration counsel regarding their options. Employers should take action promptly, as the Guidance states that employers who do not file amended petitions by the August 19, 2015, deadline will be considered to be out of compliance with USCIS guidance and regulations and will be subject to adverse action.

If you have any questions about the Guidance or other issues related to your H-1B program, please contact Mary Pivec, mpivec@fordharrison.com, Geetha Adinata, gadinata@fordharrison.com, Charles Roach, croach@fordharrison.com, or Vivien Peaden, vpeaden@fordharrison.com, all of whom are members of FordHarrison's Immigration practice group. You may also contact the FordHarrison attorney with whom you usually work.