PUBLICATION

Recent Changes in Off-Site Employment Requirements

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There have been recent changes in the immigration world regarding the requirements for off-site employment. Both the H-1B visa category and the L-1B visa category, which are two of the more common employment-based visa categories, have seen significant developments in this area in the past two months. Companies with employees in either category should be aware of these developments, particularly if they intend to change the worksite location of their H-1B or L-1B employees.

In April 2015, the USCIS Administrative Appeals Office (AAO) issued the precedential decision of *Matter of Simeio Solutions, LLC*, a decision relating to the required notification of changes in worksite location for H-1B employees. The H-1B visa category allows companies to employ foreign workers for up to six years in "specialty occupations," i.e. occupations that require a bachelor's degree or its equivalent in a field related to the occupation. Normally, an H-1B petition lists the specific locations where the employee will work. This petition is tied to one or more Labor Condition Applications (LCAs) filed online with the Department of Labor. The LCA certifies that the employer will pay the foreign employee at least the "prevailing wage" for that type of occupation in the geographic area where the foreign employee will work (which is usually determined by county or metropolitan area). The AAO's April 2015 decision clarifies that when an employer changes the location of an H-1B employee's job site to an area not covered by the LCA(s) included in the approved H-1B petition, the employer must file a new or amended H-1B petition on behalf of the employee and not just an LCA.

In the past, many employers, including the employer in the AAO decision, operated under the belief that filing an updated LCA for the new worksite was all that was required before relocating an H-1B worker. This belief stemmed from a 2003 USCIS letter from the then-Director of the USCIS Business and Trade Branch. The employer in *Simeio Solutions* indicated in the original petition that the employee would work at their office in Long Beach, California. Some months later, the employee moved to the company's Los Angeles office and also provided services at a worksite in New York. The company did not file new or amended H-1B petitions for the employee, only filing new LCAs. In its decision, the AAO held that the change in the place of employment of a worker to an area outside the area specified in the original LCA was a material change to the terms of the originally approved petition, which under the regulations would require an amended petition to be filed. As *Simeio Solutions* failed to file an amended petition, the AAO upheld the revocation of the employee's H-1B approval.

Employers with H-1B workers should be cognizant of this requirement when contemplating relocating an employee. Failure to file both an amended H-1B petition and a new LCA could be the basis for revoking the employee's H-1B status. This is of particular importance for companies with multiple locations or for employers who place their workers at third-party worksites, which is a common practice in the information technology industry. It is important to note that this new requirement does not apply to "roving workers," i.e. workers who are required to travel frequently from place to place as part of their job. A prime example of this type of worker would be a sales representative. These types of workers remain covered by an exception to the filing requirements discussed above so long as the nature of the job requires such travel, and they do not remain in one location for more than five consecutive workdays for any one trip or ten consecutive workdays for a worker who spends most of his time at one main location while traveling occasionally to another location.

Like the H-1B category, the L-1B or "Specialized Knowledge" visa category also recently received guidance on off-site work placements. The L-1B nonimmigrant visa category allows companies to transfer individuals with more than one year of experience with a foreign affiliate to the U.S. for up to five years, provided the individual possesses "specialized knowledge" related to the company's business and that the employee will apply that "specialized knowledge" at the U.S. worksite.

In March, USCIS issued a Draft Memorandum providing additional guidance on the L-1B visa category. While the majority of the March memorandum provides long-awaited clarification on the definition of "specialized knowledge," a section of the memo outlines the use of third party worksites, i.e. where L-1B employees are not located at the office of the company who filed the petition for them, but rather stationed primarily at the worksite of an unaffiliated employer. This often arises for companies that provide a customized product or service to third-parties. Many of the requirements for use of a third party worksite were set in 2004 by the L-1 Visa Reform Act which requires that the petitioning employer show that the third party lacks "principal control and supervision" over the L-1B worker. The 2004 Act also requires that the petitioning employer demonstrate that the purpose of the offsite placement is for the beneficiary to use specialized knowledge that is specific to the petitioning organization's own products or services, not those of the third-party worksite.

The March 2015 Draft Memorandum provides additional guidance on how the petitioning employer can demonstrate that a third-party worksite lacks "principal control and supervision" over the L-1B employee. According to the Memo, the petitioning employer should demonstrate that although their employee is working primarily off-site, they retain authority to: dictate the manner in which the L-1B worker performs the work; reward/discipline the L-1B worker for his or her work performance; and provide the worker's salary and any normally-provided employer benefits such as health insurance. The memo also reaffirms the long established rule that a third-party employer is not necessarily prohibited from giving day-to-day assignments to the L-1B employee, provided that, in the totality of the circumstances, the third-party work-site does not principally control and supervise the L-1B employee's activities.

While this memo is only proposed guidance which is still open to public comment, the final version of the memo will be issued in August and is not likely to change much. The memo's continued focus on third party worksites demonstrates USCIS' ongoing concern with "labor for hire" arrangements. Any employer who intends to station its L-1B employees offsite at a third-party location should be aware of the requirements of the memorandum. Such employers should ensure they maintain supervisional authority over their off-site L-1B employees and also that the off-site placement is truly in connection with the provision of their own products or services.