The Jaffe Update
Legal News Delivered
A publication of Jaffe Raitt Heuer & Weiss
June, 2015

Guidance on when an amended H-1B petition (and LCA) are required

USCIS announced in June 2015 that an AAO decision (Matter of Simeio Solutions, LLC) will now represent the official USCIS position that employers must file an amended petition before placing H-1B employees at new worksites. This clarifies the uncertainties which existed for the past 12 years resulting from a 2003 policy statement issued by USCIS which had not clearly imposed any amended-petition requirement in change-of-worksite situations. Accordingly, USCIS is granting employers a grace period until August 19, 2015 to comply with the new requirements.

Which employee-movement situations will this requirement apply to?

The new general rule is that an amended H-1B petition (preceded by a new notice-posting and filing of a Labor Condition Application (LCA) with the U.S. Department of Labor) must be filed if an H-1B employee's place of employment changes to a new worksite location.

Timing: Once the employer has filed the amended petition, the H-1B employee can immediately begin to work at the new location. There is no need to wait for a decision on the amended H-1B petition.

Exceptions and purpose of the rule.

The rule requiring amended petitions is not for purely bureaucratic reasons. It arises from that aspect of the H-1B program which seeks to assure that H-1B workers are not paid less than workers in the same job category, either with the same employer or within the same geographic area. Since wages and conditions of employment may vary from one GEO to another, movement of H-1B personnel must be recalibrated to the wages prevailing in the new area designated for the H-1B worker.

Short distance moves. If the H-1B employee is moving to a new job location within the same "area of intended employment," neither a new LCA nor an amended H-1B petition with USCIS will be required. If the new job location is within the same metropolitan statistical area (MSA) it automatically is deemed to remain within the same area of intended employment. Even if it crosses into a new MSA, it may remain within the same "area of intended employment" (and be exempt from a new LCA and amended petition) if it remains "within normal commuting distance" of the original H-1B worksite. The definition of "normal commuting distance" may vary, depending upon the factual circumstances in the area, regulations suggesting that it may be 20, 30 or even 50 miles.

Note that the employer may still be required to post an LCA notice in the new work location, if the job move did not leave the original area of intended employment. Although the more laborious USCIS amended-petition filing can be avoided in those situations, the original LCA notice must be posted in the new work location prior to the start of working there.

BUSINESS IMMIGRATION

Eli Maroko, Partner
248.727.1482
emaroko@jaffelaw.com
Download vCard File
Biography

Julianne Cassin Sharp, Partner
248.727.1576
jsharp@jaffelaw.com
Download vCard File
Biography

Kreuza Gjezi, Associate
248.727.1494
kgjezi@jaffelaw.com
Biography

The Jaffe Update
Legal News Delivered
A publication of Jaffe Raitt Heuer & Weiss
June, 2015

Guidance on when an amended H-1B petition (and LCA) are required

Short term placements. Generally, you may place an H-1B employee at a new job location for up to 30 days without having to obtain a new LCA or to file an amended petition with USCIS. That exemption increases to 60 days when the employee remains based at the original H-1B work location and also resides in the area of that original location. Both 30 and 60 day exemptions apply on a per-year basis, also being evaluated on a per-location basis.

Non-worksite locations. Short term placements are not considered to be worksites requiring an LCA or amended petition if:

- Not exceeding 10 consecutive work days for any single visit, so long as the H-1B worker spends most of their work time at the original H-1B location.
- For H-1B workers who do not spend most of their work time at any single location, not exceeding five con secutive work days for any single visit, although such short periods are permitted to be recurring, as long as not excessive.

What should you do prior to relocating an H-1B employee?

Any change of work location or temporary assignments off site of H-1B workers may trigger the need for alerting HR management. This concern arises both with long-term relocations, temporary work-location moves and placements at third party/customer facilities. Prior to moving the employee, HR should be provided the following types of information:

A. New location and anticipated duration of stay there.

B. What amount of time has the H-1B worker spent at this new location within the past year, if any?

C. The H-1B employee's usual residential address.

D. Will there be any significant job responsibilities created in working at this new location which were not included in the initial H-1B petition?

E. If this will be a placement at a customer's facility, can you confirm that the customer will consent to posting of the LCA notice at its worksite?

HR, in conjunction with legal counsel, will determine whether the proposed job site movement will require one or more of the potential actions, including posting an LCA notice at the new website, filing a new LCA for certification by the USDOL, or filing an amended I-129 petition with USCIS.

To learn more, or to discuss your needs, contact Business Immigration Attorneys **Eli Maroko, Julianne Cassin Sharp or Kreuza Gjezi at 313.351.3000**