IMMIGRATION

USCIS NOW FORMALLY REQUIRING AMENDED PETITIONS WHEN H-1B WORKSITE CHANGES

by Christian S. Allen

On April 9, 2015, the Administrative Appeals Office (AAO) of the U.S. Citizenship and Immigration Services (USCIS) issued a binding, precedential ruling that all U.S. employers must file an amended petition with the agency whenever an H-1B employee moves to a worksite location which was not specified on the underlying Labor Condition Application (LCA) attached to the original petition filing.

The AAO decision formally supports USCIS and DOL regulations and affirms a trend in policy which has been gaining momentum over the past several years. In 2003, an official at USCIS headquarters wrote a nonbinding letter in which he opined that an amended petition might not be required when an H-1B employee moves to a new worksite, provided that a new LCA was approved by the DOL and posted at the new worksite before the H-1B employee arrived there. Since that time, the USCIS has often allowed employers to follow this strategy when H-1B employees moved, without ever officially endorsing it. However, the legal authority for that strategy has always been suspect. More recently, the USCIS' anti-fraud unit "site visits" have resulted in several instances of H-1B petitions being revoked, including the petition which is the subject of this AAO ruling. We have repeatedly warned employers that a failure to file an amended H-1B petition with the USCIS in these situations could be considered a violation of long-standing, formal USCIS and DOL regulations.

This decision by the AAO is effective immediately and could have a profound impact on employers in the information technology consulting and contract staffing industries, as well as other employers who are not able to anticipate all potential H-1B employee worksites at the time of their original petition filing. There are certain, limited exceptions to the amended petition requirement, including scenarios where the employee only moves a very short geographical distance, such that the existing LCA still covers the new worksite. However, the AAO was also careful to note that even nearby worksite changes could trigger a need for an amended petition, if the move includes other changes in employment. A common example of this could be a move to a new third-party, client/customer worksite, which would normally require the company to submit evidence to the USCIS to confirm its employer-employee relationship with the H-1B worker and its ongoing, exclusive control of his or her employment.

DW Immigration will be monitoring this development closely for our clients, and we will notify you of any significant updates, including if this policy is extended to other temporary work visa classifications, such as the L-1A or L-1B categories. In the meantime, it is now clear that amended petitions must be filed whenever an H-1B worker is moved to a location which triggers a requirement for a new LCA. As always, if you have any questions or concerns about this new ruling, please feel free to reach out to any of our Immigration Attorneys for advice, at any time.

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