WHEN TO FILE H-1B AMENDMENT PETITIONS

This memo discusses the rules regarding changes in employment for current H-1B employees and when employers must take action, including potentially filing an amended H-1B visa petition, to notify the USCIS of what is considered a "material change" in employment. Human resources clearly are involved when a new hire requires an H-1B visa petition, and when work authorization is expiring. However in many cases, neither company representatives nor attorneys are updated when there are changes to the existing position that require filing of an "amendment" H-1B visa petition. Not updating immigration counsel in advance of changes in employment presents the risk of liability for immigration violations for companies, and risk of failure to maintain the terms of status for employees.

Employers are required to file an amended H-1B petition and LCA "to reflect any material changes in the terms and conditions of employment or training," or the employee's "eligibility as specified in the original approved petition." There is no exhaustive list, but it is clear that in the following situations, an H-1B amendment petition (which would involve a new Labor Condition Application (LCA) notice posting and filing) is required:

- duties significantly change to those of another job classification, not just a minor promotion or change in level (e.g., moving from engineer to senior engineer is typically not "material" but moving from engineer to manager is a material change),
- corporate change where the new corporate entity does *not* assume the interests and obligations of the original petitioning employer (e.g.,, asset sales),
- change from full-time to part-time, or vice versa,
- changes in location that are outside the Metropolitan Statistical Area (MSA) or commuting area.

Change of location is a particularly high profile change given that the USCIS Administrative Site Visit and Verification Program (ASVVP) funded by the I-129 petition anti-fraud fee involves USCIS officers appearing at company locations unannounced to verify the terms of employment. If a USCIS officer reports that the H-1B employee is not at the stated location following such a visit, it is likely that the USCIS will issue a Notice of Intent to Revoke the H-1B visa petition. It is also possible that the results of a ASVVP visit may trigger other investigations such as a DOL audit of the company's LCA files or even an I-9 audit by DHS.

The detailed question of when an H-1B amendment petition should be filed was addressed in the Appeals Office (AAO) decision of *Matter of Simeio*. In that decision, the AAO found that an H-1B amendment petition is to be filed "immediately" upon the change of worksite. The USCIS subsequently issued a web alert clarifying that the petition must be filed before the change of worksite, but the change can occur while the petition is pending.