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US IMMIGRATION & NATIONALITY LAW

MAY 2015 IMMIGRATION UPDATE

Posted on May 4, 2015 by Cyrus Mehta

Headlines:

1. H-1B Premium Processing Has Begun - On April 27, 2015, USCIS began premium processing for cap-subject H-1B petitions requesting it, and for petitions seeking an exemption from the H-1B cap for individuals with a U.S. master's degree or higher.
2. Senators Seek Multi-Agency H-1B Program Investigation - The senators expressed concerns about U.S. workers being displaced by H-1B workers following allegations that Southern California Edison replaced approximately 400 information technology workers with H-1B workers.
3. Senate Committee Holds Hearing on H-1B Program and Skilled U.S. Worker Displacement - The Senate Judiciary Committee held a hearing on March 17, 2015, "Immigration Reforms Needed to Protect Skilled American Workers."
4. District Court Grants Extension to DOL for H-2B Program - DOL will continue to process temporary labor certification applications under its 2008 H-2B regulations through May 15, 2015.
5. USCIS Resumes Premium Processing for H-2B Petitions - On April 20, 2015, USCIS resumed accepting premium processing requests for Form I-129 H-2B petitions
6. USCIS Reaches H-2B Temporary Nonagricultural Worker Cap for FY 2015 - March 26, 2015, was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before October 1, 2015.
7. China-Mainland Born EB-5 Category Oversubscribed in May; Philippines EB-3 Retrogresses - Heavy China-mainland born applicant demand has required the implementation of an employment fifth preference cut-

off date to hold visa number use within the maximum for FY 2015. Also, the current rate of increase in demand in the Philippines EB-3 category has required the retrogression of this cut-off date for the month of May.

8. OSC Issues Technical Assistance Letter on E-Verify Issues - The OSC letter was in response to concerns about the possible conflict between the obligations that Texas state contractors and certain Texas state agencies have under federal E-Verify rules and their obligations under a Texas executive order, RP-80, and about possible antidiscrimination violations.

9. Sen. Grassley Introduces E-Verify Bill - Among other things, the bill would allow employers to use E-Verify before a person is hired and require employers to check the status of all current employees within three years.

10. ESL Teacher Indicted for Stealing Tens of Thousands From Student Visa Holders - The teacher allegedly stole more than $30,000 from at least six victims, in exchange for promises of green cards that she never fulfilled.

11. AAO Decides Two Cases - Definition of 'Doing Business' and Material Change in Place of Employment P The AAO recently decided two cases of interest.

12. AAO Seeks Friend-of-Court Briefs on Legal Rights of I-140 Beneficiaries in Adjudications and Appeals - AAO is seeking amicus curiae (friend of the court) briefs from stakeholders concerning whether beneficiaries of certain immigrant visa petitions have a legal right to participate in the adjudication process, including appealing to the AAO.

13. ABIL Global: Hong Kong - Hong Kong has suspended the Capital Investment Entrant Scheme; other developments have been announced.

Details:

1. H-1B Premium Processing Has Begun

On April 27, 2015, U.S. Citizenship and Immigration Services (USCIS) began premium processing for cap-subject H-1B petitions requesting it, and for petitions seeking an exemption from the H-1B cap for individuals with a U.S. master's degree or higher. USCIS guarantees a 15-calendar-day processing time for premium processing.

For H-1B petitions that are not subject to the cap and for any other visa classification, the 15-day processing period for premium processing service

begins on the date USCIS receives the request. However, for cap-subject H-1B petitions, including advanced-degree exemption petitions, the 15-day processing period began on April 27, 2015, regardless of the date on the Form I-797 receipt notice, which indicates the date on which the premium processing fee is received.

The announcement is available at http://www.uscis.gov/news/alerts/h-1b-cap-premium-processing-begin-april-27.

USCIS had announced on April 7, 2015, that it reached the congressionally mandated H-1B nonimmigrant visa cap of 65,000 for fiscal year (FY) 2016. USCIS also received more than the limit of 20,000 H-1B petitions filed under the U.S. advanced-degree exemption. USCIS announced on April 13, 2015, that nearly 233,000 employers filed H-1B petitions in the first week of April. This means that employers have about a 30% chance of winning the H-1B lottery this year.

U.S. businesses use the H-1B program to employ foreign workers in occupations that require at least a bachelor's degree or equivalent.

USCIS will continue to accept and process petitions that are otherwise exempt from the cap. Petitions filed on behalf of current H-1B workers who have been counted previously against the cap, and who still retain their cap number, will also not be counted toward the FY 2016 H-1B cap. USCIS will continue to accept and process petitions filed to:

- Extend the amount of time a current H-1B worker may remain in the United States;
- Change the terms of employment for current H-1B workers;
- Allow current H-1B workers to change employers; and
- Allow current H-1B workers to work concurrently in a second H-1B position. U.S. businesses use the H-1B program to employ foreign workers in occupations that require highly specialized knowledge in fields such as science, engineering, and computer programming.

The USCIS announcement about the H-1B cap being reached is available at http://www.uscis.gov/news/alerts/uscis-completes-h-1b-cap-random-selection-process-fy-2016. For more information, see http://www.uscis.gov/working-united-states/temporary-workers/h-1b-specialty-occ

upations-and-fashion-models/h-1b-fiscal-year-fy-2016-cap-season.

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2. Senators Seek Multi-Agency H-1B Program Investigation

A group of senators sent a letter on April 9, 2015, to Attorney General Eric Holder, Homeland Security Secretary Jeh Johnson, and Labor Secretary Thomas Perez seeking an investigation of the H-1B program. The group, led by Sens. Richard Durbin (D-Ill.) and Jeff Sessions (R-Ala.), expressed concerns about U.S. workers being displaced by H-1B workers following allegations that Southern California Edison replaced approximately 400 information technology workers with H-1B workers.

The letter asks:

> *In many cases it appears that the H-1B workers are not employees of the U.S. company laying off American workers, but instead are contractors employed by foreign-owned IT consulting companies. This increasingly popular business practice by U.S. companies and foreign-owned IT outsourcing firms raises several questions. For example, have the U.S. companies that have laid off American workers and replaced them with H-1B workers and/or the IT consulting contractors the companies retained engaged in prohibited citizenship status discrimination against U.S. citizens? Did the Labor Condition Applications certified by the Department of LaborXs Employment and Training Administration and the petitions approved by U.S. Citizenship and Immigration Services for each H-1B visa holder who replaced a U.S. worker at these companies accurately reflect the scope and location of their work? Did such labor condition applications or visa petitions show any evidence of misrepresentation or fraud by the employer-petitioners? Did the employer-petitioners maintain a true employer-employee relationship with the H-1B workers after they were placed at the U.S. client company? While media reports indicate that the H-1B visa program is the principal visa program at issue in the layoffs, were other visa programs, such as the L-1B or the B-1, also used to displace American workers at U.S. companies?*

The letter is available at http://www.durbin.senate.gov/newsroom/press-releases/durbin-and-sessions-lead-bipartisan-group-of-senators-in-calling-for-investigation-into-abuses-within-h-1b-visa-program.

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3. Senate Committee Holds Hearing on H-1B Program and Skilled U.S. Worker Displacement

The Senate Judiciary Committee held a hearing on March 17, 2015, entitled "Immigration Reforms Needed to Protect Skilled American Workers." The hearing focused on the effects of the H-1B visa program and other temporary worker programs on skilled U.S. workers. Sen. Charles Grassley (R-Iowa), chairman of the committee, charged that the H-1B program is "highly susceptible to fraud and abuse." He noted that he and Sen. Dick Durbin (D-Ill.) have introduced legislation to require, among other things, employers seeking to hire an H-1B worker to first make a good faith effort to recruit a U.S. worker.

Sen. Patrick Leahy (D-Vt.) also released a statement. He noted the "meaningful contribution that immigrant workers make to the U.S. economy, and the ways in which a healthy immigration system can grow the country's economic base and create jobs that benefit all Americans." He said that hearing witness Bjorn Billhardt came to the United States as a high school exchange student, later earned degrees from the University of Texas and Harvard Business School, and subsequently stayed in the United States to start a successful education business that now employs over 40 people. "Mr. Billhardt's experience illustrates the value of an immigration system that welcomes diverse backgrounds and keeps promising graduates of our universities here in the United States, where they can contribute to our culture and our economy," Sen. Leahy said.

Witnesses at the hearing included Richard Trumka, President, AFL-CIO; Prof. Ron Hira, Howard University; Bjorn Billhardt, Founder and President, Enspire; Jay Palmer, an American worker from Alabama; Benjamin E. Johnson, Executive Director, American Immigration Council; John Miano, Washington Alliance of Technology Workers; and Prof. Hal Salzman, E.J. Bloustein School of Planning and Public Policy, J.J. Heldrich Center for Workforce Development, Rutgers University.

Senator Grassley's statement is available at http://www.grassley.senate.gov/news/news-releases/grassley-statement-judiciary-committee-hearing-immigration-reforms-needed-protect. Hearing testimony is available at http://www.judiciary.senate.gov/meetings/immigration-reforms-needed-to-protect-skilled-american-workers.

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4. District Court Grants Extension to DOL for H-2B Program

On April 15, 2015, the federal district court in the Northern District of Florida issued an order effectively allowing the Department of Labor (DOL) to continue issuing temporary labor certifications under the H-2B visa program through May 15, 2015. As a result, DOL will continue to process temporary labor certification applications under its 2008 H-2B regulations through May 15, 2015.

On March 4, the court vacated DOL's 2008 H-2B regulations on the grounds that DOL lacks authority to issue regulations in the H-2B program. DOL and the Department of Homeland Security are working on regulations "to minimize future interruptions to the H-2B program," U.S. Citizenship and Immigration Services said.

The announcement is available at http://www.uscis.gov/news/district-court-allows-dol-continue-processing-certifications-h-2b-program-and-uscis-resumes-premium-processing-h-2b-petitions.

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5. USCIS Resumes Premium Processing for H-2B Petitions

On April 20, 2015, USCIS resumed accepting premium processing requests for Form I-129 H-2B petitions. USCIS had announced a temporary suspension of premium processing for all H-2B petitions on March 9, 2015.

Employers are now able to file Form I-907, Request for Premium Processing

Service, either:

Ґ Together with a Form I-129, Petition for a Nonimmigrant Worker, H-2B cap exempt petition; or
Ґ Separately to request premium processing service for a previously filed H-2B petition.

The current filing fee for the I-907 is $1,225.

The announcement is available at http://www.uscis.gov/news/district-court-allows-dol-continue-processing-certifications-h-2b-program-and-uscis-resumes-premium-processing-h-2b-petitions.

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6. USCIS Reaches H-2B Temporary Nonagricultural Worker Cap for FY 2015

U.S. Citizenship and Immigration Services (USCIS) announced on April 2, 2015, that it had reached the congressionally mandated H-2B temporary nonagricultural worker cap of 66,000 visas for fiscal year (FY) 2015. March 26, 2015, was the final receipt date for new cap-subject H-2B worker petitions requesting an employment start date before October 1, 2015.

USCIS noted that employers may file petitions up to 120 days before the employment start date. USCIS therefore will reject new H-2B petitions filed more than 120 days before the employment start date.

USCIS will continue to accept H-2B petitions that are exempt from the congressionally mandated cap. This includes petitions filed on behalf of the following beneficiaries:

- H-2B workers in the United States or abroad who have been previously counted toward the cap in the same fiscal year;
- Current H-2B workers seeking an extension of stay;
- Current H-2B workers seeking a change of employer or terms of

employment;
- Fish roe processors, fish roe technicians and/or supervisors of fish roe processing; and
- H-2B workers performing labor or services from November 28, 2009, until December 31, 2019, in the Commonwealth of the Northern Mariana Islands and/or Guam.

The announcement is available at http://www.uscis.gov/news/alerts/uscis-reaches-h-2b-cap-fiscal-year-2015. Additional information on the H-2B program is available at http://www.uscis.gov/working-united-states/temporary-workers/h-2b-non-agricultural-workers/h-2b-temporary-non-agricultural-workers.

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7. China-Mainland Born EB-5 Category Oversubcribed in May; Philippines EB-3 Retrogresses

The Department of State's Visa Bulletin for May 2015 notes that heavy China-mainland born applicant demand has required the implementation of an employment fifth preference (EB-5) cut-off date of May 1, 2013, for investors from China to hold visa number use for that country within the maximum limit for FY 2015.

The bulletin notes that future visa availability will depend on a combination of demand for numbers being reported each month and the extent to which otherwise unused numbers may become available. An increase in visa demand by applicants with relatively early priority dates could make a retrogression of this cut-off date necessary before the end of the fiscal year. The Bulletin emphasizes that retrogression is not being predicted but cannot be ruled out. "It is extremely likely that this category will remain subject to a cut-off date indefinitely," the Bulletin says.

The bulletin also reports that the cut-off date for the Philippines employment third (EB-3) preference has recently advanced very rapidly "in an effort to generate sufficient demand to fully utilize all available numbers." The current rate of increase in demand has required the retrogression of this cut-off date for

the month of May to July 1, 2007, in an attempt to hold number use within the annual limit for this preference category.

On April 13, 2015, the Visa Office attended the IIUSA 2015 EB-5 Regional Economic Advocacy Conference to address questions related to the implementation of a visa cutoff date for Chinese investors in the EB-5 visa category. Responses from the Visa Office to questions are available at http://travel.state.gov/content/dam/visas/VO%20Attends%20IIUSA%20EB5%20Conference.pdf.

The Visa Bulletin for May 2015 is available at http://travel.state.gov/content/visas/english/law-and-policy/bulletin/2015/visa-bulletin-for-may-2015.html.

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8. OSC Issues Technical Assistance Letter on E-Verify Issues

The Department of Justice's Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) issued a technical assistance letter on April 15, 2015, in response to a query from an attorney expressing concerns about the possible conflict between the obligations that Texas state contractors and certain Texas state agencies have under federal E-Verify rules and their obligations under a Texas executive order, RP-80. The attorney also raised a concern about a potential violation of the antidiscrimination provision of the Immigration and Nationality Act (INA), which the OSC enforces.

First, the attorney expressed concern that RP-80's requirement that state contractors use E-Verify for "all persons employed during the contract term to perform duties within Texas" conflicts with federal E-Verify rules. The attorney noted that as a general matter, federal E-Verify rules require E-Verify users to create E-Verify cases only for newly hired employees, whereas RP-80 requires Texas contractors to use E-Verify on all their current employees performing duties in Texas, whenever hired. Second, the attorney raised concerns about RP-80's requirement that certain Texas state agencies use E-Verify for "all current and prospective agency employees." The attorney observed that federal E-Verify rules bar all employers from creating E-Verify cases for an individual

before he or she accepts a job offer and completes the employment eligibility verification form (I-9). Finally, the attorney expressed concern that under RP-80, a nationwide employer may seek "to root out employees" by "transferring some complainers into Texas after winning a Texas project" and running them through E-Verify, potentially violating the antidiscrimination provision.

In response, OSC noted that it cannot provide an advisory opinion on any set of facts involving a particular individual or entity, but that the agency can provide general guidelines. Regarding the apparent conflict between federal E-Verify rules and the provisions of RP-80, OSC noted that U.S. Citizenship and Immigration Services (USCIS), the agency that administers the E-Verify program and issues related guidance, has advised employers in Texas that federal E-Verify requirements are in effect at all times. Under federal E-Verify rules, OSC noted, most employers using E-Verify may only create E-Verify cases for new hires. However, federal E-Verify rules provide an exception for employers enrolled in E-Verify as federal (not state) contractors. Such federal contractors must create cases in E-Verify both for new hires and for existing employees performing work under the federal contract (if the employer has not already created a case for the employee), and may choose an option to create cases in E-Verify for all employees of the contractor.

OSC also noted that federal E-Verify rules also prohibit all employers from creating an E-Verify case for an individual who has not yet accepted a job offer and completed an I-9. Consequently, employers using E-Verify for prospective employees or using E-Verify for current employees, when not enrolled in E-Verify as federal contractors, "would violate federal E-Verify program rulesCthe same rules that the employers agreed to comply with in their MOU with USCIS." OSC said that "ailure to comply with E-Verify program rules could lead to possible termination or suspension from the E-Verify program."

Regarding the attorney's concern that an employer may violate the antidiscrimination provision of the INA when it uses E-Verify to improperly "root out employees," the OSC noted that an employer that uses RP-80 to assign an employee to work in Texas for the purpose of reverifying the employee's employment authorization "may raise concerns that it is treating that employee differently in the employment eligibility verification process based on perceived citizenship status or national origin." The OSC said these concerns are

heightened "where an employer requires an existing employee to provide new Form I-9 documentation to run the existing employee through E-Verify when not permitted to do so under federal E-Verify requirements."

The OSC's technical assistance letter is available at http://www.justice.gov/crt/about/osc/pdf/publications/TAletters/FY2015/184.pdf. More information about related MOUs is available at http://www.uscis.gov/e-verify/questions-and-answers/what-memorandum-understanding-mou-0. The MOU for employers is available at http://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf.

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9. Sen. Grassley Introduces E-Verify Bill

Sen. Charles Grassley (R-Iowa) introduced the "Accountability Through Electronic Verification Act," S. 1032, on April 21, 2015. Among other things, the bill would permanently authorize E-Verify, make employer E-Verify use mandatory, allow employers to use E-Verify before a person is hired, require employers to check the status of all current employees within three years, and require employers to re-verify an employee's immigration status if his or her work authorization is due to expire.

Similar legislation (H.R. 1147) is pending in the House of Representatives.

Details of the Senate bill will be posted at https://www.congress.gov/bill/114th-congress/senate-bill/1032/all-info as they become available. Sen. Grassley's statement explaining the bill is available at http://www.grassley.senate.gov/news/news-releases/grassley-introduces-legislation-expand-work-eligibility-tool-employers.

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10. ESL Teacher Indicted for Stealing Tens of Thousands From Student Visa Holders

Manhattan District Attorney Cyrus R. Vance, Jr., announced on April 6, 2015, the indictment of Jenetta Ferguson, an English as a Second Language (ESL) teacher, for allegedly stealing tens of thousands of dollars from European and Asian student visa holders by misleading the victims and falsely promising to provide them with green cards in exchange for cash payments. The defendant was charged in an indictment in New York State Supreme Court with grand larceny in the third and fourth degrees, as well as scheme to defraud in the first degree. The defendant's alleged victims include individuals from Italy, Uzbekistan, Bangladesh, and the Philippines, who were residing in the U.S. on student visas. According to the indictment and documents filed in court, Ms. Ferguson taught ESL at a school in Manhattan. Between March and September 2014, she allegedly approached the students and falsely informed them that she could provide them with green cards in exchange for a fee, charging between $8,500 and $10,500 per person. However, instead of providing the promised documents to these individuals, Ms. Ferguson allegedly kept the money, which amounted to more than $30,000 from at least six victims.
The indictment also charges that the defendant encouraged many of the victims to refrain from renewing their student visas, leaving many without adequate documentation once their visas later expired.

The announcement of the indictment is available at http://manhattanda.org/press-release/da-vance-announces-indictment-esl-teacher-stealing-thousands-student-visa-holders. U.S. Citizenship and Immigration Services' Fraud Detection and National Security Directorate in the New York Office played a key role in the indictment. The related USCIS release is available at http://www.uscis.gov/news/news-releases/uscis-assists-ny-case-leading-indictment-esl-teacher-stealing-thousands-student-visa-holders.

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11. **AAO Decides Two Cases—Definition of 'Doing Business' and Material Change in Place of Employment**

U.S. Citizenship and Immigration Services' (USCIS) Administrative Appeals Office (AAO) recently decided two cases of interest.

- In *Matter of Leaching International, Inc.*, 26 I&N Dec. 532 (AAO 2015), in which the petitioner's appeal was sustained, the AAO noted that the

petitioner is a U.S. subsidiary of a Chinese clothing manufacturing company that filed an Immigrant Petition for Alien Worker (Form I-140) to classify the beneficiary as a multinational manager or executive. The petitioner sought to employ the beneficiary in the position of deputy general manager. The Texas USCIS Service Center Director denied the petition, finding that the petitioner failed to establish that it had been doing business for at least one year as of the date the petition was filed.The Service Center Director concluded that the petitioner was not doing business as required by the regulations, reasoning that the petitioner's evidence "do not indicate 'doing business' with independent corporations or entities" for a full year preceding the filing of the petition, but rather "only demonstrate the shipment of goods from the foreign company to the U.S. company." Specifically, the Director found that the petitioner, as a clothing importer, should have provided invoices or evidence of payment of invoices from the customers who purchased the clothing for the year preceding the filing of the petition.The AAO noted that the Director's finding that the petitioner did not submit evidence of doing business with "independent corporations or entities" implies a requirement that a petitioner must transact directly with an unaffiliated third party. In sustaining the petitioner's appeal, the AAO noted, however, that:

- On appeal, the petitioner asserted that the Director erred and that existing case law and regulatory history supported a conclusion that the petitioner is doing business in a regular, systematic, and continuous fashion despite the fact that it is not a named party to contracts with buyers in the United States. The petitioner states that the evidence establishes it acts as an intermediary between its Hong Kong affiliate and the U.S. buyers and suppliers by locating customers and finalizing the details of sales contracts for the benefit of the affiliate.
- Established in New York in 2008, the petitioner imports and sells the Chinese parent company's products to United States customers, primarily major clothing retailers. The petitioner directly performed these sales activities through 2011. However, beginning on or about January 2012, it provided marketing, sales, and shipping services in the United States pursuant to a service agreement with its Hong Kong affiliate, which previously employed the beneficiary and was owned by the Chinese parent company.

(1) The definition of "doing business" at 8 CFR § 204.5(j)(2) (2014) contains no requirement that a petitioner for a multinational manager or executive must provide goods and or services to an unaffiliated third party; and

(2) A petitioner may establish that it is "doing business" by demonstrating that it is providing goods and/or services in a regular, systematic, and continuous manner to related companies within its multinational organization.

Matter of Leaching is available at http://www.justice.gov/eoir/vll/intdec/vol26/3830.pdf.

- In *Matter of Simeio Solutions, LLC,* 26 I&N Dec. 542 (AAO 2015), the AAO affirmed the Service Center Director's decision to revoke an petition's approval. Among other things, the Director had concluded that changes in the beneficiary's places of employment constituted a material change to the terms and conditions of employment as specified in the original petition. The changes included different metropolitan statistical areas from the original place of employment, which USCIS agents were unable to find. The Director held that the petitioner therefore should have filed an amended Form I-129 H-1B petition corresponding to a new labor condition application (LCA) that reflected these changes, but the petitioner failed to do so.
- In affirming the Director's decision, the AAO held:

(1) A change in the place of employment of a beneficiary to a geographical area requiring a corresponding LCA be certified to USCIS with respect to that beneficiary may affect eligibility for H-1B status; it is therefore a material change for purposes of 8 CFR §§ 214.2(h)(2)(i)(E) and (11)(i)(A) (2014).

(2) When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H−1B petition with the corresponding LCA.

The AAO noted that petitioners must immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility for H-1B status. *Matter of Simeio Solutions, LLC*, is available at http://www.justice.gov/eoir/vll/intdec/vol26/3832.pdf.

Commentary. In the past, employers relied on informal guidance indicating that as long as a new LCA was obtained before placing an H-1B worker at a new worksite, an amended H-1B petition was not required. *See* Letter from Efren

Hernandez III, Dir., Bus. And Trade Branch, USCIS, to Lynn Shotwell, Am. Council on int'l Pers., Inc. (October 23, 2003). The AAO now has explicitly stated in *Simeio Solutions* that the Hernandez guidance has been superseded. Even before the guidance was formally superseded, employers were filing amended H-1B petitions, as consular officers were recommending to USCIS that the H-1B petition be revoked if a new LCA was obtained without an amendment of the H-1B petition. According to the AAO, "f an employer does not submit the LCA to USCIS in support of a new or amended H-1B petition, the process is incomplete and the LCA is not certified to the Secretary of Homeland Security." The AAO cited INA § 101(a)(15)(H)(i)(b), 8 CFR § 214.2(h)(4)(i)B)(1), and 20 CFR § 655.700(b) to support its position, but none of these provisions seems to suggest that an LCA obtained after an H-1B petition has already been submitted is not valid if it is "not certified to the Secretary of Homeland Security." The Department of Labor (DOL) certifies the LCA. There is no separate process where the DOL also has to certify the LCA to the Secretary of Homeland Security.

It is not so much the cost that troubles employers with respect to filing an amended H-1B petition. The USCIS has made it extremely onerous for employers to obtain H-1B petitions especially when an H-1B worker will be assigned to third party client sites. This is a legitimate business model that American companies across the board rely on to meet their IT needs, but USCIS is now requiring an onerous demonstration that the petitioning company will still have a right to control the H-1B worker's employment. Each time the employer files an amendment, USCIS will again make the employer demonstrate the employer-employee relationship through the issuance of a request for evidence (RFE). The employer will thus risk a denial upon seeking an amendment, even though it received an H-1B approval initially on virtually the same facts.

H-1B workers in other industries such as healthcare also get reassigned to different locations, such as physicians, nurses, and physical therapists. They too will be burdened by the need to file amended H-1B petitions each time they move to a new work location.

Arguably, if an H-1B worker is being moved to a new job location within the same area of intended employment, a new LCA is not required, nor will an H-1B amendment be required. The original LCA should still be posted in the new work location within the same area of intended employment.

20 CFR § 655.17 defines "area of intended employment":

Area of intended employment means the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed. There is no rigid measure of distance which constitutes a normal commuting distance or normal commuting area, because there may be widely varying factual circumstances among different areas (e.g., normal commuting distances might be 20, 30, or 50 miles). If the place of employment is within a Metropolitan Statistical Area (MSA) or a Primary Metropolitan Statistical Area (PMSA), any place within the MSA or PMSA is deemed to be within normal commuting distance of the place of employment; however, all locations within a Consolidated Metropolitan Statistical Area (CMSA) will not automatically be deemed to be within normal commuting distance. The borders of MSAs and PMSAs are not controlling with regard to the identification of the normal commuting area; a location outside of an MSA or PMSA (or a CMSA) may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA (or CMSA).

So a move to a new job location within New York City (NYC) would not trigger a new LCA, although the previously obtained LCA would need to be posted at the new work location. This could happen if an entire office moved from one location to another within NYC, or even if the H-1B worker moved from one client site to another within NYC.

The DOL Wage and Hour Division Fact Sheet # 62J at http://www.dol.gov/whd/regs/compliance/FactSheet62/whdfs62j.htm also confirms this:

If the employer requires the H-1B worker to move from one worksite to another worksite within a geographic area of intended employment, must the employer obtain an LCA for each worksite within that area of intended employment?

No. The employer need not obtain a new LCA for another worksite within the geographic area of intended employment where the employer already has an existing LCA for that area. However, while the prevailing wage on the existing LCA applies to any worksite within the geographic area of intended employment, the notice to workers must be posted at each individual worksite, and the strike/lockout prohibition also applies to each individual worksite.

The AAO decision in *Simeio Solutions* further overregulates the H-1B visa. This in turn will deprive U.S. companies of an efficient business model that has provided reliability to companies in the United States and throughout the industrialized world to obtain top talent quickly with flexibility and at affordable prices and scale that benefit consumers and promote diversity of product development. This is what the oft-criticized "job shop" readily provides. By making possible a source of expertise that can be modified and redirected in response to changing demand, uncertain budgets, shifting corporate priorities, and unpredictable fluctuations in the business cycle itself, the pejorative "job shop" is, in reality, the engine of technological ingenuity on which progress in the global information age largely depends. Such a business model is also consistent with free trade, which the United States promotes to other countries but seems to restrict when applied to service industries located in countries such as India that desire to do business in the United States through their skilled personnel.

The Hernandez guidance provided flexibility to employers whose H-1B workers frequently moved among client locations, while ensuring the integrity of the H-1B visa program. Employers were still required to obtain new LCAs based on the prevailing wage in the new area of employment, and also notify U.S. workers. However, they were not required to file onerous H-1B amendments each time there was a move, and risk further arbitrary and capricious scrutiny. The AAO has removed this flexibility, and has further regulated the H-1B to such an extent that the LCA must now always firmly and securely tether an H-1B worker through an amended petition just like a dog to his leash.

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12. **AAO Seeks Friend-of-Court Briefs on Legal Rights of I-140 Beneficiaries in Adjudications and Appeals**

U.S. Citizenship and Immigration Services' Administrative Appeals Office (AAO) is seeking *amicus curiae* (friend of the court) briefs from stakeholders concerning whether beneficiaries of certain immigrant visa petitions have a legal right to participate in the adjudication process, including appealing to the AAO (and if so, when, and under what circumstances). Specifically, the AAO seeks briefs on how this issue applies to beneficiaries of Form I-140, Immigrant Petition for Alien Worker, and the effect, if any, of the American Competitiveness in the Twenty-First Century Act on denied or revoked I-140

petitions.

The deadline for the AAO to receive briefs is May 22, 2015. The AAO's request, which includes additional details, is available at http://www.uscis.gov/sites/default/files/USCIS/About%20Us/Directorates%20and%20Program%20Offices/AAO/3-27-15-AAOamicus.pdf.

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13. **ABIL Global: Hong Kong**

Hong Kong has suspended the Capital Investment Entrant Scheme; other developments have been announced.

The Hong Kong Immigration Department (HKID), under the leadership of the Chief Executive, actively reviews immigration policy to better suit the ever-evolving economic development of the Hong Kong Special Administrative Region. One of the most significant policy changes in 2015 is the suspension of the Capital Investment Entrant Scheme (CIES) effective January 15, 2015. The CIES has been a popular vehicle for residence in Hong Kong since its launch in October 2003 with the objective of facilitating the entry of investors willing to make a substantial passive investment without having to play an active role in a business.

At the end of 2014, 41,802 applications were received and 25,504 applicants have made the requisite investments and were granted formal approval to reside in Hong Kong. Additionally, 2,493 applicants were granted approval-in-principle to enter Hong Kong to make the requisite investments.

In a recent press release, the HKID made clear that when the CIES was first implemented, Hong Kong's economy was in recession and new capital was required to stimulate economic growth. However, attracting capital investment entrants is no longer a priority for the Hong Kong government in view of the latest economic situation in Hong Kong, and the focus is now on attracting and retaining talent, professionals, and innovative entrepreneurs to contribute to Hong Kong's economy.

The HKID has announced that it will introduce a series of measures in the second quarter of 2015, including a pilot "Admission Scheme for the Second Generation of Chinese Hong Kong Permanent Residents" (ASSG), to attract second-generation Chinese Hong Kong permanent residents from overseas to

return to Hong Kong. In this scheme, the applicants are not required to have an offer of employment in Hong Kong upon application and will be granted an initial stay of one year without other conditions. The applicants may then apply for extensions of stay if they have secured offers of employment at a level common for degree holders and with a remuneration package at market level.

Other measures include relaxing the duration-of-stay pattern under various visa schemes, including the General Employment Policy (GEP), the Admission Scheme for Mainland Talent and Professionals (ASMTP), and the Quality Migrant Admission Scheme (QMAS). Entrants admitted under the GEP, the ASMTP, and the QMAS under the General Point Test (GPT), will be relaxed from the current initial stay of one year to two years, and the extension pattern will be changed from the current "two-two-three" year pattern to the "three-three" year pattern.

Additionally, top-tier entrants under these immigration schemes, subject to fulfilling specified criteria, which include having worked or resided in Hong Kong under the respective schemes for at least two years, and having an assessable income for salary tax above a certain level in Hong Kong (not less than HK $2 million or approximately US $250,000), may be granted a six-year extension on time limitation only without other conditions of stay upon application for the first extension. Those successful QMAS entrants under the Achievement-Based Point Test (APT) will be granted upon entry eight years of stay on time limitation only without other conditions of stay. The HKID will also enhance the scoring scheme of the GPT to attract more talent with outstanding academic backgrounds and international work experience to work in Hong Kong.

The immigration policy in Hong Kong remains open and flexible to highly skilled people and responsive to the labor needs of businesses, to ensure that Hong Kong remains a unique "world city" while gradually being reintegrated with the mainland.

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