



Client Alert for H-1B Employers – Importance: High

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Amended H-1B Petitions May be Required Immediately

Applies to – All employers with H-1B employees working at job sites other than those specified in H-1B filing

Action needed now – Verify that actual work site of each H-1B employee has not changed since filing H-1B petition

Summary

Every H-1B petition is supported by a Labor Condition Application (LCA) attesting that the employer will pay the worker the required wage. The LCA covers specific locations. The USCIS has issued guidance that a change in work location is a material change in the terms and conditions of employment, requiring a new LCA and an amended H-1B petition. Failure to file an amended petition may result in the employee being unable to extend status in the United States, and may create liabilities for the employer. **The USCIS is requiring that no H-1B worker be moved to a new worksite after August 19, 2015 until after a new H-1B petition is filed. It is also requiring that amended petitions be filed by January 15, 2016 for H-1B employees who were moved to a new worksite prior to August 19, 2015.**

The worksite rule and the LCA

Regulations require an LCA be in effect for every worksite where H-1B workers are employed. If an employee changes worksites, a new LCA must be certified for the worksite. A new LCA requires an amendment to an existing H-1B petition. The amended petition may not be filed until the LCA is certified (about seven days after filing). The employee may change worksites as soon as the amended petition is filed.

Not all changes in physical location are considered to be a change of worksite requiring a new LCA and amended petition.

There is no requirement to file an LCA or amended petition in the following instances:

- Where an employee moves within the same “area of intended employment.” This is generally defined as a move within the same MSA (Metropolitan Statistical Area), or to an area within normal commuting distance of the original location. If an employee is moved from an office in Atlanta to an office in Norcross, Georgia, no new LCA or amended petition is required. However, even though a new LCA is not required, the existing LCA should be posted for ten working days at the new location, and documentation of the posting should be maintained.
- Employee training or developmental activities at a different location is not considered a change of worksite.
- A period of “short term placement” is not considered a new work site. There are explicit rules governing what is acceptable as short term placement. Generally, the employer is required to pay the cost of lodging, travel, meals and incidentals, and the total time at a

single secondary location is limited to 30 workdays a year (or 60 days if the employee spends most of their time at the permanent site, maintains their residence there, and has an office or workstation at the permanent site.) Please consult us as to how this exception applies in specific cases.

- The H-1B worker who travels on a short term basis – not exceeding five work days in any one visit for a frequent traveler, or ten days for an occasional traveler – is not considered to have changed work sites, if the normal duties of the employee require travel.
- Examples of travel to locations which do not create a new worksite include a computer engineer troubleshooting at a customer location, a sales representative calling on prospective customers.

The short term placement **exception will not cover** a computer engineer working on projects or accounts for weeks or months at a time or a sales representative assigned on a continuing basis to a territory outside the “home office.”

Why action is required

The USCIS issued [Final Guidance](#)¹ today regarding filing amended H-1B petitions where H-1B worksites have changed since the H-1B petition was filed.

- If an H-1B was moved to new employment prior to April 9, 2015, employers have a “safe harbor” and may delay filing an amended H-1B petition until January 15, 2016, unless a notice of intent to deny, request for evidence or notice of revocation was issued before July 21, 2015. The employer may, but is not required, to file a new petition by January 15, 2016.
- If an employee has been moved after April 9, 2015, and before August 19, 2015, the employer **must file** a new petition by January 15, 2016 to avoid adverse action with respect to the employer and the employee.
- No employee may be relocated to a new work site (as defined above), after August 19, 2015, unless an amended H-1B petition is first filed.
- Before any employee is moved to a new work site, the location must be covered by an approved LCA. The “grace period” for filing amended H-1B petitions does not change the LCA requirement.

We recommend that employers not rely on the “safe harbor” for H-1B employees moved to new worksites prior to April 9, 2015, and file new LCAs and amended H-1B petition by January 15, 2016.

We recommend that employers with H-1B employees immediately survey or audit their H-1B work force to determine if any H-1B employees have changed worksites, and immediately take action to file new LCAs and amended H-1B petitions.

An employer which fails to comply with its H-1B obligations subjects itself to penalties and possible back wage obligations. The immigration status of employees is at risk if an employer does not comply with its H-1B obligations, and the employees may be unable to renew or extend status in the U.S. and may be subject to other penalties. An employer may be debarred from filing H-1B petitions or renewals if it is found to be in violation.

Contact a member of AGG’s [Immigration and Global Migration](#)² practice if you have questions as to whether a particular H-1B employee requires the filing of a new LCA and amended H-1B petition. We are glad to assist.

For further details see:

[USCIS Final Guidance on When to File an Amended H-1B Petition](#)³
[Department of Labor Regulations on definition of “Place of Employment.”](#)⁴
[Department of Labor Regulations on short-term placement](#)⁵ of H-1B workers

1 http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf

2 <http://www.agg.com/Immigration-and-Nationality-Law-Practice/?&operation=professionals>

3 http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2015/2015-0721_Simeio_Solutions_Transition_Guidance_Memo_Format_7_21_15.pdf

4 <https://www.law.cornell.edu/cfr/text/20/655.715>

5 <https://www.law.cornell.edu/cfr/text/20/655.735>

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