July 11, 2003

Mr. William Yates
Acting Associate Director for Operations
Bureau of Citizenship and Immigration Services
Department of Homeland Security
425 Eye Street
Washington, DC 20536

Dear Bill:

I am writing to seek clarification of an issue that has caused some confusion for our members. Recently there have been conflicting opinions regarding whether an amended petition is required when an H-1B employee transfers to a new location not included on the original I-129 filing, but which is covered by a labor condition application (LCA) that was in place prior to the employee's move. ACIP believes that previous policy memoranda from the Service support the position that an amended petition is not required. However, since some of our members have received conflicting advice from legal counsel, we seek your opinion. I am sure you recognize our concern that a policy ambiguity should not result in a foreign national employee violating legal nonimmigrant status.

Often business requires that an H-1B employee be relocated to a new area of intended employment. This new location, which is covered by a LCA that is in place prior to the move, may not be included with the foreign national's original Form I-129 filing. In other words, a Form I-129 petition is approved with a supporting LCA designating Location A. After the employee has worked at Location A, the employer wishes to move employee to Location B, which is in a new geographic area, where a multiple-slot LCA is in place that would cover the employee. The second LCA was not included in the employer's original and only Form I-129 filing on behalf of the employee.

Most if not all of the Legacy INS policy letters to immigration practitioners in the past decade have stated that an amended petition would not be required if an LCA is already in place for a new geographic area that would cover a given worksite. Many practitioners and companies have interpreted this to mean that if an LCA is filed and in place prior to the transfer of an employee, or group of employees, no amended petition(s) need be filed. Therefore, as long as the LCA is filed, the appropriate worksite posting has taken place, and other wage and hour obligations are met, no amended petition would be required, regardless of when the LCA was filed and certified, as long as it is in place prior to moving the employees. We are writing to seek assurance that this policy is being continued by the Legacy INS components of the Department of Homeland Security.

At least one Legacy INS correspondence is directly on point. The most dispositive letter on the issue of geographic moves and amended petitions came from Thomas W. Simmons, then Branch Chief of the Benefits and Trade Section of INS, who stated in a November 12, 1998 policy letter (HQ 70/6.2.8) that in an instance where a petition is approved for a beneficiary to work in Location A, and the employer subsequently transfers the foreign national to Location B in a different geographic location, where an LCA is in place, an amended petition need not be filed for the change in geographic location. As is the case with a name change and other non-material changes, Mr. Simmons suggests that the employer should advise the INS of the event if and when an extension is filed. Mr. Simmons goes on to state that the Service would expect that worker to at least begin employment at the location specified in the I-129, and if not, a new or amended

petition would need to be filed. While Mr. Simmons suggests that INS does not encourage "speculative employment," he does suggest that employers include alternative locations in itineraries filed with the original I-129, presumably with multiple location or multiple LCAs that have already been appropriately posted and certified. This is prudent advice and I believe that employers and attorneys attempt to do this whenever practical.

Arguably, the need to file a new LCA based on a geographic transfer is strictly a DOL wage and hour issue. Assuming no other changes in employment, the need to file a new LCA is not material in determining whether an H-1B job or beneficiary should continue to pass muster in regard to being classified in a specialty occupation. The regulations provide that a petitioner shall file an amended petition to reflect any material changes in the terms and conditions of the foreign national's employment. As discussed in an October 2, 1995 letter from Yvonne LaFleur, then Nonimmigrant Branch Chief, Office of Adjudications, INS (HQ 214h-C), a material change "is a change that directly impacts the alien's continued eligibility for H-1B classification." This position is echoed in the Simmons letter and in the 1996 policy memo issued by then Executive Associate Commissioner T. Alexander Aleinikoff (HQ 70/6.2.8-P), wherein he stated that "an amended petition must be filed when there is a material change in the terms and conditions of employment which affect the beneficiary's eligibility for H-1B classification…and was not devised as an avenue to advise the Service of minor, immaterial changes in the conditions of the alien's employment which do not affect the alien's eligibility for classification." Later in the same memorandum, Mr. Aleinikoff suggests that an amended H-1B petition should be filed in the event that the H-1B worker's location change "invalidates the supporting labor condition application." Read in conjunction with the Simmons letter, which was issued two years later, this statement, while open to interpretation, appears to stand for the proposition that if the supporting LCA is withdrawn, an amended petition should be filed. An instance where this might happen is if the employer discontinues operations at the first location, in which case the underlying LCA should be withdrawn. It has been my observation, however, that more often than not, the supporting LCA remains in place, even as H-1B workers move to new locations, as the LCA supporting the original I-129 filing often serves as "home base." In any event, a change in geography in and of itself would not impact the eligibility of an H-1B employee since there is no change in employer, no change in duties, and adjustments in wages would be covered by the applicable LCA covering the new territory.

Additionally, since the publication of the Aleinikoff memorandum and Simmons letter, Section 401 of the Visa Waiver Permanent Program Act of 2000 was enacted into law. Section 401 eliminated the need for employers to file new or amended petitions as a result of corporate reorganizations. Congress saw the need to relieve employers from the burdens of filing new petitions when the employers shape and form changed, but where there was no material change affecting the definition of a job as belonging in a specialty occupation or a specialty worker's continued eligibility for H-1B status. The Visa Waiver Permanent Program Act marked a departure from the previous rule that a new LCA would require an amended INS petition, a move that was followed by a DOL rule that eliminated the need to file LCAs in the event of corporate restructuring. As a practical matter, it would be incongruous to require that amended petitions be filed for changes that would not have been germane to the adjudication of the original petition, and where the underlying matter is subject to the jurisdiction of a different agency.

As Mr. Simmons suggests, inclusion of a certified LCA with an H-1B petition is a safeguard against speculative employment, though is not otherwise material to status. Absent any other change in the terms of an employment relationship, there is no justification for requiring the filing of an amended H-1B petition to notify the INS of a geographic change. The only instance in which the issue of geographic change as it relates to H-1B eligibility would be relevant would be

in ensuring that the appropriate wage is being paid, a task that is clearly within the purview of the Department of Labor.

Again, we would like assurance that the BCIS and DHS will be following Legacy INS policy as discussed above, that is, that when an H-1B employee moves to a second location that was not reflected in an original or any subsequent Form I-129 filing, provided that an LCA is in place prior to their start of work at the new or second location, no amended petition is required. A change in policy on this issue without clear notice could result in unintended status violations as well as disruption of business activity on the part of hundreds and possibly thousands of companies relying on the Simmons formulation.

We would appreciate your advice on this issue at your earliest possible convenience. Thank you very much.

With kind regards.

Sincerely,

Lynn Shotwell
Legal Counsel and Director of Government Relations

cc Thomas Cook