Council for Global Immigration
A SHRM Affiliate

April 21, 2016

The Honorable Leon Rodriguez
Director, United States Citizenship & Immigration Services
Department of Homeland Security
20 Massachusetts Ave, N.W.
Washington, DC 20529

RE: Amended H-1B petitions resulting from implementation of *Matter of Simeio Solutions, LLC* Decision

Dear Director Rodriguez:

As our association reflects this month on the one year anniversary of the Administrative Appeals Office (AAO) decision in *Matter of Simeio Solutions, LLC*, I wanted to share with you our thoughts on the impact of this decision on the employer community. We appreciate that the agency was proactive last year in seeking public feedback before issuing guidance; and, in particular, we thank you for your thoughtful remarks on the matter at our 2015 Symposium. While we were hopeful that the final guidance would be manageable, our members are expressing increasing frustration with the extensive burdens they now face with regard to the decision and the way the subsequent USCIS guidance has been implemented.

CFGI has received reports from our members that entire H-1B petitions are being re-adjudicated by USCIS, compliance is even more costly and time consuming than anticipated, and increased volume has contributed to unreasonable processing delays for all H-1B extensions and amendments, not just those directly resulting from the decision. Our members have expressed that the current situation is unsustainable and that the policies in place need to be formally revisited.

We therefore respectfully ask that USCIS take the following actions:

- **Commence full notice and comment rulemaking under the Administrative Procedure Act (APA) to implement a new policy with regard to amended H-1B petitions for change of location**: A common frustration that has been raised by our members in the last year is that the *Simeio Solutions* decision seemingly came out of nowhere – the decision was issued and designated as precedent without notifying the public or offering an opportunity to submit amicus briefs.

  The burdens created by the decision are becoming unbearable and our members are increasingly dismayed as reflected in responses to a recent survey to our members:

  - 95% reported a substantial increase in staff hours to complete processes required under the new rule
  - 61% have experienced an increase in overall volume of amended H-1B petitions
  - 18% of those respondents have filed at least 50% more amended H-1B petitions
  - 62% have experienced a substantial increase in government filing fee costs
  - 43% have paid substantially more in legal fees

One member stated:

> We are spending significantly more resources on immigration due to this policy. This is likely not sustainable and highlights the need for an update of the H-1B regulations to reflect the modern day workplace and a global, mobile business market.

This decision is likely similarly straining the resources of USCIS. We recognize that the AAO has authority to issue decisions and that there is a process in place to designate decisions as precedent. However, given the significant impacts of this change, we believe the agency would be on much stronger legal footing if it were to issue a rule, after full APA rulemaking, providing the public the opportunity to comment before the rule is finalized.

- **When no other facts or circumstances have changed, instruct adjudicators not to re-adjudicate cases or issue requests for evidence (RFEs) on issues unrelated to the change of location which required the filing of an amended petition**: The *Simeio Solutions* decision held that a change of worksite location that requires a new labor condition application (LCA) constitutes a "material change" that requires the filing of an amended H-1B petition. However, CFGI members report that amended H-1B petitions pursuant to *Simeio Solutions* are being completely re-adjudicated. Even where there have been no material changes other than a change of location, employers are receiving RFEs requesting other evidence. For example, CFGI members have reported RFEs requesting the following types of evidence that was already adjudicated in the initial petition: right to control the employee, employer/employee relationship, education credentials, business leases for offices, and proof of business operations.

  Our members believed that the guidance issued after the *Simeio Solutions* decision simply intended to provide the agency a way to comply with the holding and was not intended to reopen entire cases. The reality is that the implementation of the guidance compounds uncertainty for employers and further stretches their resources in responding to RFEs. Likewise, unnecessary re-adjudication stretches the limited resources of USCIS when adjudicators could be reviewing other petitions and applications – many of which are now experiencing unnecessarily long processing times.

  We therefore ask that, when reviewing amended H-1B petitions, adjudicators be trained only to adjudicate the areas for which there is a material change and defer to the prior adjudications of other elements of the petition.

- **Allow a reasonable period of time to file amended H-1B petitions after a change of location**: In the modern economy, employees often need to move to a new location on very short notice to work on a specific project. While employers are accustomed to filing LCAs quickly, the requirement that the *amended petition* be filed before employment commences in a new location has a severe impact. Employers lose work and productivity unnecessarily suffers when employers are unable to send employees to the locations where their services are needed. We recommend that USCIS allow for a reasonable period of time after the change of location to obtain a certified LCA and file an amended H-1B petition. Our members believe 45 days would be a reasonable period of time.

- **For employees with multiple pending amended H-1B petitions and/or extensions, process all amendments and extensions within 15 days for one premium processing fee**: Extraordinary challenges arise when multiple H-1B amendments remain pending for a single employee. For example, an employer that has filed three changes of location prior to an extension would have to file premium processing for four petitions to ensure the employee remains in status if his or her extension remains pending for 240 days beyond expiration of the initial H-1B. This would cost such an employer an additional $4,900 to keep one employee in status.

We urge the agency to allow employers with multiple pending amended petitions to file one premium processing fee to have all amendments processed in a timely fashion, rather than having to pay a separate premium processing fee for each case.

- **Ensure that increased volume of amended H-1B petitions does not negatively impact processing times of H-1Bs unrelated to *Simeio Solutions***: Three-quarters of our members who responded to a recent survey report H-1B extension processing times of 6 months or more, and 12 percent of respondents have actually had employees fall out of status in the last 6 months because an H-1B extension was not processed within 240 days of the expiration of the initial H-1B. Even more members stated that they would have had employees fall out of status had they not upgraded to premium processing just before the 240 days would end.

  The reported processing times as of February 29, 2016 tell a similar story: the California Service Center reported it was processing H-1B extension petitions dated September 18, 2015 (a backlog of over 5 months) and the Vermont Service Center reported it was processing H-1B extension petitions dated July 20, 2015 (a backlog of over 7 months).

  Our members perceive the unreasonably long H-1B extension processing times to be largely a result of implementation of the *Simeio Solutions* decision. One CFGI member commented:

  > Even though we did not have to file any H-1B petitions to comply with the *Simeio* decision, the huge delays that, apparently, are the result of the significant increase in required petitions is having a significant negative impact on us. We have had to amend business processes to file petitions earlier and have had to upgrade many more petitions to Premium Processing.

  All employers – large or small, corporate or non-profit, across all industries – need reasonable processing times to keep their employees in status and comply with Form I-9 regulations. We understand that USCIS is already transferring workloads between service centers in order to manage workloads, including processing some I-129s at the Nebraska Service Center. We appreciate the measures the agency has taken to ameliorate what has become an overly burdensome process for everyone, and urge the agency to continue monitoring these workloads and processing times closely and take all possible actions to ensure resources are allocated to minimize the ongoing disruptions so many employers are currently experiencing.

This will certainly be a topic of great concern at our upcoming Symposium and I welcome the opportunity to meet with you to share our concerns in greater detail if that would be helpful to you. Thank you for your consideration of these recommendations, and we look forward to your response.

Sincerely,

Lynn Shotwell
Executive Director

cc:
Lori Scialabba, Deputy Director, USCIS
Juliet Choi, Chief of Staff, USCIS
Denise Vanison, Chief, Office of Policy and Strategy, USCIS
Donald Neufeld, Associate Director, Service Center Operations, USCIS
Mariela Melero, Associate Director, Customer Service and Public Engagement, USCIS

U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Office of the Director (MS 2000)
Washington, DC 20529-2000

U.S. Citizenship and Immigration Services

June 17, 2016

Lynn Shotwell
Executive Director
Council for Global Immigration
1800 Duke Street
Alexandria, VA 22314

Dear Ms. Shotwell:

Thank you for your April 21, 2016 letter describing the impact that the Administrative Appeals Office (AAO) decision in *Matter of Simeio Solutions, LLC*, 26 I&N, Dec. 542 (AAO 2015), has had over the past year on the employer community you represent.

As you know, on April 9, 2015, AAO issued *Simeio* which holds that an H-1B employer must file an amended or new H-1B petition when a new Labor Condition Application for Nonimmigrant Workers (LCA) is required due to a change in the H-1B worker's place of employment. On July 21, 2015, USCIS issued policy guidance (Simeio Policy Memorandum) explaining that H-1B petitioners are required to file an amended or new petition before placing an H-1B employee at a new place of employment not covered by an existing, approved H-1B petition.[1]

Regarding your request that USCIS engage in rulemaking under the Administrative Procedure Act (APA), USCIS declines to engage in notice and comment rulemaking to address the existing legal requirement that an amended petition must be filed if there is a material change in the terms and conditions of H-1B employment that may affect eligibility for the H-1B visa classification. As explained in *Simeio*, USCIS' interpretation of the law clarifies, but does not depart from, existing regulations and previous USCIS policy pronouncements on when an amended H-1B petition must be filed.[2] As such, the policy is not subject to notice and comment rulemaking under the APA. Because USCIS considers the clarification regarding the filing of

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[1] *See* USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC* (PM-602-0120) at https://www.uscis.gov/news/final-guidance-when-file-amended-or-new-h-1b-petition-after-matter-simeio-solutions-llc.

[2] 8 CFR §§ 214.2(h)(2)(i)(E) and (11)(i)(A). *See*, e.g., Memorandum from T. Alexander Aleinikoff, INS Exec. Assoc. Comm'r, Office of Programs (Aug. 22, 1996), at 1–2 (Amended H−1B Petitions), *reprinted in* 73 *Interpreter Releases* No. 35, Sept. 16, 1996, app. III at 1222, 1231–32; *see also* Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30,419, 30,420 (June 4, 1998) (Supplementary Information) (stating in pertinent part that the "proposed regulation would not relieve the petitioner of its responsibility to file an amended petition when required, for example, when the beneficiary's transfer to a new work site necessitates the filing of a new labor condition application.").

amended petitions articulated in *Simeio* to present no new issues of law, and to be consistent with the statute, regulations, and agency policy, AAO did not solicit *amici* briefs on the issue. However, submission of such briefs was not precluded – any person or organization that wished to submit an unsolicited *amicus curiae* brief could have coordinated such a submission with the appellant.[3] While *Simeio* does not establish new legal requirements, USCIS does consider the decision to be useful to both stakeholders and USCIS officers by promoting clarity and consistency in adjudications. The *Simeio* decision was designated to serve as a precedent after extensive vetting within the Department of Homeland Security (DHS) and the Department of Justice, and approval by the Secretary of DHS with the Attorney General's agreement.

USCIS solicited stakeholder input on the *Simeio* Policy Memorandum, and notified stakeholders that we would accommodate petitioners who needed to come into compliance with *Simeio* by generally not pursuing new adverse actions for pre-*Simeio* worksite changes and by providing a safe harbor filing period.[4] With regard to other concerns articulated in your letter, we note that employers participating in the H-1B program must be in compliance with applicable statutory and regulatory provisions, including those created with the congressional objective to protect U.S. workers.[5]

Additionally, you stated that some of the employers you represent indicated that they have experienced a substantial increase in government filing fees. The Fraud Prevention and Detection fee is only required for an initial petition and petitions for a change of employers. Immigration and Nationality Act (INA) section 214(c)(12). An employer filing an amended or new petition because of a change in the employee's worksite location would not trigger that fee being paid an additional time. *Id.* Also, those petitioners subject to the American Competitiveness and Workforce Improvement Act (ACWIA) fee must only pay the ACWIA fee for the initial petition, for a change of employers, or the first extension of stay filed by the petitioner for the H-1B worker. INA section 214(c)(9). An employer filing an amended or new petition because of a change in the employee's worksite location would not trigger the ACWIA fee being paid an additional time beyond when it would normally be paid. *Id.* In addition, you also stated that your members have expressed dismay at the burdens created by *Simeio*, which caused them to increase staff hours, file more petitions, and pay more legal fees. Again, USCIS is not imposing any new compliance requirements through *Simeio*, but simply clarifying an existing legal requirement.

Regarding your point concerning USCIS re-adjudication of amended H-1B petitions, amended petitions may present new facts that require adjudicators to re-examine parts of the petition, such as the Employer/Employee relationship. The petitioner must demonstrate eligibility for H-1B classification; every amended or new H-1B petition must separately meet the

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[3] *See* AAO Practice Manual, Section 3.8(e).

[4] For additional information, *see* USCIS Final Guidance on When to File an Amended or New H-1B Petition After *Matter of Simeio Solutions, LLC* (PM-602-0120) at https://www.uscis.gov/news/final-guidance-when-file-amended-or-new-h-1b-petition-after-matter-simeio-solutions-llc.

[5] For example, implemented through the LCA certification process, INA section 212(n)(1) is intended to protect U.S. workers' wages by eliminating economic incentives or advantages in hiring temporary foreign workers. *See, e.g.*, Labor Condition Applications and Requirements for Employers Using Nonimmigrants on H-1B Visas in Specialty Occupations and as Fashion Models; Labor Certification Process for Permanent Employment of Aliens in the United States, 65 Fed. Reg. 80,110, 80,110–11, 80,202 (Dec. 20, 2000) (Supplementary Information).

requirements for H-1B classification and any requests for extension or amendment of stay.[6] We welcome you to provide, through USCIS' customer service process, examples of cases where you believe USCIS inappropriately re-adjudicated amended H-1B petitions. However, please note that the customer service process is not a substitute for case specific redress by motion and/or administrative appeal.

You also requested that USCIS allow for a reasonable period of time to file amended H-1B petitions after a change of work location. The regulations require petitioners to immediately notify USCIS of any changes in the terms and conditions of employment of a beneficiary that may affect eligibility for H-1B status.[7] In addition, the regulations require an amended petition when the petitioner continues to employ the beneficiary.[8] As indicated in our guidance, USCIS does not require a petitioner to wait for a case to be approved before the H-1B employee begins work at the new location, but only that the petitioner does indeed file the amended or new petition. Once a petitioner properly files the amended or new H-1B petition, the H-1B employee can immediately begin to work at the new place of employment, provided the requirements of section 214(n) of the INA are otherwise satisfied. Further, an amended or new H-1B petition is not required when an H-1B employee is simply moving to a new job location within the same "area of intended employment;" for certain short-term placements; and for certain brief trips to non-worksite locations.[9]

Regarding your request that USCIS process all amendments and extensions within 15 days for one premium processing fee where an employee has multiple pending amended H-1B petitions and/or extensions, this request is not operationally feasible. USCIS has procedures in place to ensure that a premium processing fee was properly submitted or matched with the petition before forwarding to an officer for adjudication. A single fee would require the implementation of more time consuming processing procedures to "match-up" fees with petitions previously filed, thus adding to the processing times. Moreover, one premium processing fee for multiple petitions filed at various times would violate USCIS' policy of "first-in-first-out," as these petitions would be processed ahead of unrelated employers' earlier filed petitions. Additionally, the proposed practice would be unfair to employers who pay the premium processing fee and only have a single petition pending versus an employer who pays the premium processing fee and has multiple petitions pending. As explained in the *Simeio* Policy Memorandum, if an amended or new H-1B petition is still pending, the petitioner may file another amended or new petition to allow the H-1B employee to change worksite locations immediately upon the latest filing. Again, each amended or new H-1B petition must separately meet the requirements for H-1B classification, and if requested, for extension of stay.

As for the increased volume of amended H-1B petitions possibly having an impact on the processing times of all H-1Bs petitions, we note that USCIS service centers constantly strive to adjudicate all petitions in a timely manner. USCIS has evaluated the service centers' operational capacity for the processing of all forms and has taken steps to redistribute the
Lynn Shotwell

[6] 8 CFR §§ 103.2(b)(1) and (16)(ii).
[7] 8 CFR § 214.2(h)(11)(i)(A).
[8] *Id.*
[9] For additional information, see INA § 212(n)(4), 20 CFR § 655.734, 20 CFR § 655.735, and 20 CFR § 655.715.

workload among processing centers and decrease backlogs. USCIS will consider additional workload transfers to ensure that processing times do not increase for H-1B petitions.

Thank you again for your letter. Should you require any additional assistance, please have your staff contact the USCIS Customer Service and Public Engagement Directorate at 202-272-1318.

Sincerely,

León Rodríguez
Director