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
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[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