May 2015 Immigration Alert

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I. AAO Issues Precedent Decision Requiring Employers to File Amended Petitions When an H-1B Employee Changes Work Locations

On April 9, 2015, the Administrative Appeals Office ("AAO") issued an important precedent decision that will materially increase the burden upon employers that sponsor H-1B workers for work in multiple locations. Prior to this decision, informal guidance from the U.S. Citizenship and Immigration Services ("USCIS") instructed employers that they needed only to secure and post an approved Labor Condition Application ("LCA") in each place where the H-1B employee would work. In *Matter of Simeoi Solutions, LLC*, 26 I. & N. Dec. 542 (AAO April 9, 2015), the AAO rejected that guidance and instructed employers that a location change for an H-1B worker was a "material" change in the terms and conditions of

employment and thus required the employer to file an amended petition.

The AAO's decision in *Simeoi Solutions* raises almost as many issues as it purports to resolve. In this case, the employer changed the worksite to one in a different metropolitan statistical area ("MSA"), where a higher wage should have been paid. What should employers do when an H-1B employee is transferred to another location within the same MSA? How should an employer handle short-term assignments that appear to be allowed under current U.S. Department of Labor ("DOL") regulations? See 20 C.F.R.§ 655.735. How does this decision square with the examples of permissible short-term placements permitted by these DOL regulations?

In summary, the *Simeoi Solutions* decision appears to be another example of one agency involved in the immigration process attempting to strongly enforce the regulations of another agency without recognizing the potential consequences. The result, unfortunately, will be materially increased costs to H-1B employers because they will be forced to file amended H-1B petitions whenever the job location of these employees arguably shifts. For this reason, H-1B employers would be well advised to consult with their Epstein Becker Green immigration counsel about how best to manage these new H-1B requirements.

II. AAO Issues Precedent Decision Expanding the Term "Doing Business" for EB-1A Eligibility

On April 9, 2015, the AAO also issued its precedent decision in *Matter of Leacheng International, Inc*., 26 I.& N. Dec. 532 (AAO April 9, 2015). In *Leacheng*, the AAO reversed a decision by the USCIS's Texas Service Center ("TSC") that denied an EB-1A petition to classify an employee as a multinational manager or executive because the sponsoring employer had not been doing business for the year, as required by the regulations. The employer was the U.S. distribution center for the foreign parent company's products. The employer's revenues resulted from a service agreement with the parent that paid the employer for several services, including performing market research, supporting customer relations, assisting with after-sales services, facilitating import customs clearance, arranging storage and logistics issues, and assisting in the collection of payments. The TSC found that these activities did not satisfy the regulatory requirement that the sponsoring employer must be "doing business" to support the petition because the employer was not doing business with any "independent corporations or entities."

The AAO disagreed with the TSC's myopic interpretation of the regulations governing the business that a sponsoring employer must do. The AAO noted that nothing in the regulations required a sponsoring employer to provide goods and services to an unaffiliated third party. Accordingly, the AAO concluded that a sponsoring employer can demonstrate that it is "doing business" by showing that it is providing goods and/or services in a regular, systematic, and continuous manner to related companies within its multinational organization. This should make it much easier and more predictable for these multinational organizations to sponsor managers and executives for permanent residence in this country.

III. USCIS Proposes New Policy Guidance for the L-1B Classification

On March 24, 2015, the USCIS issued a new proposed policy memorandum providing guidance on the adjudication of L-1B petitions. The L-1B classification allows multinational organizations to transfer employees to the United States if they have "specialized knowledge" of the organization or its activities. In recent years, USCIS interpretations of the term "specialized knowledge" have become so arbitrary and unpredictable that the agency effectively has eliminated the L-1B category as a reliable immigration option. The USCIS proposal recognized the problems that the agency has had in interpreting this classification and represented the agency's effort to address the problem.

We are not optimistic that this latest USCIS effort to provide some rational framework for the L-1B classification will be successful. It follows several agency memos and a dedicated training program in this area that appear to have exacerbated, not reduced, problems in this area. One primary source of friction is the continued reference by the USCIS in all of its L-1B guidance, including this proposal, that this classification was not designed to accommodate large numbers of foreign nationals. This continues despite the fact that, contrary to other nonimmigrant visa classifications, Congress has never imposed a

quota on the number of L-1B nonimmigrants who can enter the United States.

This not-so-subtle message has not been lost on USCIS adjudicators who administratively develop and apply increasingly narrow interpretations of what "specialized knowledge" means and, thus, who can qualify. This latest proposal does not even retain many of the helpful examples that prior guidance contained. Nor is there any suggestion as to how this proposal will overcome an examiner bureaucracy so ignorant of modern business practices and resistant to rational approaches to the concept of specialized knowledge in a modern and constantly changing economy. The bottom line is that employers should continue to plan as if the L-1B classification does not exist and use it only as a last resort when no other option is available!

IV. NLRB Expands Rights of Undocumented Workers to Conditional Reinstatement After an Employer's Unfair Labor Practice

The National Labor Relations Board ("NLRB") decision in *Mezonos Maven Bakery, Inc*., and *LatinoJustice PRLDEF*, Case 29-CA-025476 (March 27, 2015), expanded the rights of undocumented workers to conditional reinstatement following an unlawful dismissal in violation of the National Labor Relations Act ("NLRA"). In this case, the NLRB held that the complainants were former employees who were unlawfully terminated for engaging in concerted activity protected by the NLRA. The question in the case concerned the remedy for these undocumented workers. Under the U.S. Supreme Court decision in *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002), the NLRB was legally precluded by the Immigration Reform and Control Act of 1986 from awarding back pay to undocumented workers. Here, the NLRB decided that it could award reinstatement conditioned on a discharged employee's ability to prove that he or she was *now* work authorized.

V. NLRB's Office of General Counsel Issues Updated Guidance on How to Handle Immigration Status Issues During Unfair Labor Practice Proceedings

On February 27, 2015, the NLRB's General Counsel's Office ("GCO") issued a memorandum outlining the "updated" procedures for addressing immigration status issues that arise during unfair labor practice proceedings. In this memorandum, the GCO reminded all Regional Directors that the NLRA protects all statutory employees, regardless of immigration status. Thus, these Directors need to make merits determinations on whether the NLRA has been violated without considering the employees' immigration status. And, when the charge concerns an alleged unlawful discharge that an employer claims was required under the immigration laws, the only inquiry at this stage is whether this, in fact, was the reason for the adverse action. Finally, where the NLRB may not be able to remedy the losses suffered due to the Supreme Court's decision in *Hoffman Plastics,* the GCO memo instructs the Regions to determine whether the complainants might be eligible for U or T visas or deferred action and, if so, whether the NLRB should support that action, refer the case to the Department of Justice's Office of Special Counsel ("OSC"), or engage the Department of Homeland Security to ascertain whether there are other enforcement options available.

This recent GCO memorandum underscores the NLRB's efforts to protect the rights of undocumented workers under the NLRA and serves as another reminder to employers that they may not be able to rely on an employee's undocumented status to avoid NLRB unfair labor practice proceedings.

VI. OSC Issues Guidance on How Employers Should Respond When an Employee Provides New Documents for Form I-9 Compliance

The OSC recently issued guidance to employers on how they should respond when they have accepted documentation from an employee that they reasonably believe establishes work authorization, and the employee now provides new documentation and admits that the prior documentation was phony.

The OSC noted that employers in this situation need to distinguish between their Form I-9 obligations and the enforcement of whatever honesty policies they may have. From a Form I-9 perspective, the USCIS indicates that the fact that an employee has previously provided false documentation does not require termination if the new documentation establishes identity and work authorization. With respect to

enforcement of an employer's honesty policies, the OSC indicated that such enforcement would not be discriminatory under federal law as long as the employer treated all employees, citizens, and foreign nationals in the same manner for these misrepresentations. In some states, such as California, this position might violate state law if it prohibits an employer from using a foreign national's prior misrepresentations to support an adverse employment action.

VII. District Court Upholds DOL Fine Against Medical Care Provider for Violations of the H-1B Program Requirements

In *Greater Missouri Medical Pro-Care Providers, Inc. v. Perez*, 3:14-CV-05028-MDH (W.D. Mo. Oct. 24, 2014), a federal district court upheld a DOL administrative determination that the employer had violated the H-1B program. Greater Missouri provides physical and occupational therapists for hospitals, nursing homes, and other similar facilities. Some of the therapists were foreign nationals that Greater Missouri had sponsored for H-1B nonimmigrant visas. The DOL fined Greater Missouri more than $125,000 for violating the H-1B program requirements by: (i) not paying these workers for down time, (ii) deducting immigration and counsel fees from the employees' paychecks, and (iii) improperly withholding the employees' final paychecks. The district court's decision upheld the DOL's determinations regarding violations of the H-1B program and the fine that it had imposed.

VIII. Federal District Court in California Rejects Request by Stop-Loss Carrier to Deny Medical Benefits to Undocumented Employee

In *Bay Area Roofers Health and Welfare Trust v. Sun Life Assurance Company of Canada*, Case No. 13-cv-04192-BLE (N.D. Calif. 2014), a federal district court in California granted the plaintiff trust's (the "Trust") request for an order requiring the defendant insurance company (the "Insurance Company") to pay medical expenses for children of an employee who was an undocumented alien and had secured his employment by presenting a false Social Security number ("SSN"). The Trust is a multiemployer Taft-Hartley Trust, created to provide employee benefits, including health care and life insurance benefits, for employees and dependents covered by the collective bargaining agreements with the roofing industry in the San Francisco area. The Insurance Company issued a "stop loss" insurance policy to reimburse the Trust for covered medical expenses that the Trust otherwise would have to pay as part of its self-funded plan. In May 2011, a plan participant enrolled his newborn twins in the Trust's health plan. The twins are American citizens because they were born here. They incurred medical expenses in excess of $450,000 because they were born prematurely. The Insurance Company denied the claim because the employee had used a SSN and phony green card to secure employment. According to the Insurance Company, this meant that the plan participant did not fit the plan's definition of a "lawful employee," and thus could not claim benefits. After this decision, the Insurance Company "refunded" to the plan the premiums that this participant had paid. The Trust then sued, claiming, among other things, that the Insurance Company had breached its contract of insurance. The parties then cross-moved for summary judgment.

The district court granted the Trust's motion, but the court's reasoning should raise red flags for employers outside of states like California. The Insurance Company claimed that the plan covered only "employees," which could only mean individuals lawfully permitted to work in the United States. To support this position, the Insurance Company cited to *Garcia v. American United Life Insurance Co*., 422 Fed. App'x 306 (5th Cir. 2011), an unreported decision in which the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court decision that the spouse of an undocumented worker could not claim death benefits because the undocumented worker had secured employment by using a SSN that did not belong to him and thus was not an employee covered by the policy. The district court, however, said that *Garcia* did not apply because California law, specifically, California Government Code Section 7285, gives undocumented workers the right to retain "all protections, rights and remedies available under state law." See also *Salas v. Sierra Chemical Co*., 59 Cal. 407, 426 (2014). Relying on Section 7285, the district court rejected the Insurance Company's argument and concluded that the employee was a plan participant under California law.

While the Trust prevailed in *Bay Area Roofers*, the district court's reasoning could be used to support the opposite result in jurisdictions outside California that do not have a statutory scheme that covers undocumented workers in this manner. In those states, a court might well have upheld the insurer's denial and this would have left the self-insured plan on the hook for the medical expenses that the participant claimed. *Bay Area Roofers* is a warning shot across the bow of all self-insured plans that rely on stop-loss

policies similar to the one at issue in the case.

IX. DOS Issues May 2015 Visa Bulletin

The Department of State ("DOS") has issued its Visa Bulletin for May 2015. This bulletin determines who can apply for U.S. permanent residence and when. The cutoff dates for family-based immigration advanced slightly but continued to show backlogs due to the heavy demand for these visas. On the employment-based side, the May 2015 Visa Bulletin showed that the First Preference ("EB-1") remained current for all countries. The Second Preference ("EB-2") remained current for all countries, except China and India. For China, the EB-2 category has reached June 1, 2012, and for India it has reached April 15, 2008. In the May 2015 Visa Bulletin, the cutoff dates for the Employment-Based Third Preference ("EB-3") category are as follows: January 1, 2015, for all chargeability, including Mexico. The EB-3 cutoff date for China is May 1, 2011; for India, it is January 15, 2004; and for the Philippines, it is July 1, 2007. Finally, the May 2015 Visa Bulletin indicated that the Chinese Investor Category ("EB-5") had regressed to May 1, 2013.

The DOS's monthly Visa Bulletin is available at http://travel.state.gov/visa/bulletin/bulletin_1360.html.

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