June 26, 2015

Hon. León Rodríguez
Director, U.S. Citizenship and Immigration Services
20 Massachusetts Avenue, NW
Washington, DC 20529

Re: ***Matter of Simeio Solutions, LLC* and Corresponding USCIS Guidance on Amended H-1B Petitions**

Dear Director Rodríguez:

We, the undersigned organizations, representing a variety of industries and small, medium, and large businesses, write to express our collective concerns surrounding the April 9, 2015 the Administrative Appeals Office (AAO) precedent decision, *Matter of Simeio Solutions, LLC*,[1] and the subsequent USCIS guidance on the filing of amended H-1B petitions in light of the *Simeio* holding.[2]

**Introduction**

If implemented as drafted, the *Simeio* guidance would require employers to review their entire population of current H-1B professional workers to determine if any individuals had moved locations without the filing of an amended visa petition at USCIS – even where the employer had properly obtained a certified LCA (Labor Condition Application) for the new job location, and posted that LCA, in compliance with Department of Labor (usually hereafter DOL) regulations. Then, after conducting this burdensome and time consuming review of relevant files, the guidance would require employers to file amended H-1B petitions at USCIS for such employees. In addition to this retroactive application, the prospective guidance envisions the most cumbersome and costly means for compliant employers to notify USCIS when H-1B professional workers change their place of employment to a new worksite location, even if a new LCA has been certified in compliance with DOL regulations and posted at the new location in compliance with DOL regulations.

For the reasons described below, the *Simeio* decision should be undesignated as precedent the implementing guidance withdrawn, and notice and comment rulemaking initiated to implement

[1] 26 I&N Dec. 542 (AAO 2015).
[2] http://www.uscis.gov/news/alerts/uscis-draft-guidance-when-file-amended-h-1b-petition-after-simeio-solutions-decision. The guidance was initially issued on May 21, 2015, and then republished as interim guidance on May 26th and as draft guidance on May 27th.

the intended policy change in order to receive needed input from the regulated community. Through this process, the government can fully assess the impact of the proposed policy on both stakeholders and the agencies, and explore other potential options for accomplishing its goals of creating a mechanism for the government to be notified of a change in work location at an earlier point in time.

We are writing because we believe:

1) This policy change imposes significant costs and burdens on employers and USCIS,

2) This burdensome approach does not achieve any new worker protections and thus careful consideration of unnecessary employer burdens should be of more concern,

3) The policy in place before *Simeio* had existed de facto for 20 years and a new policy cannot be applied retroactively, and

4) The policy and approach outlined by the agency in the *Simeio* guidance will increase litigation risk for the government and create uncertainty for high-skilled workers and their employers, especially because of its inappropriate retroactive application, and instead should be promulgated through notice and comment rulemaking in order to avoid unnecessary burdens, while still allowing the agency to achieve its goals.

**Procedural Background**

On April 9, 2015, the AAO issued the precedent decision, *Matter of Simeio Solutions, LLC*, in which it held that a change in the place of employment of a beneficiary to a geographical area requiring a new certified LCA is a "material change" for purposes of 8 CFR §§214.2(h)(2)(i)(E).[3] Thus, in addition to complying with DOL regulations by obtaining a certified LCA and complying with the posting requirements at the new geographical area of employment, according to *Simeio*, the employer must also file an amended H-1B petition with USCIS. In reliance on 8 CFR §214.2(h)(11)(i)(A), the AAO noted that the amended H-1B petition must be filed "immediately."[4]

On May 21, 2015, USCIS released guidance on the filing of amended H-1B petitions in light of the *Simeio* decision. USCIS notified members of the public of the guidance through its email list of all interested members of the public, and posted the guidance on the agency website. In sum, the guidance instructs employers to file amended petitions for H-1B employees who have changed or are going to change their place of employment to a worksite location outside of the MSA (Metropolitan Statistical Area) or "area of intended employment" covered by the existing H-1B petition, even if a new LCA has been certified and posted at the new location. For H-1B

[3] 26 I&N Dec. 542 (AAO 2015).
[4] 26 I&N Dec. at 546.

employees who changed work locations prior to the issuance of *Simeio,* employers are given 90 days (until August 19, 2015) to file amended petitions.

On May 26, 2015, USCIS posted a notice that this guidance was "interim" guidance that was "currently in effect" and that comments would be accepted until June 26, 2015. This change in language was likewise posted through the agency's public email notification system to all interested members of the public and on the agency's website. Just one day later, on May 27, the announcement was updated again (on the agency's website, but not through an electronic notification sent through the agency's notification system to all interested members of the public) to note that the guidance was "draft" guidance and that comments would be accepted for "a limited period of time" (the text confirming that the guidance was currently in effect was deleted).

## I. *Simeio* Policy Change Imposes Significant Costs and Burdens on Employers and USCIS

### A. Practices and Procedures In Place Today

Petitioning H-1B employers understand that an H-1B nonimmigrant worker is defined under the Immigration and Nationality Act (INA) as:

> an alien … who is coming temporarily to the United States to perform services … in a specialty occupation described in section 214(i)(1) … and with respect to whom the ***Secretary of Labor determines and certifies*** to the Attorney General that the intending employer has filed with the Secretary a [labor condition] application under section 212(n)(1).[5]

By filing an LCA at DOL, H-1B petitioning employers are clear they are required to make a number of attestations in order to comply with DOL regulations, including that the H-1B worker will be paid the higher of (1) the prevailing wage for the occupational classification in the geographic "area of intended employment," or (2) the actual wage paid by the employer to similarly situated U.S. workers.[6]

"Area of intended employment" is defined by DOL as "the area within normal commuting distance of the place (address) of employment where the H-1B nonimmigrant is or will be employed."[7] DOL notes that while "any place within the MSA or PMSA [Primary Metropolitan Statistical Area] is deemed to be within normal commuting distance of the place of employment … [t]he borders of MSAs and PMSAs are not controlling with regard to the identification of the

[5] INA §101(a)(15)(H)(i)(b) (emphasis added).
[6] 20 CFR §655.730(d)(1).
[7] 20 CFR §655.715.

normal commuting area; a location outside of an MSA or PMSA … may be within normal commuting distance of a location that is inside (e.g., near the border of) the MSA or PMSA."[8]

Under 20 CFR §655.735, DOL rules fully describe, and regulate, when and under what circumstances an employer may treat a new job site as a "short-term placement" and when a new LCA is needed.

Under USCIS regulations, 8 CFR §214.2(h)(2)(i)(E), the H-1B employer must file an amended petition "to reflect any material changes in the terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition….In the case of an H-1B petition, this requirement includes a new labor condition application."

Considering the statutory provisions, the DOL regulations, and the USCIS regulations, employers have long believed that no amended petition was required as a result of a mere change in job site, although DOL required that an LCA be certified for such a job site, and notice provided in compliance with DOL regulations.

Today, an employer notifies the government that a change in work location has occurred at the time the employer files a subsequent application with the government.

B. New Process Announced by *Simeio* Guidance is Burdensome on Employers

While we support the underlying goal reflected in both the *Simeio* decision and *Simeio* guidance of creating a mechanism for the government to be notified of a change in work location, we believe that the precedent decision and implementing guidance will impose unnecessary costs and burdens on the agency and the regulated community.

It is undisputed that the policy change will impose substantial new financial costs and operational burdens on employers. Under the new policy, employers of all sizes who employ H-1B nonimmigrant workers and seek to change their work locations will need to file additional H-1B petitions. To do this, at minimum an employer must pay the $325 filing fee and the American Competitiveness and Workforce Improvement Act (ACWIA) fee of $750 or $1,500 per petition, unless an exemption applies. What this means is that a start-up company that grows into a new office in a different metropolitan area will be required to pay thousands of dollars in government filing and legal fees just to relocate its workers in the same occupation, performing the same duties under the same terms and conditions. For a large multi-national company, the new policy is likely to result in tens of millions of dollars in additional costs.

More importantly, apart from the financial cost employers will need to alter their company procedures, a logistical challenge that requires extensive planning, budgeting, and potentially the hiring of additional personnel. Every company that employs an H-1B worker will be required to change its processes and procedures related to the internal transfer of its employees. For

[8] *Id.*

example, a company that runs a rotational program for its Masters level new hires in R&D Engineering will have to change how employees are selected for rotations within the company and monitor such a program differently than today. Currently, H-1B engineers and U.S. engineers are treated no differently and no consideration to immigration status is given for where the Masters level engineers are sent across the country – but this must change under *Simeio* to ensure that no H-1B engineer is sent to a new location until an amended visa petition is filed at USCIS. Critically, a company with this type of program would be obligated under the *Simeio* guidance to review the personnel files of all H-1B engineers currently on staff to determine which, if any, had previously changed job sites without first having an amended petition submitted.

That the *Simeio* policy is particularly burdensome to legitimate, well-established, compliant professional services companies is well-understood by USCIS, and has been well-understood for more than 15 years. In 1998, legacy INS explained in its proposed rule on this same subject that "companies which are in the business of contracting out . . . computer professionals often get requests from customers to fill a position with as little as 1 day advance notice. Clearly an H–1B petitioner in this situation could not know of all particular contract jobs at the time that it first files the H–1B petition with the Service. As a result, many such bona fide employment contractors do not know all of the locations where a contract worker will be employed at the time the Form I–129, Petition for a Nonimmigrant Worker, is initially filed." [9]

Human resources representatives, managers, and other designated representatives must dedicate substantial time to preparing these petitions at the expense of other important responsibilities. USCIS estimates that it takes 5.26 hours to prepare an H-1B petition.[10] Especially for professional services companies, the time it takes to prepare and file a high volume of H-1B petitions for H-1B employees who are moving locations means that companies will face delays in their ability to move these employees within the United States. Those delays will increase costs, delay the delivery of services, and result in the need for additional administrative support to manage the new procedures.

C. New Process Announced by *Simeio* Guidance is Burdensome on USCIS

We are particularly concerned about the operational challenges that USCIS will face as a result of the new *Simeio* amended petition policy.

USCIS has not provided any public information regarding the projected number of additional H-1B petitions that will be filed each year. However, our associations have received early indications that the number of repeated amended visa petitions to be filed would be quite large.[11]

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[9] Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30419, 30420 (June 4, 1998).
[10] As required by the Paperwork Reduction Act, USCIS estimates the public reporting burden at 2.26 hours for the Form I-129, 2 hours for the H Classification Supplement and 1 hour for the H-1B Data Collection/Filing Fee Exemption Supplement. Form I-129 Instructions at 28 (Mar. 26, 2015 edition).
[11] Some estimates are in the tens of thousands. If retroactive filings are required for job site changes that have happened in the past the agency might be especially inundated initially.

What we do know is that, on May 26, 2015, USCIS announced its intention to temporarily suspend premium processing for extension of stay H-1B petitions, in order to allow the agency to "implement the Employment Authorization for Certain H-4 Spouses final rule in a timely manner and adjudicate applications for employment authorization filed by H-4 nonimmigrants under the new regulations."[12] The fact that USCIS was forced to eliminate this service for a subset of applications in order to accommodate an increased workload suggests that at this point in time, USCIS does not have adequate resources to manage the influx of new petitions required by the *Simeio* decision. Implementation of this decision will likely result in slower adjudications of the many other immigration benefits USCIS is charged with processing.

## II. The *Simeio* Doctrine Imposes Significant Burdens on Employers without Adding Additional Protections for U.S. Workers

It should also be noted that the protections afforded to U.S. workers as part of the H-1B process are not realized in the filing of an amended petition, but rather are afforded through the filing and public posting of the LCA. The new LCA for the new job site is already required by longstanding DOL regulation. The only purposes served by the filing of an amended petition are to notify USCIS of the new work site of the beneficiary and to collect the filing fees. A streamlined process, whereby the employer can notify USCIS of the change in work site, with perhaps a nominal processing fee could just as easily serve in place of the filing of a complete amended petition, while easing the burdens on employers.

## III. Employers Have Relied on Two Decades of Guidance from Legacy INS and USCIS That No Amended Petition Is Required When There Is an LCA in Place for the New Work Site.

The retroactive application of *Simeio* is particularly troubling in light of the fact that, for several decades, employers have relied on written guidance from the government that differs from the *Simeio* decision. In footnote seven of *Simeio*, the AAO relies on a 1996 Aleinikoff memorandum and the Supplementary Information from the June 4, 1998 proposed H-1B regulations to validate the claim that its holding in *Simeio* "clarifies, but does not depart from, the agency's past policy pronouncements that '[T]he mere transfer of the beneficiary to another work site in the same occupation, does not require the filing of an amended petition, provided … the supporting [LCA] remains valid.'"[13] Citing the October 23, 2003 letter from Efren Hernandez III, USCIS Director of the Business and Trade Branch to Lynn Shotwell of the American Council on International Personnel (now renamed as the Council for Global

[12] http://www.uscis.gov/archive/archive-news/uscis-temporarily-suspends-premium-processing-extension-stay-h-1b-petitions.

[13] 26 I&N Dec. at 547, FN 7, *citing* Memorandum from T. Alexander Aleinikoff, INS Exec. Assoc. Comm'r, Office of Programs (Aug. 22, 1996), at 1-2, *reprinted in* 73 *Interpreter Releases* No. 35, Sept. 16, 1996, App. III at 1222, 1231-32; Petitioning Requirements for the H Nonimmigrant Classification, 63 Fed. Reg. 30419, 30420 (June 4, 1998). We note, however, that this proposed rule was never finalized and implemented.

Immigration), the AAO goes on to state, "[t]o the extent any previous agency statements may be construed as contrary to this decision, those statements are hereby superseded."[14]

What the AAO fails to recognize, however, is that employers have relied upon far more than the Hernandez-Shotwell letter to conclude that an amended petition is in fact not required if the employer is in possession of a certified LCA for the beneficiary's new work site, and the LCA was posted at the new site as required under 20 CFR §655.734. The first known memorandum to speak to this issue, was published in 1992 by James J. Hogan, INS Executive Associate Commissioner for Operations. It states:

> The mere transfer of the beneficiary to another work site, in the same occupation, does not require the filing of an amended petition provided the initial petitioner remains the alien's employer and, provided further, the supporting labor condition application remains ***valid***.[15]

This language is identical to the current language in the Adjudicator's Field Manual (AFM) at 31.2(e). However, stakeholders were confused by the language "provided, further, the supporting labor condition application remains valid." Is the "supporting" LCA the original LCA or could it be a subsequently filed LCA? The Aleinikoff memo purportedly sought to clarify this question. The Aleinikoff memo repeats the above-quoted language in the Hogan memo and then adds:

> An amended H-1B petition must be filed in a situation where the beneficiary's place of employment changes subsequent to the approval of the petition and the change ***invalidates*** the supporting labor condition application.[16]

Unfortunately, as a result of the continuing emphasis on the validity or "invalidation" of the LCA and the use of the word "supporting" to describe the LCA, confusion continued. Under 20 CFR §655.750(c)(1), an LCA will be invalidated only upon a final determination by the DOL Wage and Hour Division that (1) the employer failed to meet the LCA's condition regarding strike or lockout; (2) the employer willfully failed to meet the wage and working conditions provisions of the application; (3) the employer substantially failed to meet the notice of specification requirements; or (4) the employer misrepresented a material fact in the application. Therefore, an LCA is not "invalidated" upon the transfer of the beneficiary to a work site outside the area of intended employment. Moreover, it was still not clear whether "the supporting LCA" was only the LCA submitted with the initial H-1B petition or could be a new LCA filed for the new location.

The agency cannot sustain a position that the policy pre-*Simeio* clearly and consistently required a new LCA when an employee moved jobsites, especially to the extent this position is grounded

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[14] *Id.*
[15] Memorandum from James J. Hogan, INS Exec. Assoc. Comm'r, Operations (Oct. 22, 1992), *reprinted in* 69 *Interpreter Releases* 1449, App. II (Nov. 9, 1992) (hereinafter "Hogan Memo") (emphasis added).
[16] Memorandum from T. Alexander Aleinikoff, INS Exec. Assoc. Comm'r, Office of Programs (Aug. 22, 1996), *reprinted in* 73 *Interpreter Releases* 1231 (Sept. 16, 1996) (emphasis added).

in a mistaken belief that an LCA is "invalidated" if an employee moves jobs sites when, in fact, the DOL regulates and defines when an LCA is "invalidated" and the movement of an H-1B worker does not invalidate an LCA.

As a result of the lack of clarity in official agency policy guidance, over the years, stakeholders have repeatedly sought clarification on this issue and repeatedly have been advised that an amended petition is not required as long as the LCA requirements have been met for the new location. For example:

- **The 10/23/03 Hernandez Letter**: "[A]n amended Form I-129 petition would not be required simply on the basis of the geographic move. As long as the LCA has been filed and certified for the new location, 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 the certification took place before the employee was moved."[17]

- **The 11/12/98 Simmons Letter:** "[I]t is my opinion that an amended petition need not be filed to reflect the change in job locations. After the transfer, the alien is still working for the same employer and the employer already has a labor condition application on file for the new location. Therefore, an amended petition need not be filed."[18]

- **The 6/9/97 Russell Letter**: In essence, you question whether a petitioner must file an amended petition in a situation where the beneficiary is transferred from one location to another but where the petitioner had a valid labor condition application in place for both locations when the petition was first filed with the INS….It is my opinion at this time,… that an amended petition need not be filed in a situation where the alien is transferred to another location where the petitioner had previously obtained a certified labor condition application from the Department of Labor.[19]

Therefore, USCIS has consistently interpreted its own official guidance, which was far from clear, to mean that as long as a certified LCA has been obtained and posted at the new work location prior to the beneficiary's commencement of employment at the new location, an amended petition is not required.[20] Comparing the less than clear directive in the AFM,

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[17] Letter from Efren Hernandez III, Dir. Bus. and Trade Branch, USCIS, to Lynn Shotwell, American Council on International Personnel (Oct. 23, 2003), *published on* AILA InfoNet Doc. No. 03112118.
[18] Letter from Thomas W. Simmons, Branch Chief, Benefits and Trade, INS, to Shirley Tang, Friedman & Siegelbaum LLP (Nov. 12, 1998), *reprinted in* 76 *Interpreter Releases* 1740, App. IV (Dec. 21, 1998).
[19] Letter from Isaiah Russell, Jr., Acting Branch Chief, Bus. and Trade Services, to Nathan Waxman (Mar. 12, 1997), *reprinted in* 74 *Interpreter* Releases 952, App. II (June 9, 1997).
[20] Though we recognize that the November 29, 1995 letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications to attorney Richard D. Steel states that amended petitions should be filed where an employer transfers an H-1B nonimmigrant alien and must obtain a new LCA, the three opinion letters cited above were all issued subsequent to the LaFleur letter. Thus, the guidance and statements issued by INS and USCIS over the years, though inconsistent, heavily lean toward the position that no amended petition was required. Importantly, when an agency is inconsistent in this way the Supreme Court has said deference to the agency's expertise is sometimes quite

Aleinikoff memo, and Hogan memo to the very clear directives in the Hernandez, Simmons, and Russell letters, it is easy to see why many employers would have decided to not file amended petitions when transferring H-1B workers to new work sites. In addition, it should be noted that in stakeholder engagements since late 2010, when stakeholders sought clarification as to whether an amended petition is required when the beneficiary moves to a new work site, USCIS consistently declined to provide a definitive answer and instead simply indicated that it was working on guidance as part of a comprehensive H-1B policy review.

While the *Simeio* decision (footnote seven) mentions the Hernandez-Shotwell letter as a statement that "may be construed as contrary to this decision," in fact for the past 20 years USCIS has made numerous policy statements that no amended petition is required to reflect a change in work site outside the MSA on the original LCA, as long as the LCA requirements have been met for the new work location prior to the transfer of the beneficiary. *Simeio* presents a sudden departure from this prior guidance.

## IV. The policies announced in *Simeio* and especially its retroactive application will increase litigation risk for the government and create uncertainty for high-skilled workers and their employers

### A. Retroactivity

In applying the decision to activity that occurred prior the issuance of the precedent decision, the government exposes itself to increased litigation risk which will result in unnecessary costs and additional uncertainty and confusion for employees and companies. DHS by its own regulation, limits the effect of precedent decision to "future proceedings:"

> The Secretary of Homeland Security or [designated DHS officials] may file with the Attorney General decisions relating to the administration of the immigration laws of the United States **for publication as precedent in future proceedings**…. [D]esignated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions they are binding on all Service employees in the administration of the Act.[21]

This limitation on the application of precedent decisions is consistent with the ordinary dictionary and legal dictionary definitions of "precedent." For example, Black's Law Dictionary defines the term "precedent" as:

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limited. See, e.g., *Judulang v. Holder*, 132 S. Ct. 476, 488 (2011), where the Court found that the decision of the Board of Immigration Appeals (BIA) was not entitled to deference since BIA "repeatedly vacillated in its method for applying" the relevant section of the INA (p. 484).

[21] 8 CFR §103.3(c) (emphasis added).

> An adjudged case or decision of a court of justice considered as furnishing an example or authority for an identical or similar case **afterwards arising** or a similar question of law.[22]

Similarly, Merriam Webster Dictionary defines the term as:

> A similar action or event that happened **at an earlier time**. Something done or said that can be used as an example or rule **to be followed in the future**.[23]

"[R]etroactivity is not favored in the law." *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994) (internal citation omitted). When, as here, the change in policy "attaches new legal consequences to events completed before its enactment," the change must be applied prospectively. *See, e.g., Vartelas v. Holder*, 132 S. Ct. 1479, 1482-82 (2012) and cases cited therein. As described in the draft guidance, the consequences of failing to file an amended petition by the stated deadline are severe:

> If you do not file an amended petition for these employees by August 19, 2015, you will be out of compliance with USCIS regulation and policy and thus subject to adverse action. Similarly, your H-1B employees would not be maintaining their nonimmigrant status and would also be subject to adverse action.

Therefore, in seeking to require employers to file amended petitions for pre-*Simeio* work site transfers, USCIS is impermissibly imposing retroactive legal consequences to pre-decisional events. If litigation does arise, it will create uncertainty not only for the government, but also for all employers and employees affected by the policy.

B. Rulemaking under the Administrative Procedure Act

The *Matter of Simeio Solutions, LLC* decision by the AAO was designated a binding precedent. We recognize that the AAO has power to render decisions through appeals, as well as cases certified by the government for AAO review, and to establish precedents with the approval of the Secretary of the Department of Homeland Security and the Attorney General under 8 C.F.R §103.3.[24] The issue that we are facing now is whether decisions made by the AAO are subject to the limitations of the Administrative Procedure Act (APA). Under *Perez v. Mortgage Bankers*

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[22] Black's Law Dictionary, accessed on June 9, 2015, at http://thelawdictionary.org/precedent/ (emphasis added).
[23] Merriam Webster Dictionary, accessed on June 9, 2015, at http://www.merriam-webster.com/dictionary/precedent (emphasis added).
[24] Legacy INS established the Administrative Appeals Unit (AAU) in 1983 to centralize the review of administrative appeals. Prior to 1983, responsibility for the adjudication of administrative appeals and issuance of precedent decisions was shared the INS Commissioner, four regional commissioners, and three overseas district directors. Legacy INS later established the Legalization Appeals Unit to adjudicate appeals in legalization and special agricultural worker applications that had been filed after the Immigration Reform and Control Act of 1986. In 1994, legacy INS consolidated the two units to create the Administrative Appeals Office (AAO). Pursuant to the Homeland Security Act (2002), INS was separated into three separate components each part of the newly created Department of Homeland Security effective March 1, 2003, at which time the AAO became part of USCIS.

*Association*, 135 S. Ct. 1199 (2015), the Supreme Court divided the rule making abilities of agencies into two possibilities. The first was the traditional method under the APA and the second was through interpretative rule making. Under the traditional method, required when there is a substantive and legislative change, an administrative organization had to follow the rules outlined under the APA including providing adequate time for notice and comment procedures. The second method was through interpretative rule making; the Court determined this method's purpose is to advise the public of the agency's construction of the statutes and rules which it administers. It is our belief that the *Simeio* rule does fall under the purview of the APA because it is a substantive rule change by the AAO.

Moreover, the courts may view USCIS's proposed delay in implementing the *Simeio Solutions* rule and associated sanctions for noncompliance to be a tacit admission by the agency that the new rule is substantive or legislative. Sound legal arguments support the contention that prior to implementation even on a prospective basis, USCIS must have complied with the notice and comment provisions of APA, and the amendments to the APA in the Regulatory Flexibility Act, the Small Business Regulatory Fairness Enforcement Act of 1996, Section 3(f) of Executive Order 12866 (requiring review by the Executive Office of Management and Budget), and the Paperwork Reduction Act. USCIS's posting of the *Simeio* guidance on May 26, 2015, announcing its intent to accept comments from the public for possible revision and/or clarification prior to June 26, 2013, notwithstanding the fact that the guidance was nevertheless already in effect, represents, in our view, a modest and totally ineffective effort to comply with APA legal requirements, as interpreted by the courts.

The failure to comply with the formal APA rulemaking process in 2015 is fairly remarkable given that (1) legacy INS seemingly acknowledged the need to comply with the requirements in promulgating the 1998 proposed rule governing filing H-1B amended petitions – which was abandoned prior to publication of a final rule; and (2) the 2003 Hernandez advisory letter negated the substance of the 1998 proposed and abandoned H-1B amended petition rule based on a geographic relocation that required a new LCA. Because the *Simeio* rule, as interpreted by the *Simeio* guidance, threatens employers and employees with substantial prospective sanctions up to and including deportation based on a failure to comply, the courts are likely to insist on compliance with the formal rulemaking process to ensure adequate public notice, comment and due process of law.

However, much more is at stake than sanctions for conduct post-dating announcement of the *Simeio* rule. Based on the agency's position that the regulatory interpretation announced in *Simeio* clarifies but does not change the agency's longstanding policy, USCIS proposes to apply the rule to impose sanctions and penalties upon employers and employees for violations pre-dating the decision after August 19, 2015. The threatened retroactive application of *Simeio* violates a longstanding principle prohibiting an agency from engaging in retroactive rulemaking under the APA or otherwise unless Congress has specifically authorized such action. Because neither USCIS nor its parent agency, the Department of Homeland Security, has been granted retroactive rulemaking authority by Congress, and because the temporary abeyance in enforcement announced under the Guidance raises more questions than it answers, employers

adversely affected by the *Simeio* rule should give serious consideration to challenging the rule in the courts, either directly or through business trade associations.

C. Change in Job Site as the Marker for a Material Change is the Type of Question that Would Benefit from Input from the Regulated Community

Additionally, USCIS has not demonstrated that it has considered any alternative means of accomplishing the stated goal. USCIS has not demonstrated that the filing of a completely new H-1B petition, which requires employers to pay an additional set of filing fees and be subjected to new Requests For Evidence and possible denials based solely on a change in job site, constitutes the only possible method by which DHS and DOL can effectively share information.

We believe that, ideally, the new LCA governing the new job site, which is already required to be in a public access file under DOL regulations,[25] can be shared with USCIS and be subject to review as part of the already existing Fraud Detection and National Security (FDNS) site visits conducted for over 15,000 H-1B petitions annually under the Administrative Site Visit and Verification Program (ASVVP) run by USCIS. Alternatively, it may be that each employer with an H-1B worker moving job sites could make an electronic filing to USCIS, perhaps using the agency's Electronic Immigration System (ELIS), to confirm the new job site and simply provide the USCIS receipt number associated with the H-1B petition along with the ETA case number (from DOL's Employment and Training Administration) for the new LCA – the particulars of each LCA are already a public record[26] and are available online.[27]

Notice and comment rulemaking would give USCIS the chance to consider alternative, less burdensome solutions to accomplish its stated goals. Because this policy imposes burdens on employers and on the government, and the increased workload for USCIS could result in the hampering of other adjudications, USCIS should not implement it without first exploring other avenues.

Utilizing precedent case adjudication as the means to announce a policy change regarding the materiality, and associated mechanics of notifying USCIS, of a change in job site is particularly problematic because no single case presents all of the fact patterns and issues that would have to be addressed in appropriate guidance. This is the type of issue that is, therefore, best addressed through notice and comment rulemaking. For example, the following questions and answers should be part of the final guidance provided to the regulated community in this policy area but are not discussed in *Simeio*:

> Additional question (1) - What is the impact of a pending location change amendment on an H-1B beneficiary's status and work authorization?

[25] 20 CFR §655.760
[26] Congress specifically provided that LCAs be a public record. § 212(n)(1)(G)(final paragraph) of the INA.
[27] http://www.foreignlaborcert.doleta.gov/performancedata.cfm.

Proposed answer (1) - An H-1B employee who is the beneficiary of a pending amended petition is work-authorized for the location(s) and position specified in the pending petition from the date of submission of the amendment through the date of adjudication. The H-1B employee is maintaining his or her status while working at the location and position set forth in the pending amendment.

Additional question (2) - The draft guidance indicates that when an amendment is denied, the H-1B employee may return to the work location specified in the sponsoring employer's prior petition for the H-1B, as long as that petition remains valid and the beneficiary can maintain status at the original worksite. How much time does the H-1B beneficiary have to return to a prior location after an amendment is denied?

Proposed answer (2) - If an amendment is denied, the beneficiary has 30 days from the date of the amendment denial to return to a position and worksite location specified in a previously-approved valid petition filed by the employer on his or her behalf. The amendment denial, on its own, will not cause the H-1B beneficiary to be deemed to have violated his or her status, provided he or she returns to a prior approved worksite location or, as discussed below, a location specified in a subsequently filed or approved amendment, within the 30-day period.

Additional question (3) - After an amendment for a new worksite is approved, may the beneficiary return to worksite locations specified in the employer's earlier valid petitions for the H-1B employee, as long as the employee can maintain status at those earlier worksites?

Proposed answer (3) - If the amendment is approved, it coexists with the employer's prior valid H-1B petitions filed on behalf of the beneficiary. The H-1B employee may return to a location or locations specified in a prior H-1B petition and LCA filed by the employer on behalf of the employee, provided that the petition remains valid and the beneficiary can maintain status at the worksite(s) specified on the earlier petition.

Additional question (4) - The draft guidance states that, when the H-1B beneficiary's status has expired while successive amended petitions are pending, the denial of any request to amend or extend in the "chain" will result in the denial of all successive requests to amend or extend. What is the impact of an amendment denial where the beneficiary's status has <u>not</u> expired? Are successive requests to amend or extend also denied?

Proposed answer (4) - If the beneficiary's current period of stay has not expired when an amendment is denied, successive requests to amend or extend the beneficiary's stay remain approvable or, if already approved, remain valid. The beneficiary of a denied amendment has 30 days to return to a worksite location specified in a previously-approved valid petition or to a location specified in a subsequent pending or approved amendment filed by the employer on his or her behalf.

Moreover, given that the agency has designated only a handful of cases as precedents since its creation in March 2003, it seems unwise, and impractical, to rely on precedent case adjudications decisions to determine the answers to these and other additional questions that need to be resolved.

For these reasons, employers and the agency would benefit from a thorough exploration of these concerns and any alternative solutions through the notice and comment rulemaking process prescribed by the APA.

**Request for Agency Action**

The mobility of H-1B employees is of critical importance to the competitiveness of U.S. employers, including but not limited solely to those in the professional services industries. Since 2003, employers have specifically relied on the now-rescinded Hernandez-Shotwell correspondence when relocating H-1B employees to worksite locations outside of the geographic area specified in an H-1B petition and accompanying LCA – and prior to 2003 similar agency guidance had reiterated a similar approach. The agency's prior guidance allowed employers to transfer H-1B employees without an amended petition as long as an LCA for the new location was certified by the Department of Labor before the move. This policy enabled employers to relocate H-1B employees quickly while ensuring compliance with DOL regulations.

The draft *Simeio* guidance represents a significant and abrupt change in procedure for employers, as well as substantial financial and operational burdens. It would require immediate adjustments in employers' internal processes and unanticipated expenditures for H-1B relocations. It would also obligate employers who relied on prior guidance to file amendments and incur additional costs for tens of thousands of already relocated employees, all by August 19, 2015.

In keeping with USCIS's recognition that employers properly relied on the Hernandez-Shotwell guidance for relocations prior to *Simeio*, and its appropriate assurance that employers would not be penalized for doing so, we urge the agency to be very clear that employers are not obligated to assess or file amended petitions for pre-April 9, 2015 location changes in order to comply with *Simeio*. Furthermore, we also believe, as explained above, that the agency would be on much stronger legal grounds if it announced its plan to engage in full notice and comment rulemaking regarding this important policy issue, and took the necessary steps to withdraw *Simeio* as a precedent decision (or in announcing its rulemaking announced its intention to modify *Simeio*).

Should the agency choose to finalize guidance now, without going through full notice and comment rulemaking, the agency should promptly issue such new guidance and such guidance should recalibrate the timeline for compliance with the *Simeio* decision. For location changes occurring after April 9, we urge USCIS to extend the filing deadline for as long as possible, but at least 90 days after guidance is finalized. This will allow employers sufficient time make necessary modifications to their internal procedures and to budget for the substantial increase in filing fees related to location changes.

**Conclusion**

The *Simeio* decision should be undesignated as precedent, and USCIS should rescind the related guidance and instead afford the public an opportunity to comment on the many implications of this change in policy through notice and comment rulemaking. We appreciate the chance to share our views on this important issue.

Sincerely,

Alliance of Business Immigration Lawyers
American Immigration Lawyers Association
Compete America Coalition
Computer & Communications Industry Association
Information Technology Industry Council
National Association of Manufacturers
TechServe Alliance
TechNet
U.S. Chamber of Commerce