



Challenges in Employment-Based Immigration

‘Location, Location, Location’

DESIREE GOLDFINGER AND PHILIP K. SHOLTS

While businesses have moved into the new millennium by implementing flextime, telecommuting from home offices, and globally mobile employees, immigration law has remained virtually unchanged since before the turn of the 21st century. Today’s visa processes do not address the needs of the modern workplace, and previously routine requirements for visa processes now are increasingly onerous in view of new workplace realities.

The specific location of a foreign worker’s employment has historically been an essential component in employment-based immigration. This is true for both the H-1B visa, the most widely utilized temporary work visa for professionals, and for alien labor certification, the most common path to permanent residence for professionals and skilled and unskilled workers. The location of employment is utilized when balancing the interest of protecting the wages of the U.S. worker versus the need to bring foreign workers into the United States. Is the foreign worker being paid less than a U.S. worker at that same location, thereby deterring the U.S. employer from hiring a U.S. worker? Are there no minimally qualified U.S. workers available in that specific geographic location to perform the job, thereby necessitating that a foreign worker be granted permanent residence in the U.S. to alleviate the labor shortage? These questions, formulated at a time when the American workforce was less mobile, are increasingly difficult for employers to answer today.

Work Location and the H-1B Visa

Historically, the location of employment has been a concept regulated primarily by the U.S. Department of Labor (DOL). As background, the Immigration and Nationality Act (INA) defines an H-1B nonimmigrant worker as “an alien ... who is coming temporarily to the United States to perform services ... in a specialty occupation ... 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 an application under section 1182(n)(1).”¹ This application filed with the secretary of labor, called a Labor Condition Application (LCA), requires the employer to certify that it will offer the H-1B worker the higher of either: (1) the actual wage paid to the employer’s other employees at the worksite with similar experience and qualifications for the specific employment in question, or (2) the prevailing wage for the occupational classification in the area of intended employment.² In this manner, the LCA ensures that the foreign worker is being paid a salary commensurate to that of U.S. workers at the same work location and that the foreign worker is not being hired as a cheaper labor alternative that may take jobs away from U.S. workers.

As further evidence that the concept of a foreign worker’s location of employment has historically been rooted within the realm of the DOL, the “area of intended employment” for which the employer must make the relevant attestations in the LCA, is also defined and governed by DOL regulations. The definition of the “area of intended employment” is critical because the employer must obtain a DOL-certified LCA for each area of intended employment. The DOL defines the “area of intended employment” as “the area within normal commuting distance of the place of employment where the H-1B nonimmigrant is or will be employed.” The DOL further clarifies that normal commuting distance may vary. Any location within

a single metropolitan statistical area (MSA) or primary metropolitan statistical area (PMSA) is deemed within normal commuting distance. However, the borders of the MSA or PMSA are not necessarily controlling, and locations outside of the MSA or PMSA may be within normal commuting distance.³In contrast, all locations within a consolidated metropolitan statistical area (CMSA) will not automatically be deemed within commuting distance.⁴

The DOL also defines the “place of employment” where the H-1B nonimmigrant is or will be employed. Specifically, a location is not considered a worksite requiring a certified LCA if the worker travels to that location for professional developmental activities such as conferences or seminars. Additionally, a location where the H-1B worker may be present on a casual or short-term basis (a single visit not to exceed five consecutive workdays for a worker who travels frequently, or 10 workdays for a worker who travels occasionally), is

approved petition.... In the case of an H-1B petition, this requirement includes a new labor condition application.”⁷

Despite referencing the LCA in the regulations, USCIS has long maintained the position, through a series of nonbinding guidance memos, that a change in work location is *not* considered a material change in employment requiring the filing of an amended H-1B petition.

The Hogan Memo

One of the earliest guidance memos on whether a change in work location is considered to be a material change in employment was issued in October 1992 by James J. Hogan, executive associate commissioner of operations with the legacy Immigration and Naturalization Service (INS). In addressing scenarios in which an amended H petition must be filed by an employer, the Hogan Memo explained that “the mere transfer of the beneficiary to another

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not considered a worksite. However, the DOL clarifies that the difference between a “non-worksite” location and a “worksite” location is ultimately dictated by the worker’s job functions, rather than the nature of the employer’s business.⁵

Finally, the DOL provides an exception to the LCA requirement for short-term placement of H-1B nonimmigrants outside the area of intended employment listed on the LCA. Under the short-term placement rule, an H-1B nonimmigrant can work for up to 30 workdays in a one-year period outside the area of employment listed on the LCA without a new LCA, or up to 60 days in a one-year period when the nonimmigrant maintains his or her residence at the permanent worksite and continues to spend a substantial amount of time at the permanent worksite. An employer utilizing the short-term placement rule is subject to other protections for U.S. workers, however, such as requirements that the employer pays for the foreign worker’s lodging and actual cost of travel, as well as ensuring that the employer does not assign the foreign worker to a worksite where there is a strike or other labor dispute.⁶

While it is clear that an H-1B employer must obtain the requisite certification from the DOL when there is a change in the area of intended employment for a foreign worker, the question of what, if anything, U.S. Citizenship and Immigration Services (USCIS) requires when a foreign worker changes worksites has been a long-debated topic. As discussed, the protection of U.S. workers at the worksite is regulated exclusively by the DOL; USCIS does not directly address work location in its regulations. USCIS does, however, provide that an 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

worksite, 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.”⁸

The Aleinikoff Memo

Legacy INS also issued a memorandum on Aug. 22, 1996, in an attempt to clarify its prior guidance regarding what would be considered a material change in the terms of employment requiring the filing of an H-1B amendment. Authored by T. Alexander Aleinikoff, executive associate commissioner, the Aleinikoff Memo built upon the Hogan Memo and explained that “the mere transfer of the beneficiary to another worksite, 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. 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 support labor condition application.”⁹

The Russell Letter

Following the Aleinikoff Memo, INS and successor USCIS continued to issue guidance letters that reinforced the concept that an amended petition would not be required if an LCA was filed and certified for the new employment location. Acting Branch Chief of INS Business and Trade Services Isiah Russel Jr. wrote in 1997 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.”¹⁰

The Simmons Letter

Similarly, INS Branch Chief of Benefits and Trade Thomas W. Simmons wrote in 1998 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.”¹¹

The Hernandez-Shotwell Letter

Finally, Efren Hernandez III, director of the business and trade branch of USCIS, authored a letter to Lynn Shotwell of the American Council on International Personnel in October 2003 in which he stated that “as long as the LCA has been filed and certified for the new employment location ... no amended petition would be required regardless of when the LCA was filed and certified, as long as certification took place before the employee was moved.”¹²

Matter of Simeio Solutions, LLC

On April 9, 2015, the Administrative Appeals Office (AAO) of USCIS issued its decision in *Matter of Simeio Solutions, LLC*.¹³ Designated a precedential and binding decision by the Department of Homeland Security—one of only six precedent decisions issued in the past 15 years—the AAO sent a shockwave throughout the numerous industries employing approximately 650,000 H-1B beneficiaries across the United States.¹⁴ The AAO held that a change in an H-1B beneficiary’s place of employment *was* a material change in the terms and conditions of employment if the change placed the beneficiary in a geographical area requiring a new corresponding LCA to be certified by the DOL.¹⁵ This new precedent—deemed an “interpretation” that clarified but did not depart from prior policy statements—reversed more than 20 years of government guidance and practice.¹⁶

Simeio reversed the long-standing rule that a change in work location is not a material change in employment, ultimately making work location a central consideration for USCIS in the adjudication of H-1B petitions. Controversially, USCIS decided to apply *Simeio* retroactively to hundreds of thousands of H-1B visa holders relying on long-standing USCIS guidance. Specifically, on May 21, 2015, USCIS issued a draft guidance stating that employers had 90 days (until Aug. 19, 2015) to file amended petitions for any H-1B employee who changed worksite location either before or at the time of the *Simeio* decision.¹⁷ Recognizing that it would not be feasible for the professional community to file hundreds of thousands of amended petitions within 90 days, USCIS issued a policy memorandum on July 21, 2015, in which it retracted its retroactive enforcement against pre-*Simeio* changes in worksite location, except for cases for which enforcement had been initiated prior to July 21, 2015. Instead, the new policy memorandum created a safe harbor period through Jan. 15, 2016, for employers to file amended petitions for pre-*Simeio* changes in work location.¹⁸

Simeio resulted in an immediate surge in the filing of H-1B amendments based upon the USCIS ultimatum. The longer term implications for employers have been significant as well, most notably relating to costs of preparing and filing amended petitions.¹⁹ Employers have experienced slower adjudications of H-1B petitions across the board and USCIS has redistributed the H-1B workload to include three of its four regional service centers to address delays in adjudications.²⁰ Aside from generating substantial revenue for USCIS, it is unclear what value is added by obtaining USCIS’ approval of a change in work location after the DOL has already certified the location—H-1B site visits per-

formed by the USCIS Fraud Detection and National Security Directorate prior to *Simeio* revealed a fraud rate of less than 1 percent for the H-1B visa program.²¹ The most notable result of the *Simeio* decision is an administrative and physical delay in moving an H-1B employee to a new worksite, meaning that employers face additional challenges in ensuring that they can meet the growing demands of their clients in an increasingly mobile work environment.

Work Location and Permanent Residence

Even more than the H-1B nonimmigrant visa program, the permanent residence process is grounded in DOL regulations revolving around work location. The INA provides that “any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the secretary of labor has determined and certified to the secretary of state and the attorney general that (1) there are not sufficient workers who are able, willing, qualified ... and available at the time of application for a visa and admission to the United States and *at the place* where the alien is to perform such skilled or unskilled labor, and (2) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.”²² This certification is referred to as a “labor certification.”²³

To obtain labor certification, the employer must test the U.S. labor market within the job opportunity’s geographic area of employment to prove that U.S. workers would not be displaced by the permanent placement of the foreign worker at the job opportunity. The geographic area of employment is key to the labor certification process because the regulations require that the employer (1) provides notice of the filing of the labor certification application to employees at the facility or location of the employment,²⁴ (2) places advertisements for the position that “indicate the geographic area of employment with enough specificity to *apprise applicants of any travel requirements and where applicants will likely have to reside to perform the job opportunity*,”²⁵ and (3) attests that the foreign worker will be paid the “prevailing wage” for the position for the area of employment.²⁶ If the phrase “area of intended employment” looks familiar, it is because its definition is identical to the definition of “area of intended employment” in the H-1B/LCA context.²⁷ Both define the “area of intended employment” as “the area within normal commuting distance of the address of intended employment” and further clarify that there is no rigid measure of distance.

However, DOL regulations are silent when it comes to addressing situations in the modern workplace where the geographic location of employment is a location that is flexible, unanticipated, and changing. This has resulted in a plethora of questions on how to properly meet the regulatory requirements. There are primarily two questions that arise in preparing a labor certification case: (1) in which geographic location should the advertisements run and what content must appear in those ads about work location, and (2) which location will govern the salary?

Travel

DOL regulations mandate that an employer filing an application for labor certification “apprise applicants of any travel requirements” of the offered position through an advertisement requirement.²⁸ In addition, the same regulations provide that these advertisements must not contain any job requirements or duties which exceed the job requirements or duties listed on the Application for Permanent Em-



content requirements additionally apply to certain notices of filing.³³² In distinguishing the content requirements for different types of recruitment, BALCA held that “the regulation that governs the additional recruitment step at issue here, 656.17(e)(1)(ii)(C), only requires that a petitioning employer advertise *the occupation* involved in the application.”³³³ Prior to *Symantec*, BALCA had already found that the content requirements did not apply to job orders with the state workforce agency.³⁴ After *Symantec* BALCA has consistently held that the advertising content requirements articulated in 20 C.F.R. § 656.17(f) only apply to newspapers of general circulation, professional journals, and notices of filing. Accordingly, failure to list a travel or relocation requirement on the employer’s website posting does not violate 20 C.F.R. § 656.17(f)(3), which requires advertisements to contain a description of the vacancy specific enough to apprise U.S. workers of the job opportunity for which certification is sought.³⁵

Similarly, mentioning a travel requirement on the employer website and job search website, but omitting it on other mandatory steps for labor certification, does not violate 20 C.F.R. § 656.17(f)(6), which states that

employment Certification (ETA Form 9089).²⁹ However, regulations are purposely vague when it comes to the content of the advertisements relating to the location of employment. The regulators believed that “the proposed regulatory language gives employers flexibility to draft appropriate advertisements that comply.... As long as the employer can demonstrate a logical nexus between the advertisement and the position listed on the employer’s application, the employer will meet the requirement of apprising applicants of the job opportunity.... Employers need not specify the job site, unless the job site is unclear; for example, if applicants must respond to a location other than the job site (e.g., company headquarters in another state) or if the employer has multiple job sites.”³⁰ In practice however, the lack of guidance on advertisement content has resulted in extensive case law, most of which involves a discrepancy in content between the prevailing wage determination (which specifically asks whether travel is required), the Application for Permanent Employment Certification ETA Form 9089 (which does not include a field asking whether travel is required for the role), the mandatory notice of filing, the mandatory newspaper/professional journal advertisements, the mandatory job order with the state workforce agency, and the additional recruitment steps required for professional positions.

The seminal case governing the content requirement of advertisements, and specifically whether and when travel must be articulated in the advertisements, is the Department of Labor’s Board of Alien Labor Certification Appeals’ (BALCA) 2014 *en banc* decision in *Symantec Corp.*³¹ *Symantec* ruled that the content requirements for advertisements, which are listed at 20 C.F.R. § 656.17(f) and include the above-referenced requirement to apprise applicants of any travel requirements, is limited to “advertisements placed in newspapers of general circulation or in professional journals.” These

the advertisements cannot contain any job requirements or duties that exceed the job requirements or duties listed on the ETA Form 9089.³⁶ The inconsistent drafting of DOL forms and regulations, as emphasized by the *Symantec* decision, has unnecessarily complicated the labor certification process when the prospective position includes a travel requirement or other unconventional work location.

Travel Versus Relocation

An emerging gray area in the labor certification process is what an employer should do when the amount of travel in a labor certification case rises to a level requiring relocation, and whether this should be disclosed in the application or recruitment. In a 2012 decision, BALCA distinguished travel from relocation, stating “‘travel to various unanticipated locations to interact with clients and train end users for short and long term assignments’ connotes only that the job opportunity would require travel for short and long term assignments. Travel for long term assignment is not the same as relocation. Relocation implies that the employer will be requiring the incumbent to move to a new location rather than just travel to it.”³⁷ BALCA clarified that “we note [the Employment & Training Administration] has issued no guidance whatsoever alerting employers to the [certifying officer’s] position that the possibility of relocation needed to be specifically disclosed in the application and advertising.”³⁸ Consistent with the lack of guidance, BALCA has found that failure to mention relocation in an employer’s website advertisements is not a basis for denial of certification on the basis that the certifying officer is unable to determine if “there is in the United States a worker who is able, willing, qualified, and available for and at the place of the job opportunity.”³⁹ However, relocation raises the important question of how to handle a future unknown work location in the labor certification context.

The Roving Worker and the Default of an Employer's Corporate Headquarters

An employee who travels to various unanticipated locations as part of their employment—seen commonly in the consulting industry—presents one of the most challenging scenarios in the labor certification process. Where does an employer advertise or post the job opportunity to properly notify U.S. workers of a roving position? How does the employer articulate where the work will take place? Which area(s) of intended employment should be used to determine the prevailing wage for the position?

The DOL has issued sparse guidance on how to apply the labor certification process to roving employees. The primary guidance is a field memorandum issued by DOL Administrator for Regional Management Barbara Ann Farmer on May 16, 1994, consolidating and disseminating DOL policy regarding recent issues arising in labor certification. In addressing labor certification applications filed on behalf of foreign workers who will work at various unanticipated worksites, regional administrators were instructed that applications “should be filed with the local employment service office having jurisdiction over the area in which the employer's main or headquarters office is located. In ... the Application for Alien Employment Certification, the employer should indicate that the alien will be working at various unanticipated locations throughout the [United States]. A short explanation should also be included explaining why it is not possible to predict where the worksites will be at the time the application is filed.”⁴⁰ The early guidance provided by the Farmer Memo continues to be reflected in DOL answers to frequently asked questions, published as further policy guidance to employers on the DOL website.⁴¹

One of the reasons for using the corporate headquarters as the default location when the location of employment involves unanticipated worksites is to ensure that an employer with multiple offices nationwide does not engage in forum shopping. BALCA has stated that the issue when filing an application for labor certification involving unanticipated worksites “is not so much whether the location of filing of the application [i]s permissible, but whether the employer is testing the labor market in a place appropriate for the position offered.”⁴² This includes ensuring that the employer is not taking advantage of a location where the prevailing wage may be lower.⁴³

While the Farmer Memo does provide some direction on which location governs the prevailing wage and recruitment when the specific work location is unclear, it is already more than 20 years old and fails to address many of today's variations beyond traditional employment. Since the Farmer Memo, the only other guidance provided by the DOL's Office of Foreign Labor Certification (OFLC) has been through the minutes of quarterly stakeholder meetings, which BALCA has noted are nonbinding.⁴⁴ The failure of the DOL to issue clear guidance on many of the modern-day issues encountered in the labor certification process, despite repeated efforts by the immigration bar to obtain guidance, has resulted in inconsistent adjudication of cases—even among identical job opportunities sponsored by the same employer. The due process concerns regarding the DOL's lack of clarity or consistency on how to address work location in the permanent residence process has even been acknowledged by BALCA.⁴⁵

Locality Pay Adjustments for Roving Employees

One of the deficiencies of the Farmer Memo is that it merely provides

that the prevailing wage for labor certification involving roving employees should be dictated by the wage at the corporate headquarters. In the recent BALCA case, *Cognizant Technology Solutions US Corp.*, the employer offered roving employees a base salary, plus a cost of living adjustment (COLA) based upon the work location.⁴⁶ BALCA found that the COLA was a wage adjustment and not merely a per diem payment. This is significant because a per diem payment is considered a benefit, and BALCA previously held that an employer is not required to list all benefits in advertisements posted through the labor certification process.⁴⁷ BALCA further held in *Cognizant* that since the COLA was a wage adjustment, the employer was not required to include the locality pay in newspaper advertisements nor in the additional professional recruitment steps. However, BALCA held “the regulations could be reasonably construed to require statement of a locality pay adjustment on a notice of filing in order to sufficiently apprise interested persons about the job opportunity.”⁴⁸

Ultimately, BALCA did not deny the case even though the employer failed to state the locality pay adjustment on the notice of filing. Instead, it remanded the case to the certifying officer for certification, emphasizing once again that “the Employment and Training Administration's regulations, forms and instructions provide no notice of such an interpretation of the regulations (nor a means for reporting such a wage adjustment on the Form 9089). Accordingly, we find that a denial based on a lack of statement of a locality pay adjustment in the [notice of filing] in this case cannot be sustained.”⁴⁹

Telecommuting

Another area where DOL guidance is lacking is the process for labor certification for an employee who works from a home office, commonly referred to as telecommuting. Regulations require that the advertisements placed in newspapers of general circulation, professional journals, or the notice of filing not contain terms of conditions of employment that are less favorable than those offered to the foreign worker.⁵⁰ The OFLC noted at the quarterly DOL stakeholder meeting on Feb. 13, 2013, that “it views the option of telecommuting as a benefit that must be disclosed in order to ensure a valid market test for positions involving telecommuting.”⁵¹ Of course, subsequent to *Symantec*, telecommuting does not need to be disclosed in additional recruitment measures.⁵²

The next question that must be addressed is where advertisements must be placed when recruiting for a telecommuting position and which location should be utilized in determining the prevailing wage. When an employee telecommutes, the location of employment for labor certification purposes is not necessarily the employee's home. In a 2012 decision where an employer recruited for a position at the foreign worker's home location, BALCA held that “this was a geographic condition of employment that is favorable to the alien beneficiary[,]” and “by tailoring the job location in the advertisement around the alien's geographic location, the employer may have placed a restrictive condition of employment on potential U.S. applicants who ... would be led to believe that either commuting or relocation would be required for the job. This suggested to potential U.S. applicants that the job location was less flexible than it actually is.”⁵³

Generally, the Farmer Memo prevails in most telecommuting scenarios. At the June 16, 2015, OFLC quarterly stakeholder meeting, stakeholders asked DOL representatives for clarification regarding how to properly file LCAs for positions in which telecommuting was

optional or required. In response, the OFLC stated that “the 1994 Barbara Farmer memo remains the controlling guidance on issues relating to employees who do not work at a fixed location. Consistent with that memorandum, for most telecommuting situations, the company headquarters would be the location of the job for prevailing wage and recruitment effort purposes.”⁵⁴ The OFLC noted, however, that if the company’s primary location moved outside of the MSA for a position that involves telecommuting from anywhere, the move “could be considered a different job opportunity requiring differ-

Consequences of a Change in Work Location on the Permanent Residence Process

Finally, even when an employer successfully obtains labor certification for an employee, similar to the H-1B process, a change in work location in most cases requires a new employer filing either with the DOL or USCIS. As a reminder, regulations require that the U.S. employer obtain certification from the DOL that “there are not sufficient workers who are able, willing, qualified ... and available *at the time of application for a visa and admission to the United States* and

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ent recruitment.”⁵⁵ Prior to this 2015 guidance, the OFLC similarly affirmed that the Farmer Memo was valid guidance for roving or telecommuting employees at quarterly DOL stakeholder meetings held in February 2013, September 2012, and March 2012.⁵⁶

However, the Farmer Memo may not govern all telecommuting scenarios. For employees who telecommute full time but whose work is limited to a certain geographic region, attention must be given to both where the advertisements are placed and how to “indicate the geographic area of employment with enough specificity to apprise ... where applicants will likely have to reside to perform the job opportunity.”⁵⁷ Minutes from the DOL stakeholder meeting on March 15, 2007, include the following request for clarification: “If an employer requires an employee to work from home in a region of intended employment that is different than the location of the employer’s headquarters (i.e., work is required to be performed in a designated county or state that differs from the employer’s headquarters), please confirm that the prevailing wage determination and recruitment can take place in the location of the employee’s region of intended employment. Please confirm that the notice of posting under this circumstance should be posted at the company’s headquarters.” In response, the OFLC simply stated that “if the [ETA Form] 9089 form shows the worksite at a designated location other than headquarters, the [prevailing wage determination] and recruitment would be for the worksite.”⁵⁸ While the above guidance provides that recruitment may be performed where the foreign worker resides and that the foreign worker’s address may be used as the primary worksite on ETA Form 9089, it does not provide advice on the content of the advertisements. Listing the work location as the foreign worker’s city of residence, especially when the job does not need to be performed specifically in that city, “suggests that the geographic location of the job opportunity was not as restrictive as the employer led potential applicants to believe.”⁵⁹ Once again, the lack of consistent guidance and instruction from the DOL, and the fact that there is only one field on ETA Form 9089 in which to list the location of employment, creates a continued challenge for employers who file for labor certification where an employee works at an unconventional work location.

at the place where the alien is to perform such skilled or unskilled labor.”⁶⁰ Thus, the place of employment must continue to be relevant at the time of a foreign worker’s application for admission to the United States. In order to be admitted to the United States as a permanent resident, an immigrant visa must be available for the foreign worker. Due to an outdated quota system, immigrant visa availability is severely backlogged for foreign workers born in India and China, with wait periods for some foreign workers in excess of a decade.⁶¹ It follows that if the “place where the alien is to perform such skilled or unskilled labor” changes within the decade or more during which time the employer and foreign worker are waiting for an immigrant visa to become available, the labor certification obtained is no longer valid and a new certification must be obtained.

The problem of delayed immigrant visa applications in the employment-based immigration process was apparent as early as 2000, when Congress passed the American Competitiveness in the Twenty-First Century Act of 2000 (AC21).⁶² AC21 allowed for increased job flexibility for long-delayed applicants for adjustment of status. Specifically, it provided for the continued validity of the immigrant petition for alien worker with respect to a new job for an individual whose application for adjustment of status has been filed and remained unadjudicated for 180 days or more, so long as the new job is in the same or similar occupational classification as for the job for which the petition was originally filed.⁶³ However, the main delays foreign workers face today, as opposed to 17 years ago, are not as much lengthy adjudication times of the adjustment of status but rather immigrant visa backlogs that prevent the foreign worker from filing for adjustment of status for a decade or more after the labor certification is filed on his or her behalf. As a result, today the portability provisions of AC21 benefit only a small percentage of foreign workers who have reached the final stages of the permanent residence process.

The likelihood of a foreign worker not moving outside the original area of intended employment, as defined by the DOL, for more than a decade is increasingly slim in today’s professional environment. Accordingly, an employer who seeks to move a foreign worker to a new location of employment in the foreseeable future must not only amend the employee’s H-1B visa, but must also file for a new

labor certification. This results in disparate treatment of Indian- and Chinese-born foreign workers compared to foreign workers born in other countries, because employers must either limit the mobility of these employees to alleviate the cost and administrative burden of multiple immigration filings, or plan for and strategically time the filing of multiple H-1B amendments and labor certification filings to reduce the disruption to business operations. This ultimately causes an inability to freely move these employees to locations as required by a company's business needs for five to 10 years (or more) as these employees wait to become eligible to file for adjustment of status.

In conclusion, one of today's biggest challenges in employment-based immigration is an outdated immigration system that does not take into account the mobility of the modern worker.

The failure of government agencies to issue clear guidance on how to address the realities of a mobile workforce is only part of the problem. It is apparent that the employment-based immigration system has failed the test of time. Current law is not easily adaptable to the modern-day realities of the workplace, and the immigrant visa quota system has resulted in the disparate treatment of foreign workers born in certain countries. For a nation of immigrants where foreign workers fill critical gaps in the U.S. workforce, an updated system that takes into account the mobility of the modern workforce is required to allow U.S. companies to meet their business needs in an increasingly mobile and global economy. ☺



Desiree Goldfinger is an associate in Fragomen, Del Rey, Bernsen & Loewy's New Jersey office where she practices exclusively in the field of federal immigration and nationality law with a focus on

employment-based nonimmigrant visas and permanent residence. Prior to joining Fragomen, Goldfinger worked at several New York City-based immigration firms advising corporations, universities, hospitals, small businesses, and individuals on all aspects of corporate immigration law. Philip K. Sholts is an associate with Fragomen, Del Rey, Bernsen & Loewy, LLP. He is a graduate of the American University Washington College of Law (2015) and Washington University in St. Louis (2008). During law school, Sholts served as the associate symposium editor of the American University Law Review and as a judicial intern for Hon. Michael O'Keefe of the Superior Court of the District of Columbia.

Endnotes

¹Immigration and Nationality Act (INA) § 101(a)(15)(H)(i)(b), 8 U.S.C. § 1101(a)(15)(H) (AILA 2016).

²20 C.F.R. §§ 655.730(d)(1)(i)–(ii) (AILA 2016).

³*Id.*

⁴*Id.* § 655.715.

⁵20 C.F.R. § 655.715 (providing specific “worksite” and “non-worksite” examples based on a worker’s job functions).

⁶*Id.* § 655.735.

⁷8 C.F.R. § 214.2(h)(2)(i)(E).

⁸Memorandum from James J. Hogan, Exec. Assoc. Comm’r, Operations, Immigr. & Naturalization Serv. (Oct. 22, 1998), reprinted in 69 INTERPRETER RELEASES (WEST) 1448, App. II (Nov. 9, 1992).

⁹Memorandum from T. Alexander Aleinikoff, Exec. Assoc. Comm’r,

Immigr. & Naturalization Serv. (Aug. 22, 1996), reprinted in 73 INTERPRETER RELEASES (WEST) 1231, App. III (Sept. 16, 1996).

¹⁰Letter from Isiah Russell Jr., Acting Branch Chief, Bus. & Trade Servs Branch, Immigr. & Naturalization Serv., to Nathan Waxman (Mar. 12, 1997), reprinted in 74 INTERPRETER RELEASES (WEST) 952, App. II (June 9, 1997).

¹¹Letter from Thomas W. Simmons, Branch Chief, Benefits & Trade, Immigr. & Naturalization Serv., to Shirley Tang (Nov. 12, 1998), reprinted in 76 INTERPRETER RELEASES (WEST) 1740, App. IV (Dec. 21, 1998).

¹²Letter from Efred Hernandez III, Dir., Bus. & Trade Branch, U.S. Citizenship & Immigr. Servs., to Lynn Shotwell, Am. Council on Int’l Pers. Inc. (Oct. 23, 2003), AILA InfoNet Doc. No. 03112118.

¹³26 I. & N. Dec. 542 (AAO 2015).

¹⁴David North, *Estimating the Size of the H-1B Population in the U.S.*, CTR. FOR IMMIGR. STUDIES (Feb. 2011), available at <http://cis.org/estimating-h1b-population-2-11> (last visited Jan. 27, 2017).

¹⁵*Simeio Solutions, LLC*, 26 I. & N. Dec. 542 (2015).

¹⁶*Id.* at 547 n.7 (contradicting itself by claiming that “[t]his interpretation of the regulations clarifies, but does not depart from, the agency’s past policy pronouncements” yet noting “[t]o the extent any previous agency statements may be construed as contrary to this decision, those statements are hereby superseded”).

¹⁷*USCIS Draft Guidance on When to File an Amended H-1B Petition After the Simeio Solutions Decision*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Aug. 24, 2016), available at <https://www.uscis.gov/news/alerts/uscis-draft-guidance-when-file-amended-h-1b-petition-after-simeio-solutions-decision> (last visited Jan. 27, 2017).

¹⁸U.S. CITIZENSHIP & IMMIGRATION SERVS., U.S. DEP’T OF HOMELAND SEC., PM-602-0120, USCIS FINAL GUIDANCE ON WHEN TO FILE AN AMENDED RR NEW H-1B PETITION AFTER MATTER OF SIMEIO SOLUTIONS, LLC (July 21, 2015).

¹⁹2016 USCIS OMBUDSMAN ANN. REP. 59.

²⁰*Id.* at 31; *Nebraska Service Center to Accept Certain H-1B Petitions*, U.S. CITIZENSHIP & IMMIGR. SERVS. (June 1, 2016), available at <https://www.uscis.gov/news/alerts/nebraska-service-center-accept-certain-h-1b-petitions> (last visited Jan. 27, 2017).

²¹USCIS FRAUD DETECTION & NAT’L SEC. (FDNS), SUPPLEMENTAL QUESTIONS & ANSWERS: ADMINISTRATIVE SITE VISITS & VERIFICATION PROGRAM (ASVVP), AILA InfoNet Doc. No. 11080569 (Aug. 5, 2011).

²²INA § 212(a)(5)(A) (emphasis added).

²³20 C.F.R. § 656.2(c).

²⁴*Id.* § 656.10(d) (emphasis added).

²⁵*Id.* § 656.17(f)(4).

²⁶*Id.* § 656.10(c)(1); *id.* § 656.40(a) (requiring that the prevailing wage be determined in accordance with section 212(t) of the INA, which governs the requirements for Labor Condition Applications for nonimmigrant professionals in the H and E visa classifications).

²⁷The definition of “area of intended employment” is virtually identical in 20 C.F.R. § 656.3 and 20 C.F.R. § 655.715. The only variation in language is “however, *not* all locations within a consolidated metropolitan statistical area (CMSA) will be deemed automatically to be within normal commuting distance” at 20 C.F.R. § 656.3 (emphasis added), compared to “however, all locations within a [CMSA] will *not* automatically be deemed to be within normal commuting distance” at 20 C.F.R. § 655.715 (emphasis added).

²⁸20 C.F.R. § 656.17(f)(4).

²⁹*Id.* § 656.17(f)(6).

³⁰Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System, 69 Fed. Reg. 77,326, 77,347 (Dec. 27, 2004) (to be codified at 20 C.F.R. pts. 655 and 656).

³¹*Symantec Corp.*, 2011-PER-01856 (BALCA July 30, 2014).

³²*Id.* Reversing *Credit Suisse Securities (USA) LLC*, 2010-PER-00103 (BALCA Oct. 19, 2010) in which BALCA held that the content requirements in 20 C.F.R. § 656.17(f) implicitly apply to the advertisements that employers place to fulfill the additional recruitment steps.

³³*Id.* (emphasis added).

³⁴*Chabad Lubavitch Ctr.*, 2011-PER-02614 (BALCA July 29, 2013).

³⁵*Synergy Global Techs. Inc.*, 2016-PER-00817 (BALCA Dec. 6, 2016) (omission of a travel and relocation requirement on the employer website did not violate 20 C.F.R. § 656.17(f)(3)).

³⁶*Computer Scis. Corp.*, 2012-PER-00642 (BALCA July 9, 2015) (inclusion of the language “willingness to travel, may require work from home office on the employer website and job search website does not violate 20 C.F.R. § 656.17(f)(6)”).

³⁷*Patel Consultants Corp.*, 2011-PER-00535 (BALCA Feb. 27, 2012) (denying certification due to the employer’s inconsistent use of language pertaining to travel in its advertisements and ETA Form 9089).

³⁸*Infosys Ltd.*, 2016-PER-00074 (BALCA May 12, 2016).

³⁹*Synergy Global Techs. Inc.*, 2016-PER-00817 (BALCA Dec. 6, 2016) (omission of a travel and relocation requirement on the employer website did not violate 20 C.F.R. § 656.24(b)(2)).

⁴⁰Memorandum from Barbara Ann Farmer, Adm’r for Reg’l Mgmt., U.S. Dep’t of Labor (May 16, 1994), AILA InfoNet Doc. No. 94052390.

⁴¹*OFLC Frequently Asked Questions and Answers*, OFFICE OF FOREIGN LABOR CERTIFICATION, EMP’T & TRAINING ADMIN., U.S. DEP’T OF LABOR (Dec. 17, 2015), available at <https://www.foreignlaborcert.doleta.gov/faqsanswers.cfm> (last visited Jan. 27, 2017).

⁴²*eBusiness Applications Solutions Inc.*, 2005-INA-00087 (BALCA Dec. 6, 2006).

⁴³*Paradigm Infotech Inc.*, 2007-INA-00003 (BALCA June 15, 2007).

⁴⁴See, e.g., *Infosys Techs. Ltd.*, 2012-PER-00417 (BALCA Nov. 16, 2012) (“These are informal meeting minutes, and the DOL has not placed this information on its own website as official guidance. The meeting minutes are not capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”).

⁴⁵*Infosys Ltd.*, 2016-PER-00074 (BALCA May 12, 2016) (highlighting that “OFLC has issued neither formal nor informal guidance concerning the relocation question. There is simply nothing in the record suggesting how this Employer could have known that the [certifying officer (CO)] expected it to disclose the possibility of relocation. While the Employer’s due process concerns were raised in its Request for Reconsideration . . . , that issue is not addressed

in either the CO’s denial of reconsideration or the CO’s brief to the Board” and explaining in its holding that “the CO’s apparent concession reinforces our conclusion that due process concerns compel a reversal.”).

⁴⁶See *Cognizant Tech. Solutions US Corp.*, 2013-PER-01448 (BALCA Sept. 29, 2016).

⁴⁷See *Emma Willard Sch.*, 2010-PER-01101 (BALCA Sept. 28, 2011).

⁴⁸*Cognizant Tech. Solutions US Corp.*, *supra*.

⁴⁹*Id.*

⁵⁰20 C.F.R. § 656.17(f)(7).

⁵¹STAKEHOLDER QUESTIONS SUBMITTED FOR DOL STAKEHOLDER MEETING (Feb. 13, 2013), AILA InfoNet Doc. No. 13022144.

⁵²*Computer Scis. Corp.*, 2011-PER-00642 (BALCA July 9, 2015) (“Because the [certifying officer] denied the application solely on the grounds that two of the employer’s additional recruitment advertisements did not meet a content requirement with which they need not comply [namely the inclusion of the language ‘may require work from home office’], we reverse denial of certification in accordance with *Symantec Corp.*”).

⁵³*JDA Software Inc.*, 2011-PER-02661 (BALCA Sept. 27, 2012).

⁵⁴U.S. DEP’T OF LABOR, OFFICE OF FOREIGN LABOR CERTIFICATION Q. STAKEHOLDER MEETING (H-1B, PREVAILING WAGE, & PERM) (June 16, 2015), AILA InfoNet Doc. No. 15080705.

⁵⁵*Id.*

⁵⁶STAKEHOLDER QUESTIONS SUBMITTED FOR DOL STAKEHOLDER MEETING (Feb. 13, 2013), AILA InfoNet Doc. No. 13022144; QUESTIONS RAISED BY DOL STAKEHOLDERS FOR MEETING (Sept. 28, 2012), AILA InfoNet Doc. No. 12102641; DOL/OFLC STAKEHOLDERS’ MEETING NOTES (Mar. 29, 2012), AILA InfoNet Doc. No. 12042544.

⁵⁷20 C.F.R. § 656.17(f)(4).

⁵⁸DOL STAKEHOLDERS LIAISON MEETING (Mar. 15, 2007), AILA InfoNET Doc. No. 07041264.

⁵⁹*Juniper Networks*, 2011-PER-00841 (BALCA Sept. 20, 2012) (denying certification where the employer listed the employee’s home city of “Charlotte, North Carolina” as the place of employment, despite the fact that the work could have been performed from a broader range of geographic locations); see also *Siemens Water Techs. Corp.*, 2011-PER-00955 (BALCA July 23, 2013) (denying certification where the employer properly recruited in Houston, Texas, but erred in listing the employee’s home city of “Houston, Texas” as the place of employment when the work could have been performed from a broader range of geographic locations).

⁶⁰INA § 212(a)(5)(A) (emphasis added).

⁶¹U.S. DEP’T OF STATE VISA BULL., available at <https://travel.state.gov/content/visas/en/law-and-policy/bulletin.html> (last visited Jan. 27, 2017).

⁶²Public Law 107-273, 116 Stat. 1758 (Oct. 17, 2000).

⁶³INA § 204(J).

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