American Immigration La
918 F Street, NW
Washington, DC 20004
www.aila.org

Employment Changes and H-1Bs: Guiding Principles and Recent Developments

By

Laurie Grossman

I. Introduction

What types of changes in an alien's employment are "material," giving rise to the requirement that an amended petition be filed? When does a change in the petitioner's identity result in the creation of a "new employer" that must then file a new petition? Which agencies must approve the change?
The answers to these and related questions involving "changed circumstances" continue to elude employers, aliens and their representatives, 1 as the many types of change possible make "bright-line" tests infeasible. As a result, the government agencies involved in the oversight of nonimmigrant workers have largely addressed such issues on a case-by-case basis, issuing advisory opinions that may be vague or conflicting and by which they are not bound. Ultimately, the responsibility for the determination is placed squarely on the shoulders of the petitioner. 2
The need for clear directives upon which employers can rely has in no way diminished in recent years. For example, given that the global trend towards corporate consolidation continues unabated, issues arising from a change in the employer's identity are likely to recur with frequency: this past year alone saw over 10,000 mergers, carrying a price tag of over $1.3 trillion, 3 and including some of the largest in history. 4 Even absent such a wholesale change in the employer's business operation, employment relationships rarely remain static, and thus there is a high likelihood that some change will occur during a worker's term of employment. Furthermore, the risk for an employer who fails to take appropriate action remains substantial, including potential revocation of the worker's visa, violations of the nonimmigrant worker's status, IRCA violations with the attendant penalties and in some cases even debarment from the filing of employment-based immigrant and nonimmigrant petitions.
This article will review the guidelines for analyzing a wide array of changes in employment and will discuss what action an employer need take. It will also discuss certain aspects of the Department of Labor's Notice of Proposed Rulemaking (NPRM) 5 implementing the American Competitiveness and Workforce Improvement Act of 1998. 6 While this legislation has far-reaching effects on the entire H-1B program, which are mostly beyond the scope of this article, the NPRM contains two important provisions bearing on "changed circumstances" cases: the Department of Labor proposal that a single definition of "employer" be adopted for all purposes under the H-1B program and the reinstatement of the "short term placement option" for employers seeking to place workers temporarily at a new employment location. 7

II. Authorities

A. Statutes
1. Immigration and Nationality Act of 1952 (INA), Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§ 1101-et seq.) (hereinafter INA)
a. INA § 101(a)(15)(H)
This section defines the H-1B as an alien "coming temporarily to the United States to perform services. . . in a specialty occupation. . . or as fashion model. . . 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). . ."

b. INA § 214(i)

This section defines the term "specialty occupation" as an occupation requiring the theoretical and practical application of a body of highly specialized knowledge and the attainment of at least a bachelor's degree or its equivalent, as a minimum for entry into the occupation the United States.

c. INA § 214(n)

This section describes the filing of a labor condition application (hereinafter LCA), which is a prerequisite to issuance of an H-1B visa. This section sets forth the required employer attestations, maintenance of documents and penalty provisions. Extensive amendments made by ACWIA include additional attestations for "H-1B dependent" employers, enhanced procedures for investigating violations, "whistle blower" protections, "no- benching" rules, and rules ensuring parity of employment benefits programs between H-1Bs and U.S. workers.

d. INA § 214(c)

This section provides that an employer is liable for the reasonable costs of return transportation for an alien who is dismissed from employment before the end of his/her authorized admission.

2. Internal Revenue Code § 414, 26 USC § 414

a. IRC § 414 – (b), (c), (m) and (o)

The definition of "single employer" for purposes of "H-1B dependent" employer provisions of INA § 214(n) is now governed by these rules, which are a part of the Subchapter on Deferred Compensation (Pension, Profit-Sharing, Stock Bonus Plans, etc.). The Department of Labor proposes to redefine "employer" for all purposes under the H-1B program in accordance with these rules.

b. IRC § 1563 (Definitions and special rules)

This section defines "controlled group of corporations," including parent-subsidiary controlled group, brother-sister controlled group and combined group.

B. Regulations

1. 8 CFR § 214.2(h) – Temporary Employees

This section provides general instruction on the filing of petitions for temporary worker status and sets forth the rules relating to admission and maintenance of status. Some of the specific provisions dealing with changes in employment are as follows:

a. 8 CFR § 214.2(h)(4)(ii)

This section defines U.S. employer as a "person, firm, corporation, contractor, or other association, or organization in the United States which: (1) Engages a person to work within the United States; (2) Has an employer- employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise, or otherwise control the work of any such employee; and (3) Has an Internal Revenue Service Tax identification number."

b. 8 CFR § 274a.1(g)

This section defines employer as "a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term 'employer' shall mean the independent contractor or contractor and not the person or entity using the contract labor."

c. 8 CFR § 214. 2 (h)(2)(i)(D)

This section provides that if the alien is in the United States and seeks to change employers, the new employer must file a petition requesting classification and extension of stay and states that the alien "is not authorized to begin the employment with the new petitioner until the petition is approved."

d. 8 CFR § 214.2 (h)(2)(i)(E)

This section provides that "[t]he petitioner shall file an amended or new petition, with fee, with the Service Center where the original petition was filed to reflect any material changes in the terms and conditions of employment or training or the beneficiary'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." Proposed revisions to this subsection provide a few concrete examples of material changes, but continue to place the responsibility for determining the materiality of the change upon the petitioner. 8

e. 8 CFR § 214. 2 (h)(11)(i)(A)

This section provides that the petitioner shall immediately notify the Service of any changes in the terms and conditions of employment which may affect eligibility under section 101(a)(15)(H) and requires either

the filing of an amended petition if the petitioner continues to employ the beneficiary or provision of notice to the INS Director who approved the petition if the beneficiary is no longer employed.
f. 8 CFR § 214.2(h)(11) (ii)
This section provides that if the petitioner goes out of business, the petition is automatically revoked.
g. 8 CFR § 214.2 (h)(11)(iii)(A)
This section provides for revocation on notice if the director finds that the beneficiary is no longer employed by the petitioner in the capacity specified in the petition or if the petitioner violated terms and condition of the approved petition. The proposed regulations would make revocation automatic. 9
h. 8 CFR § 214.2(h)(17)
This section discusses the effect of a strike or a lockout on H-1B aliens.
2. 22 CFR § 41.53 Temporary Workers and Trainees
22 CFR § 41.53(c) provides that the validity of an "H" visa may not exceed the period indicated in the petition.
3. 20 CFR § 655 Subpart H
The Labor Department regulations describe the general requirements and procedures for filing labor condition applications for employers using nonimmigrants on H-1B visas employed in specialty occupations or as fashion models.
a. 20 CFR § 655.715
This section defines "employer" as "a person, firm, corporation, contractor, or other association or organization in the United States: (1) which suffers or permits a person to work within the United States; (2) which has an employer-employee relationship with respect to employees under this part, as indicated by the fact that it may hire, pay, fire, supervise or otherwise control the work of an such employee; and (3) which has an Internal Revenue Service tax identification number." The Department of Labor is considering revision of the regulations to adopt a single definition of "employer" for all purposes under the H-1B program. The proposals also define "employed or employed by the employer" (for purposes of the "no displacement" rules of the ACWIA), in accordance with common law. Also see 20 CFR § 655.100(b).
b. 20 CFR § 655.730
This section describes the application process including who must file and what must be submitted. 20 CFR § 655.730 (c)(2) describes the procedures respecting multiple places of employment
c. 20 CFR § 655.733
This section describes prohibitions that apply in the event of a strike or lockout at the place of employment
d. 20 CFR § 655.735
This section sets forth special provisions for short-term placement of H-1B nonimmigrants at place(s) of employment outside the area(s) listed on the LCA
4. 20 CFR § 656.3
This section defines employer as "a person, association, firm, or a corporation which currently has a location within the United States to which U.S. workers may be referred for employment, and which proposes to employ a full-time worker at a place within the United States or the authorized representative of such a person, association, firm, or corporation. For purposes of this definition an 'authorized representative' means an employee of the employer whose position or legal status authorizes the employee to act for the employer in labor certification matters."
5. 26 CFR § 1.414(b)-1; 1.414(c)-1; 1.414(q)-1T; 26 CFR § 1.1563-1; 1-1563-3
IRS regulations also define controlled group of corporations and component members and set forth rules for determining stock ownership. These rules have not only become important for purposes of defining "single employer" for the rules relating to "H-1B dependent" employers under INA § 212(n), but they may become increasingly more important if the Department of Labor adopts a uniform definition of "employer" for all H-1B purposes, as it has proposed.
C. Instructions
1. INS Operations Instructions (OIs)
OI 214.2 (h) describes special requirements for admission, extension, and maintenance of status for temporary workers.
2. 9 U.S. Department of State Foreign Affairs Manual 41.113 (hereinafter FAM)
The FAM describes the general procedures for nonimmigrant visa issuance. Of relevance to our discussion below are the provisions requiring the annotation of visas with the petitioner's name and petition number (9 FAM § 41.113(d)) and the provision that an alien may not possess more that one valid visa of the same classification at the same time (9 FAM § 41.113 Note 2.1).

3. INS Central Office and Department of Labor Instructions

In changed circumstances cases, many critically important terms are either undefined in the regulations (i.e., "material change") or defined differently in several places (i.e., "employer"). As previously noted, the proposed regulations state that "it is the responsibility of the petitioner to determine whether, in a particular case, there exists a material change. . . necessitating the filing of an amended petition." 10 Accordingly, one must attempt to glean INS and Department of Labor policy from policy guidelines that have been issued and the advisory opinions written by agency officials in particular cases.

The INS "guidelines" on amended petitions issued in 1992 (the "Hogan memorandum") left many questions unanswered. In September 1993, the Central Office indicated that it was in the process of developing a policy memorandum discussing the issues of corporate mergers, acquisitions and takeovers. 11 This long- awaited memorandum was finally issued in August 1996. 12 Unfortunately, this statement did little more than recap the 1992 memorandum, leaving practitioners to continue to extrapolate INS policy from a dossier of correspondence written to private attorneys.

A word of caution is warranted with respect to replacing too much reliance on these memoranda and opinions. It should be noted that the INS has a codification system for these memoranda and opinions – "C" for correspondence and "P" for policy. Policy memoranda are intended to be binding. With the exception of the "Aleinikoff memorandum," the guidelines either carry no Central Office coding or a "C" code. Only the Aleinikoff memorandum carries a "P" code. 13 Even if these opinions/memoranda had all been intended as binding, they attempt to fill in so many gaps in the regulations that they may be substantive, rather than interpretative. Yet if they are substantive, they must be published in accordance with the rulemaking procedures of the Administrative Procedure Act. 14

a. Memoranda

(1) INS Central Office mem. CO 214h-C, CO 2141-C (Oct. 22, 1992), reprinted in 69 Interpreter Releases 1448, Nov. 9, 1992) (hereinafter "Hogan memorandum"). This statement, and the Aleinikoff memorandum confirming it, are discussed at length below. The memorandum provides general policy guidelines relating to the requirements for filing amended or new petitions for H and L nonimmigrants.

(2) INS Central Office mem. HQ 70/6.2.8-P. (reprinted in 73 Interpreter Releases 1231, Sept. 16, 1996) (hereinafter "Aleinikoff memorandum"). This Central office policy memorandum on the filing of amended petitions within the H-1B classification essentially recaps Service policy enunciated in the Hogan memorandum.

(3) INS Central Office Memorandum from Michael L. Aytes, Assistant Commissioner Adjudications (Dec. 29, 1995), reprinted in 15 AILA Monthly Mailing 177 (Mar. 1996), regarding the interpretation of "itinerary" in H-1B petitions.

(4) INS Central Office Memorandum from Michael L. Aytes, Assistant Commissioner Adjudications (July 8, 1997), reprinted in 74 Interpreter Releases 1459 (Sept. 22, 1997), regarding the continuing validity of nonimmigrant visas, despite a change in employers.

b. Advisory Opinions

The following advisory opinion letters are referenced in this article:

(1) Letter from Flora T. Richardson, Chief, Division of Foreign Labor Certifications, U.S. Department of Labor to Michael Phulwani (Mar. 2, 1993), reprinted in 70 Interpreter Releases 515 (Apr. 12, 1993), discussing issues regarding multiple work locations for an LCA.

(2) Letter from Jacquelyn A. Bednarz, Chief, Nonimmigrant Branch Adjudications (INS) to Mark N. Bravin (Sept. 10, 1993), reprinted in 70 Interpreter Releases 1573 (Nov. 22, 1993), discussing immigration aspects of mergers and acquisitions as applied to H-1B and TN nonimmigrants.

(3) Letter from Flora T. Richardson, Chief, Division of Foreign Labor Certifications, U.S. Department of Labor to Michael Phulwani (Dec. 1, 1993), reprinted in 71 Interpreter Releases 269 (Feb. 14, 1994) discussing the placement of an H-1B worker at a job site not listed on the LCA.

(4) Letter from James A. Puleo, Acting Executive Associate Commissioner for Operations (INS) to David A.M. Ware (Jan. 25, 1994), reprinted in 71 Interpreter Releases 405 (Mar. 21, 1994), discussing the necessity of filing an amended petition when the job site of an H-1B worker has changed.

(5) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to Susan J. Cohen (Oct. 12, 1995), reprinted in 72 Interpreter Releases 1600 (Nov. 20, 1995), discussing the meaning of "material change."

(6) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to Richard D. Steel (Nov. 29, 1995), reprinted in 15 AILA Monthly Mailing 91 (Feb. 1996), discussing whether an amended petition need be filed when an employee's job site is changed.

(7) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to Alberto A. Lense (Dec. 28, 1995), reprinted in 73 Interpreter Releases 95 (Jan. 16, 1996), discussing the effect of an H-1B principal alien's change of employer on the nonimmigrant status of H-4 dependents.
(8) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to John S. Brendel (Feb. 21, 1996), reprinted in 73 Interpreter Releases 286 (Mar. 4, 1996), discussing a change in employment by an alien who has had multiple petitions approved in his behalf.
(9) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to H. Ronald Klasko (Feb. 5, 1996), reprinted in 73 Interpreter Releases 345 (Mar. 18, 1996), discussing the "leasing" of employees.
(10) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to E. Vance Winningham (Apr. 29, 1996), reprinted in 73 Interpreter Releases 775 (June 3, 1996), discussing an H-1B's resumption of employment with the original employer after a leave of absence.
(11) Letter from Flora T. Richardson, Chief, Division of Foreign Labor Certifications, U.S. Department of Labor to Harry J. Joe (July 16, 1996), reprinted in 73 Interpreter Releases 1060 (Aug. 5, 1996), discussing the effect of an employer's relocation on an existing LCA.
(12) Letter from Yvonne M. LaFleur, Chief, Nonimmigrant Branch Adjudications (INS) to Michael Maggio (July 22, 1996), reprinted in 73 Interpreter Releases 1062 (Aug. 5, 1996) discussing the payment of an H-1B's salary by an overseas company.
(13) Letter from H. Edward Odom, Chief, Advisory Opinion Division, Directorate for Visa Services, U.S. Department of State to James A. Bach (Aug. 29, 1996), reprinted in 73 Interpreter Releases 1307 (Sept. 30, 1996), discussing the validity of the H-1B visa when there has been an interruption of employment.
(14) Letter from James Norris, Chief, Division of Foreign Labor Certifications, U.S. Department of Labor to Julia L. Stommes (Nov. 4, 1996), reprinted in 73 Interpreter Releases 1635 (Nov. 18, 1996), discussing the necessity of amending labor condition applications when there has been a change in the duties and salary of the alien.
(15) Letter from Katherine A. Lorr, Acting Chief, Business and Trade Branch (INS) to Ms. Taylor (Nov. 20, 1996), reprinted in 16 AILA Monthly Mailing 93 (Feb. 1997), discussing the impact of a change in job location on the labor condition application.
(16) Letter from John W. Brown, Acting Chief, Business & Trade Services Branch Benefits Division (INS) to Nathan Waxman (Dec. 17, 1996), reprinted in 74 Interpreter Releases 207 (Jan. 27, 1997), discussing the necessity of filing an amended petition where there has been a change in the ownership structure of the employer.
(17) Letter from Flora Richardson, Chief of Foreign Labor Certification, U.S. Department of Labor to Carolyn J. Fuchs, summarized in 16 AILA Monthly Mailing 95 (Feb. 1997), regarding the validity of an LCA in the event of a payroll transfer.
(18) Letter from H. Edward Odom, Chief Advisory Opinions Division, Directorate for Visa Services, U.S. Department of State to Martin L. Rothstein (Feb. 12, 1997), reprinted in 74 Interpreter Releases 592 (April 7, 1997), discussing the continuing validity of a visa where the alien has a new employer.
(19) Letter from Isaiah Russell, Jr., Acting Branch Chief Business and Trade Services Branch Benefits Division (INS) to Nathan Waxman (March 12, 1997), reprinted in 74 Interpreter Releases 952 (June 9, 1997), discussing the transfer of an alien to a new location where a prior valid LCA is in place.
(20) Letter from James Norris, Chief Division of Foreign Labor Certifications, U.S. Department of Labor to Donald H. Freiberg (March 4, 1997), reprinted in 74 Interpreter Releases 1095 (July 14, 1997), discussing the need to file a new LCA where the employer's name has changed.
(21) Letter from Isaiah Russell, Jr., Acting Branch Chief Business and Trade Services Branch Benefits Division (INS) to Donald H. Freiberg (March 19, 1997), reprinted in 74 Interpreter Releases 1097 (July 14, 1997), discussing the need to file an amended H-1B petition where only the company's tax identification number has changed.
(22) Letter from John W. Brown, Acting Branch Chief Business and Trade Services Branch, Benefits Division (INS) to Matthew Insoo Oh (August 27, 1997), reprinted in Bender's Immigration Bulletin, Vol. 2 No. 21 at 912 (Nov. 1, 1997), discussing resumption of employment by an alien with multiple petitions approved in his behalf.
(23) Letter from John W. Brown, Acting Branch Chief Business and Trade Services Branch Benefits Division (INS) to Carolyn J. Fuchs (January 5, 1998), reprinted in 75 Interpreter Releases 185 (Feb. 2, 1998), discussing resumption of employment by an alien with multiple petitions approved in his behalf.

(24) Letter from Thomas W. Simmons, Branch Chief Benefits and Trades Section (INS) to Shirley Tang (November 12, 1998), reprinted in 75 Interpreter Releases 1751 (Dec. 21, 1998), discussing the need to file a new petition to reflect a change in job locations.

III. Key Considerations

A. New Employer

The threshold determination to be made in a case of "changed circumstances" is whether the alien has a "new employer." If she does, a new petition must be filed. 15 To file the petition, the following must be submitted: (1) Form I-129, (2) all supporting documentation, (3) a new LCA, (4) the base petition fee (currently $110) and (5) until October 1, 2001, the $500 "training fee" imposed by the ACWIA. 16 If a new petition is required, it must be approved before the alien may lawfully assume employment.

If the alien has simply changed jobs, it will usually be obvious that there is a new employer. However, where the only change is one in the structure of the entity that originally petitioned for the alien, determining whether a "new employer" has resulted from the change requires an understanding of the term "employer" in the immigration context. In the proposed regulations implementing the ACWIA, the Department of Labor has sought comments on whether it should adopt a single definition of "employer," using the IRS rules, for all purposes under the H-1B program. Unless such a change occurs, we must continue to analyze regulations which contain several different definitions of "employer," and a body of case law which offers little help in clarifying the meaning of the term. 17

The H-1B regulations define a U.S. employer as a party (1) who engages a person to work within the United States, (2) has an "employer-employee relationship" by virtue of authority to hire, fire, pay, supervise or otherwise control the work of the employee, and (3) has an Internal Revenue Service tax identification number. The regulations relating to employer sanctions additionally state that in the case of independent contractors, the term employer means the contractor, not the person or entity using the labor. 18 The Department of Labor's proposed regulations implementing the ACWIA also contain a definition of a new term, "employed or employed by the employer" for purposes of the secondary displacement rules. This definition lists a variety of indicia of the employment relationship as that term has evolved under common law and notes that "no shorthand formula or magic phrase can be applied to find the answer. . . ." 19

No single factor is dispositive of the issue. For example, although "authority to pay" is one of the characteristics of an employer enumerated in the H-1B regulations, the source of the alien's salary is not determinative. The Department of Labor has stated that there is "no requirement. . . that the U.S. employer pay the salary" and the alien may remain on a foreign payroll, provided that the U.S. entity "controls" the alien. 20 Further, INS has found salary to be relatively unimportant with respect to other visa categories, and administrative decisions on L-1s have clearly held that "employment" does not depend on compensation, 21 and the source of the salary is not necessarily relevant. 22

Further compounding the difficulties inherent in these determinations is the fact that the INS and the Department of Labor have sometimes offered conflicting advice. For example, with respect to the significance of a new tax identification number, the INS once opined that new I-129 petitions were not required for the employees of five companies consolidated into one corporate structure with a single tax identification number. 23 However, in another case the Department of Labor had advised that a payroll transfer to a successor company with a different tax identification number would invalidate the LCA. 24 The Department of Labor has restated this view, 25 and the INS has confirmed that it is in fact Service policy to require an amended H-1B petition if the Department of Labor requires the petitioner to obtain a new LCA due to a change in the company's tax identification number. 26

The regulations may soon address with greater particularly whether receipt of a new Employer Identification Number (EIN) or certain other employer change triggers the need to file a new LCA (and therefore a new petition with the INS). In its massive Notice of Proposed Rulemaking and Request for Comments 27 implementing the ACWIA, the Department of Labor has taken the opportunity to attempt clarification of a number of existing rules under the H-1B program. One change under consideration is the adoption of a single definition of "employer" for all purposes under the H-1B program "to the extent it may serve to accommodate common business activities and facilitate administration and enforcement of the program." 28

The Department of Labor proposes to tie in to the rules set forth by Congress in the ACWIA which, for purposes of the new "H-1B dependent" provisions, treat any group as a "single employer" if treated as such under the Internal Revenue Code § 414(b), (c), (m) or (o). 29 Thus, in the Notice of Proposed Rulemaking, the Department of Labor states that it is "interested in learning from commenters the consequences of a regulation which would provide that where an 'employer' files an LCA and thereafter undergoes some change of structure (e.g., buy-out by a successor corporation; corporate restructuring of subsidiaries), the 'employer' for LCA purposes would be the entity which satisfies the Internal Revenue Code definition of a single employer." 30 An employer that has changed its corporate structure (the examples noted are by acquisition or spin-off) but which meets the IRS definition would not be required to file a new LCA despite a change in EIN. The change would be documented in its public disclosure file which would include an express acknowledgment of all LCA obligations by the successor entity.

The IRS rules treat certain related entities that report their income on a consolidated return as a single employer, even if they are separately incorporated. For example, IRC § 414(b) treats as a "single employer" two or more corporations that are part of a "controlled group of corporations." 31 This in turn is defined, through the implementing regulation 32 and the statute 33 as a parent-subsidiary, brother-sister, or combined group of companies which are connected through certain specified percentages of stock ownership.

The application of this definition will likely simplify the analysis of certain types of "successor-in-interest" cases. In applicable cases, depending upon the rule's final language, corporate counsel could presumably provide the necessary documentation establishing that the companies are treated as a single employer under IRS rules. This documentation, along with the employer's acknowledgment of LCA obligations, would be made part of the public disclosure file.

Absent final rules that provide a more authoritative source for determining whether the alien has a "new employer," the individual elements (salary, control of the alien's work, etc.) will continue to serve as indicia of an employment relationship when ownership of the petitioning entity has changed. If the new owner remains the alien beneficiary's employer, and has assumed all of the previous owner's duties and liabilities including those of the prior owner relating to the filing of the labor condition application, the new owner should qualify as a "successor-in-interest" – a legal principle recognized by the INS. 34 However, unless the Department of Labor rules change, a successor company meeting all these criteria would still have to file an amended petition if the reorganization has resulted in issuance of a new tax identification number.

Faced with these vague or contradictory interpretations, it has been recommended that wherever possible the entities themselves spell out who will be the alien's employer, addressing such issues as payroll, control of the alien's work and obligations to the employee. 35 Although this may not fully settle the matter, the Service has indicated (in correspondence addressing "employee leasing" issues) that it "is unwilling to designate a particular company as the petitioner. . . as it is not the responsibility for the Service to provide such determinations. The decision as to who the employer is in a given situation is made by the entities involved in the employment agreement." 36

B. Material Changes in Employment

Where there has been a "material" change in employment, the INS regulations provide that an amended petition must be filed. 37 "Minor" changes are generally addressed by apprising the Service of the change if and when the petitioner requests an extension of stay. 38

According to one advisory opinion, a change is "material" if it "directly impacts the alien's continued eligibility for H-1B classification." 39 This should not interpreted to mean that if the alien will qualify for H-1B status based on the new petition, the change is immaterial. For example, a change from one specialty occupation to another requires the filing of a new petition, even though both the old and new positions may qualify the alien for H-1B classification. 40

As the term remains largely undefined by regulation, analysis of the "materiality" of the change can only be made on a case-by-case basis. Indeed, even the regulations proposed by the INS to clarify when an amended petition is required do no more than "codify the longstanding Service policy and practice" set forth in the 1992 Hogan memorandum, and provide three examples of changed circumstances. The regulation then warns that "these examples are not all-inclusive, it is the responsibility of the petitioner to determine whether, in a particular case, there exists a material change in the terms and conditions of the H nonimmigrant alien's employment or training necessitating the filing of an amended petition." 41

Accordingly, the guidelines issued by the Central Office and a number of INS and Department of Labor advisory opinion letters addressing specific changes will be reviewed below.

C. "New" vs. "Amended" Petition

Most INS advisory opinions pertaining to the need to file a "new or amended petition" fail to distinguish between the two. 42 In response to a direct inquiry as to which should be filed, the Central Office has indicated that "a new petition would be required only if it is determined that the alien will be employed by a new employer since I-129 petitions are employer-specific. Amended petitions on the other hand, would be filed to address other material changes which occur in the terms and conditions of the beneficiary's employment, e.g., a change in the beneficiary's job duties." 43 This letter goes on to state that "a petitioner has the option of filing a new petition in lieu of an amended petition."

Whether the petition is "new" or "amended," the petitioner must file Form I-129, but an amended petition does not require the duplication of supporting documentation. 44 For an amended petition, the filing fee (further discussed below) is the "base" petition fee unless the petitioner is also requesting an extension. Both a new petition and an amended petition requesting an extension must include the additional $500 fee imposed by the ACWIA.

Apart from the difference in filing fees, the principal distinction between the two may lie in the timing of the application. It is clear from the regulations that an employee is not authorized to work for the new employer until the new petition is approved. By contrast, in the case of an amended petition, the Service has indicated that a petitioner would not be penalized for filing an amended petition after the occurrence of a material change, since nothing in the current regulations specifies when an amended petition should be filed. 45 In addressing the specific question of a change in geographic location, the Service has allowed that "the alien may transfer to the new location prior to the approval of the amended petition." 46 Note, however, that as with other issues arising under changed circumstances, conflicting opinions have been offered with respect to timing. An earlier INS pronouncement indicated that "if an amended petition is required, it must be adjudicated prior to the alien commencing employment under the terms of the amended petition." 47

D. Filing Fees

The ACWIA imposes a $500 filing fee, over and above the "base" petition fee, on all H-1B petitions filed between December 1, 1998 and October 1, 2001. The fee applies to all petitions for new employment (whether initial, concurrent or sequential) and to the first extension of stay filed by an employer. Certain institutions of higher education and nonprofit or governmental research organizations are exempt from the fee.

The INS has experienced some initial problems implementing the new fee. For example, interim regulations note that the additional fee is not required of an employer filing an amended petition under 8 CFR § 214.2(h)(2)(i)(E) unless a petition has the effect of extending the alien's status and is the first petition that the employer has filed to extend the alien's status. 48 However, the regulation improperly transposes the terms "change in employer" and "change in employment." Furthermore, the rule's commentary provides that the $500 fee is required for a "change in employment (e.g., a change from one specialty occupation to another specialty occupation.)" This is clearly inconsistent with the provision that amended petitions do not require the $500 fee, since a change in job duties, even from one specialty occupation to another, is properly addressed by the filing of an amended, not a new petition. (Indeed, it is even cited as a specific example of a change requiring an amendment in INS' proposed regulations. 49) Accordingly, such a change should not be subject to the $500 fee unless the petition is also seeking extension.

Anecdotal evidence suggests that contractor personnel responsible for receipt of I-129s at Service Centers do not always recognize the distinction between new and amended petitions and have improperly required the additional fee on amended petitions. It has therefore been recommended that amended petitions be submitted with the fee waiver form, Form I-129W, (although it is not intended for such purpose), and that both the I-129 and I-129W be clearly marked "AMENDED PETITION – NOT SUBJECT TO THE $500 TRAINING FEE." 50

IV. Specific Changes

A. Corporate Changes

1. Mergers & Consolidations

A new legal entity created as the result of a merger or consolidation is clearly a "new employer," and a new petition, supported by a new LCA, must be filed. 51 By contrast, when existing business entities are simply restructured or consolidated, there may be no new entity created as a result of the change. In the latter case, the surviving company may assume all rights, duties and obligations of the H-1B sponsor which it has absorbed, yet the name, payroll or other aspect of the employing entity may change.

Mergers and consolidations that do not result in creation of a new legal entity must be analyzed on a case-by-case basis, to determine whether "the petitioning entity continues to remain the alien beneficiary's employer." 52 Where the surviving entity assumes all rights, obligations and duties of the original petitioner (presuming that no other material change exists in the terms or working conditions), the principle of "successor-in-interest," which the Service has acknowledged it accepts, 53 presumably controls. This is especially true in light of the fact that most mergers and consolidations are creatures of statutory law, under which the surviving or consolidated corporation is required to assume all liabilities, obligations and penalties of each of the constituent corporations. 54 Accordingly, statutory mergers of this nature would appear to comport even with the narrow view of "successor-in- interest" recognized by the Service. 55

However, as previously noted, the Department of Labor's definition of "employer" has brought about some anomalous results. It applies a three-pronged test, the third prong of which is that the employer "has an Internal Revenue Service tax identification number." 56 Therefore, the issuance of a new EIN is deemed to be "material," invalidating the LCA. If the LCA is invalidated, a new or amended petition must be filed. 57

The Department of Labor proposals discussed above would address these true successor-in-interest cases in which only the EIN has changed, obviating the need to obtain a new LCA, and permitting the employer to merely document the change in its public disclosure file. 58

2. Acquisitions

A new or amended petition is generally not required when the petitioner's stock has been acquired, presuming that (1) it is only ownership of the petitioning entity which has changed, (2) the petitioning entity continues to be the alien's employer, and (3) the owner(s) assume all of the previous owner's duties and liabilities, including those of the prior owner relating to the filing of the labor condition application. 59

Where the petitioning company's ownership does not change but its assets have been acquired, the Service will also recognize the concept of "successor-in- interest," presuming that the purchaser has assumed both the assets and liabilities of the portion of the company that employs the H-1B have been assumed. 60 This rule may have very limited application, however, as asset acquisitions are often pursued in lieu of other arrangements precisely because the acquiring company is not willing to assume the liabilities of the company purchased.

As with other changes, situations involving acquisitions must be assessed on a case-by-case basis. Where no new or amended petition is required, the purchasing company should notify the Service of the purchase of the H-1B sponsor if it petitions for extension of stay for affected employees.

3. Transfer from One Branch or Firm to Another within the Same Organization

Mere transfer from one branch of a firm to another branch of the same firm does not require the filing of a new or amended petition, "since a branch of a firm is not considered to be a separate entity from its parent company." 61 However, according to the Aleinikoff memo, when the beneficiary is transferred from one entity to another entity within the same organization, a new or amended petition should be filed if the new entity becomes the beneficiary's U.S. employer. 62 This is one of the changes that would likely be affected by a revision in the Department of Labor rules. If the past and proposed employing entities are treated as a "single employer" under IRC § 414(c), (c), (m) or (o), no new LCA would be required. 63

In either case, a transfer also involving a change in the job site could invalidate the underlying LCA. If it has, an amended petition must be filed. 64

4. Name Change

When only the name of the company changes, no new or amended petition need be filed. 65 The regulations proposed by the INS 66 specifically state that a change in name of the petitioning entity, standing alone, is not a material change. Note, however, that amending the I-129 even though it is not required may prevent the beneficiary from experiencing undue difficulty on future entries into the United States.

5. Business Dissolutions

If the petitioner goes out of business, the approval of the petition is automatically revoked. 67

B. Geographic Changes

1. Change of Location

a. INS Rule

Both the INS Operations Instructions and the Central Office memoranda have stated that the mere transfer of the beneficiary to another work site while performing the same duties with the same employer does not necessitate the filing of an amended petition. This rule is severely limited, however, by the fact that an amended petition is required if the petitioner is required to obtain a new LCA from the Department of Labor. 68 Moreover, the Department of Labor has previously stated that employment of an H-1B worker in an area not reflected on a currently valid LCA may be both a misrepresentation of a material fact on the LCA and a violation of the H-1B beneficiary's lawful status. 69

b. Department of Labor Rule

The general rule is that a new LCA is required before an employer places an H-1B employee at a worksite outside the area(s) of intended employment identified on the employer's original LCA. 70 "Area of intended employment" is defined as the area within normal commuting distance of the H-1B worker's place of employment. Any place within the same Metropolitan Statistical Area (MSA) will be deemed to be within normal commuting distance of the place of employment. 71

In its proposed regulations, the Department of Labor has stated unequivocally that under the H-1B program, every worker is protected by an LCA and no H-1B worker is legally permitted to "rove" or "float" without an applicable LCA that prescribes the employer's obligations as to notice, wages, and all other program requirements for that worker. 72

Accordingly, the Department of Labor states that an employee is permitted to "rove" only in the following three circumstances:

· Where the worker is dispatched to "non-worksite" location(s),
· Where the worker is dispatched to worksite(s) within area(s) of employment covered by LCA(s), or
· Where the worker is dispatched to worksite(s) not covered by any LCA, pursuant to the "short term" placement option.

c. Transfer to a "Non-Worksite"

Under both current and proposed regulations, the threshold determination should be whether the worker is being placed at a new "worksite," since temporary placement at a "non-worksite" requires no employer action. A "worksite" is the "physical location where the work is actually performed." 73 The interpretation of the term has been a source of contention, with the Department of Labor having previously taken the extreme position that brief attendance at a business meeting or outside consultation with clients could constitute performance of services at a "worksite." This led to potentially absurd results, since under the posting rules that were then in effect, even an extended business lunch or an appearance in court could have prompted the need to post notice at the "worksite."

The proposed regulations take a more common-sense view of what "worksite" means, interpreting "worksite" as not including any location where

· Employee developmental activity is performed (i.e., management conference, staff seminar, business meeting or formal course – but not "on-the-job training") or
· The employee's job functions require short-term presence at the location, provided that (1) the nature of the worker's occupation or duties mandates his/her short term presence at the location, (2) such presence is casual and short-term (i.e., no more than five consecutive work days) and (3) the H-1B is not there as a "strike breaker."

Noting that this interpretation will not result in "absurd or unduly burdensome situations," the Department of Labor cautions that it will "look carefully at situations which appear to be contrived or abusive." 74 Examples of "non-worksite" situations may include a computer engineer who troubleshoots at a client's location, a sales representative making a customer call, a manager monitoring performance of out-stationed employees, an auditor conducting a review, a physical therapist making a home visit, or persons making court appearances, having business lunches or conducting library research. 75

If a location is a non-worksite, the employer need not file a new LCA or post notice. The employer's obligations as to that H-1B worker are governed by the LCA for the worker's home station area of employment, even if the non-worksite location is within an area of employment covered by a different LCA. 76

d. Transfer to a New Worksite

If an employer is placing an H-1B worker at a new worksite, the next issue is whether the worksite is within an area of intended employment already covered by an LCA. Under the Department of Labor rules, an H-1B worker may leave his or her home station worksite to perform job functions at (1) worksite(s) within the same area of employment and thus covered by the same LCA already applicable for that employee, or (2) at worksites in some other area of employment covered by a different LCA. The employer's obligations (e.g., wages, travel expenses) as to that H-1B worker for that worksite are prescribed by the home station LCA, unless the worker is permanently reassigned to the new area or is dispatched to that new area for an extended period of time, to be determined on a case-by-case basis. 77

With respect to a worker being placed at a new worksite, the regulations promulgated by the Department of Labor in 1994 provided that the employer was required to post notice at the worksite prior to or at the time of the H-1B worker's placement. 78 This was one of the provisions the Department of Labor was specifically enjoined from enforcing in the NAM suit, 79 as having been promulgated in violation of the APA without proper notice and opportunity to comment. The proposed regulations reinstate the posting requirement and allow such posting to be accomplished by electronic means through e-mail or the employer's intranet, 80 as an alternative to posting "hard copy."

With respect to transfers to new worksites outside the area of intended employment, the INS has confirmed that, so long as the employer had approved LCAs for both locations, no amended petition need be filed. 81 The approved LCA for the new location need not have been submitted in support of the original I-129 petition, as long as the petitioner had valid LCAs "in place" for both locations when the petition was first filed with the Immigration Service.

The INS has taken the position, however, that if the employee never worked at the location shown on the I-129 but went directly to the "new" location upon entering the United States, "the employer must file a new petition with the INS." 82 Further, the proposed Department of Labor regulations indicate that the "short term placement" option, discussed below, would not be available in such circumstances, since a worker initially coming to the United States from outside the country "must be placed at a location covered by the LCA on which the H-1B petition is based." 83

e. Short-Term Placement Option (90-Day Rule)

The most significant regulatory provision struck down by the NAM suit 84 was the short-term placement rule, under which employers were allowed to place H-1B workers at worksites in areas of employment not listed on previously filed LCA(s) for a period of 90 days within a three-year period, without filing a new LCA. The provision has been reintroduced by the proposed regulations, with a slightly modified version of the manner in which the 90-day limit is tabulated.

The proposed regulation counts workdays on a per-worker basis, so that the cumulative period of 90 days will have been reached when any H-1B worker works for 90 days at any worksite or combination of worksites in the new area of employment. The regulations caution that the employer may not "continuously rotate H-1B nonimmigrants to an area of employment in a manner that would defeat the purpose of the short-term placement option." 85

Under the proposed rule, as an alternative to filing an LCA for a new area of employment, the employer could place the worker at the new worksite without filing a new LCA for the new area so long as:

· The 90 day cumulative period, tabulated in accordance with the above rule, is not exceeded

· The H-1B worker receives the applicable wage rate (the higher of the prevailing or actual wage) under the LCA certified for the worker's permanent worksite

· The employer compensates the worker for all travel expenses, with the Federal government per diem 86 serving as the minimum for reimbursement, and

· No H-1B worker is placed at a location where there is a strike or lockout for the same occupation. 87

Note that the short-term placement option is not available to relocate a worker to an area for which the employer already has a valid LCA. It may not, therefore, be invoked by an employer to "overcrowd" an area of employment – i.e,. where there is an approved LCA for ten slots and the employer now seeks to temporarily place an eleventh H-1B worker. However, as a matter of enforcement discretion, the Department of Labor has stated it would not cite a violation in this case so long as (1) the number did not significantly exceed the number shown on the LCA, (2) there were no other violations, and (3) the employer was making a good faith effort to comply, such as taking timely steps to file an additional LCA and revised petition. 88

2. Multiple Locations

The regulations provide that if the alien will be rendering services in more than one location, an itinerary with the dates and locations of the services must accompany the petition. The petition is filed with the Service office having jurisdiction over H-1B petitions in the area in which the petitioner is located, which for this purpose is the address the petitioner specifies as its location on the I-129 petition. 89

In practice, INS has allowed the itinerary requirement to be met in any number of ways. For example, the listing of locations on the LCA may in some cases suffice as an itinerary, or the general statement of the alien's proposed or possible employment by an employment contractor may be acceptable. The itinerary need not list each and every day of the alien's employment in the United States. 90

The proposed regulations reflect a liberal interpretation of the itinerary requirement, adding language which permits a petitioner who has not yet determined all employment locations to provide, in addition to the itinerary of known employment, a description of proposed or possible employment for the period covered by the petition. Note, however, that agents (other than agents who are functioning as employers) will still be required to furnish a complete itinerary and may be required to back it up by providing copies of contracts. 91

Where the itinerary changes "before the petition is adjudicated by the Service" the petitioner need not file a new H-1B petition. However, the petitioner must submit a new LCA reflecting the work sites and notify the Service of the change. 92

The Department of Labor regulations permit the employer to list multiple places of employment on the LCA. The proposed draft of the new ETA-9035 (which can be electronically scanned) would list an initial work location and space to enter four "additional or subsequent" work locations. All places of employment covered by the application must be located within the jurisdiction of a single regional Employment and Training Administration (ETA) office, or, if the nonimmigrant(s) is (are) to be employed sequentially in various places of employment, the application is to be submitted to the regional office having jurisdiction over the initial place of employment. 93 The petitioner must furnish notice of filing the LCA to the collective bargaining representative in the area of intended employment. If there is no such bargaining representative, the petition must post the notice at a conspicuous location (or, under the proposed regulations, by electronic means) 94 at each place of employment where an H-1B worker will be employed in the area of intended employment. 95

C. Multiple Employers

According to the regulations, if the alien will perform services for more than one employer, each must file a separate petition with the Service Center having jurisdiction over the area where the alien will perform services or receiving training, unless an established agent files the petition. 96 In spite of the Department of Labor's earlier pronouncement that different employing entities could be treated as joint employers, 97 the INS has stated that it does not recognize the concept of "co-employers" in employee leasing agreements. When employers share responsibilities for the employee, one of the firms must designate itself as the employer, or, if the alien has two employers, each must file a petition. 98 (If there are also multiple locations, see the preceding discussion respecting the need to file an itinerary, and the Department of Labor requirements.)

The INS has consistently stated that neither the new employer nor the beneficiary need take action with the INS if the beneficiary switches employers, as long as multiple petitions were approved and the petition for the current employer remains valid. For example, where an alien had two petitions approved on her behalf, elected to take up employment with Employer A, but later became dissatisfied and switched to Employer B, no new or amended petition was required. 99 Similarly, the Service has advised that, presuming both employers have petitions approved, an alien could take a 6-8 month leave of absence from Employer A to work for Employer B, and then resume working for Employer A without filing a new H-1B petition. 100

Nor was a new petition required when the beneficiary had switched back and forth between a parent company and its subsidiary, where both had approved H-1B petitions. 101 In another case, the fact that the beneficiary was outside of the United States when the petition for Employer B was approved but was readmitted on the visa issued for Employer A (by whom the alien was at that time still employed), was not deemed a relevant factor. 102

It is important to note that in each of the above cases, the original H-1B petition had not been revoked. Under the regulations, however, a petitioner is supposed to promptly notify INS when the beneficiary is no longer employed by the petitioner, at which time INS may then revoke the petition. 103 While the present rule provides for revocation on notice under these circumstances, the proposed rule would make revocation automatic when the INS is notified that the beneficiary is no longer employed by the petitioner. 104

Further note that although the INS allows for multiple employers, the Foreign Affairs Manual (FAM) provides than an alien may not hold more than one valid visa in the same classification at the same time. 105

D. Strikes and Lockouts

As part of the LCA, the employer is required to state that there is no strike, lockout or work stoppage 106 in the occupational classification in the area of intended employment as of the date of filing. If such labor dispute occurs during the validity period of the LCA, the employer must notify the ETA within three days, and may not place, assign, lease or otherwise contract out an H-1B nonimmigrant to any place of employment where there is a strike or lockout in the same occupational classification as the H-1B. 107

The penalties for violations of this provision can be harsh. An employer who files an LCA during a strike or lockout may be subject to sanctions under INA § 212(n)(2)(C), which provides for fines and possible debarment from filing of employment-based petitions for at least one year. 108 While the employer is not required to maintain documentation to substantiate the "no strike or lockout" statement, in the event of an investigation the employer bears the burden of proving that there was no strike or lockout at the time of filing and during the validity of the LCA. 109

The existence of a labor dispute can also affect an H-1B worker's status. If the Secretary of Labor certifies that a strike or other labor dispute is in progress in the occupation at the place where the beneficiary is to be employed, and that such employment would adversely affect the wages and working conditions of U.S. citizen or lawful permanent resident workers, then: (1) a petition for H-1B status is to be denied; (2) if already approved, but the alien has not yet entered the United States or has entered the United States but has not commenced the employment, approval of the petition is suspended and the alien shall be denied admission. An alien who participates in a strike or labor dispute is not deemed to be in violation of status solely by virtue of such participation but is still subject to all other terms and conditions of such status and duration of authorized stay. 110

E. Job Changes

Routine promotions are generally not deemed "material," as they do not directly impact the alien's continued eligibility for H-1B classification. 111 Accordingly, the Service has held that "a promotion to a higher position within the same occupation would not normally require the filing of an amended petition, provided that the alien is required to utilize the same academic training as was required in the former petition." 112 However, the INS has also stated that "[i]f the alien's job duties change to the extent that the duties are no longer those of the position identified on the original petition and the supporting LCA, a new or amended petition must be filed. 113

Similarly, a salary increase which is commensurate with a promotion within the same occupation would not generally be a material change and thus would not require a new petition or a new LCA. (In the Service correspondence discussing the promotion issue noted above, the attorney's inquiry indicated an increase in pay from $27,000 to $35,000. 114) However, the employer would have to develop and maintain documentation explaining the changes to show that, after such salary adjustment, the wages paid to the H-1B nonimmigrant are at least the greater of the adjusted actual wage or the prevailing wage for the occupation in the area of intended employment. 115 Furthermore, if in determining the "prevailing wage" the employer relied on a published survey or other source data that provided various levels of wage based on the level of skill, the employer must adjust the rate of pay in accordance with the appropriate level for the new petition. 116

A change to an occupation not listed on the LCA invalidates the LCA. 117 In this regard, a promotion that results in the application of a new Occupational Code (such as a move from professional employment to a management level position) may constitute a change in occupation. When the new job is in a different specialty occupation, INS will deem this to be a material change. The INS Central Office memoranda and the proposed regulations make it clear that a change in duties from one specialty occupation to another necessitates the filing of an amended petition.

Whether a change in duties rises to the level of a change in specialty occupation depends on the specific circumstances of each case. In the example provided in the Aleinikoff memorandum, if an alien physician is admitted to the United States to teach or conduct medical research and then seeks to provide clinical care, an amended petition must be filed. 118

F. Hours

Employers should also consider whether the filing of an amended petition is required, or is advisable, when there has been a significant change in hours. Under the ACWIA, Congress has now reinstated the Department of Labor's "no benching" rules, which were struck down in the NAM decision. These rules impose an affirmative duty upon an employer to pay wages to an H-1B who is in "nonproductive status," unless such nonproductive status is due to either the worker's own initiative or certain circumstances which render the worker unable to work.

When an employer does not have sufficient work for the H-1B worker to make payment of his/her required wages feasible or advantageous to the employer, the employer may terminate the H-1B's employment, notify the INS and pay for the alien's return transportation. 119 If the employer continues to employ the worker, but his or her hours have changed significantly, the employer may wish to file an amended petition to reduce the worker's hours in order to avoid remaining liable under the no benching rules for the number of hours listed on the previous petition. 120

V. Procedural Considerations

A. Dependents

An H-4 visa is not employer-specific. 121 Accordingly, when the H-1B visa holder changes employers, no action is required to amend the status of his or her H-4 dependents, so long as the principal alien remains in valid H-1B status. However, the I-94s of dependents should be extended at the same time any extension is sought for the principal alien as the result of a new or amended petition being filed.

B. Visas

An H-1B visa remains valid up until the date of its expiration unless it is canceled or the underlying petition is revoked. This is true even if the visa holder has changed H-1B employers since the visa was first issued 122 or had an intervening change of status to H-4. 123 The procedure for entry is for the alien to present the new H-1B approval notice along with the old visa was applying for admission. 124

As a practical matter, it may not be prudent to rely on the validity of the existing visa when the alien travels; the alien will not always know whether the original visa petition had been revoked, rendering the visa void. As previously noted, an employer is obligated under the regulations to notify INS if the alien leaves its employ, at which time INS may revoke the petition. Under the proposed regulations, such revocation would be automatic. 125

Furthermore, until the visa is near its expiration date the situation cannot be remedied by "amending" the visa in the United States. The Department of State will not revalidate the old visa (reflecting the new employer) until the visa is within 60 days of expiration. Furnishing evidence to the DOS that the prior petition was revoked would not persuade the Department of State to revalidate the visa, since the original visa would thereby be rendered void and could not be revalidated. 126

C. Obligations

Depending upon the particular changed circumstances, the regulations impose a broad array of requirements upon employers. These include filing of new or amended petitions or LCAs, providing notice to the INS, the Department of Labor or the employer's own workforce, and maintaining documentation respecting certain changes. In addition, the employer must be alert to responsibilities arising under the Immigration Reform and Control Act of 1986 (IRCA). Under IRCA's employer sanctions provisions, it is illegal for an employer to hire, recruit or refer for a fee an alien who is not authorized to work. 127 The statute and regulations also impose a variety of paperwork requirements on employers to insure that workers have presented proper documentation to establish their authorization to work. Violations of these paperwork requirements, even technical ones, can result in the imposition of substantial fines. 128

When prior staff is retained by a related, merged, successor or reorganized employer, the "successor" company 129 may be relieved of certain paperwork requirements. A successor company may also be held liable for its predecessor's paperwork violations. 130 In view of the potential for liability, an in-house audit of I-9s should be conducted when the acquiring company in a stock or asset acquisition conducts its "due diligence" of the target company to assess the extent of possible penalties, and to attempt to cure deficiencies.

VI. Checklist

A. Preventative Measures

1. Advise employers to keep you informed of any changes in the terms and conditions of the H-1B's employment and of changes in the employer's organization.
2. Before filing an LCA, discuss with the employer the possibility of additional locations to which an employee may be assigned.
3. Encourage parties to a merger/acquisition to determine which entity will be the "employer" and to commit issues of control of the employees, payroll and other relevant items to a written agreement.
4. If you represent an acquiring company in a stock or asset merger or acquisition, recommend a complete in-house I-9 audit to evaluate the target company's compliance with employer sanctions law. Given the potential for liability, this should become a routine part of pre-transaction "due diligence."

B. When "Changed Circumstances" Have Already Occurred

1. First assess whether or not there is a "new" employer. If yes:

· File a new I-129
· With fee (both petition fee and $500 training fee)
· Supported by a new LCA

· And all supporting documents
N. B. The petition must be approved before the alien commences the new employment.
2. If there is no "new" employer, but a material change has occurred:
· File an amended I-129
· With fee (but not the $500 fee unless an extension is also being requested). Noticeably mark the face of the petition to reflect that it is an amended petition for which the $500 training fee is not required and consider attaching Form I-129W.
· Duplication of the supporting documentation is not required.
· A material change generally requires the filing of a new LCA, unless the change relates to a move to a place of employment for which there is an approved LCA.
N. B. Conflicting advice has been given regarding whether the amended petition must be approved in advance of the change, but the regulations do not affirmatively require the alien to await approval as they do with respect to "new" employment.
3. If the employee has left employment, the employer is required to notify the Service.
4. In the event of a strike or lockout, the Department of Labor must be notified within three days.
5. If a minor change has occurred, the employer may generally apprise the Service at the time of requesting an extension of stay.