Consultant Travel/Travel Time and the Typical Four (4) Day Away-Work Model: LCA and H-1 Guidance

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The professional consultant services industry requires travel, and typically, such travel is four days a week. Travel is required for professional consultant work. In addition, throughout the professional consultant services industry, the professional consultant needs to travels away from their official duty station. Accordingly, in light of such, but to enhance work-life-balance, as able, the professional consulting industry typically uses the four (4)-day-away model. (Examples: Deloitte, McKinsey, Accenture). The professional consultant services industry lifestyle therefore includes travel four days a week. [1]

Akin with industry standards, Consultant positions, in most all circumstances, require both travel time and travel time away from the employee's official duty station. In addition, Consultant positions follow the four (4)-day-away industry model. Naturally, this travel must be for work purposes and must be either approved or otherwise authorized under established policies.

Consultants who are on H-1Bs, due to the "peripatetic" nature of the employee's job duties, with frequent travel/visits to client sites that last no more than four consecutive business days per trip, these trips are not "non-worksites" per 20 C.F.R. § 655.715.[2] This "non-worksite" classification only applies when the role is peripatetic/frequent constant travel such travel is no more than five consecutive business days in any one location. Any travel which does not qualify will require an approved LCA (and associated H-1B filing) for that location prior to such travel. The Consultant spends no more than four consecutive business days at any one location.

This practice is supported by the applicable DOL regulations, namely 20 C.F.R. § 655.715. Under the regulations, the "place of employment" is defined as "the worksite or physical location where the work actually is performed by the H-1B . . . nonimmigrant." *See* 20 C.F.R. § 655.715. Certain locations, however, are exempt from this definition and are therefore not considered to be the H-1B employee's "worksite" – in fact, certain places are defined as "non-worksites," as explained in more detail below.

Where, as here, the nature and duration of the position requires frequent changes of location with little time spent at any one location, then such locations are considered "non-worksite" locations, pursuant to 20 C.F.R. § 655.715. As a result, such non-worksites do not need to be

[1] Even the federal governmental acknowledges that amendment may occur for an employee's time spent in a travel status, away from the employee's official duty station, (i.e. compensatory time off). In the private professional consultant industry, amendment is typically the four (4) day work away model.

[2] The nature of the peripatetic work/ travel is for all company consultants, not just H1B employees, and is equally reflected in the company policy/ treatment of state unemployment payments, state tax filings, etc.

included on the LCA or H-1B under the law. For the "non-worksite" definition to apply, the following must be true:

- The nature and duration of the H-1B worker's job functions mandates his/her short-time presence at the location. For this purpose, either of the following must be true:
    - (1) The H-1B nonimmigrant's job must be peripatetic in nature, in that the normal duties of the worker's occupation (rather than the nature of the employer's business) requires frequent travel (local or non-local) from location to location; -- or –
    - (2) The H-1B worker's duties must require that he/she spend most work time at one location but occasionally travel for short periods to work at other locations; and
- The H-1B worker's presence at the locations to which he/she travels from the "home" worksite is on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding five consecutive workdays for any one visit by a peripatetic worker, or 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations); and
- The H-1B nonimmigrant is not at the location as a "strikebreaker" (i.e., the H-1B nonimmigrant is not performing work in an occupation in which workers are on strike or lockout).

Where the above criteria is satisfied, the additional location(s) outside of the home worksite do not need to be listed on the LCA or H-1B filing. Application of the non-worksite rules should not be used to circumvent LCA or related H-1B obligations.

Understanding though, and to the extent that circumstances may change in the future whereby a non-worksite would or could become a worksite under the definitions, the company may at any time file an amended LCA and H-1B, even out of an abundance of caution, to ensure the H-1B employee would be covered in the future should the facts/circumstances indeed change. By doing so, the company does not alter the current 20 C.F.R. § 655.715 LCA guidance that the current location is a non-worksite, but, by doing so, the company is undertaking a precautionary measure in order to have LCA authorization in place should the position/role/ travel/terms change. To do so enables as well flexibility should the company client's needs require such.

In light of this policy, as a practical matter, for temporary non-work projects, the company may select a increment of time to assess the likelihood of the facts changing and/or the possible loss of the peripatetic nature and/or any un knows, and assess if even for a precautionary LCA and amended H1B be initiated.

Company policy should always be to ensure that any H-1B employee has the appropriate LCA(s) and H-1B filing(s) in place before the employee begins working at a "worksite" as defined by 20 C.F.R. § 655.715.