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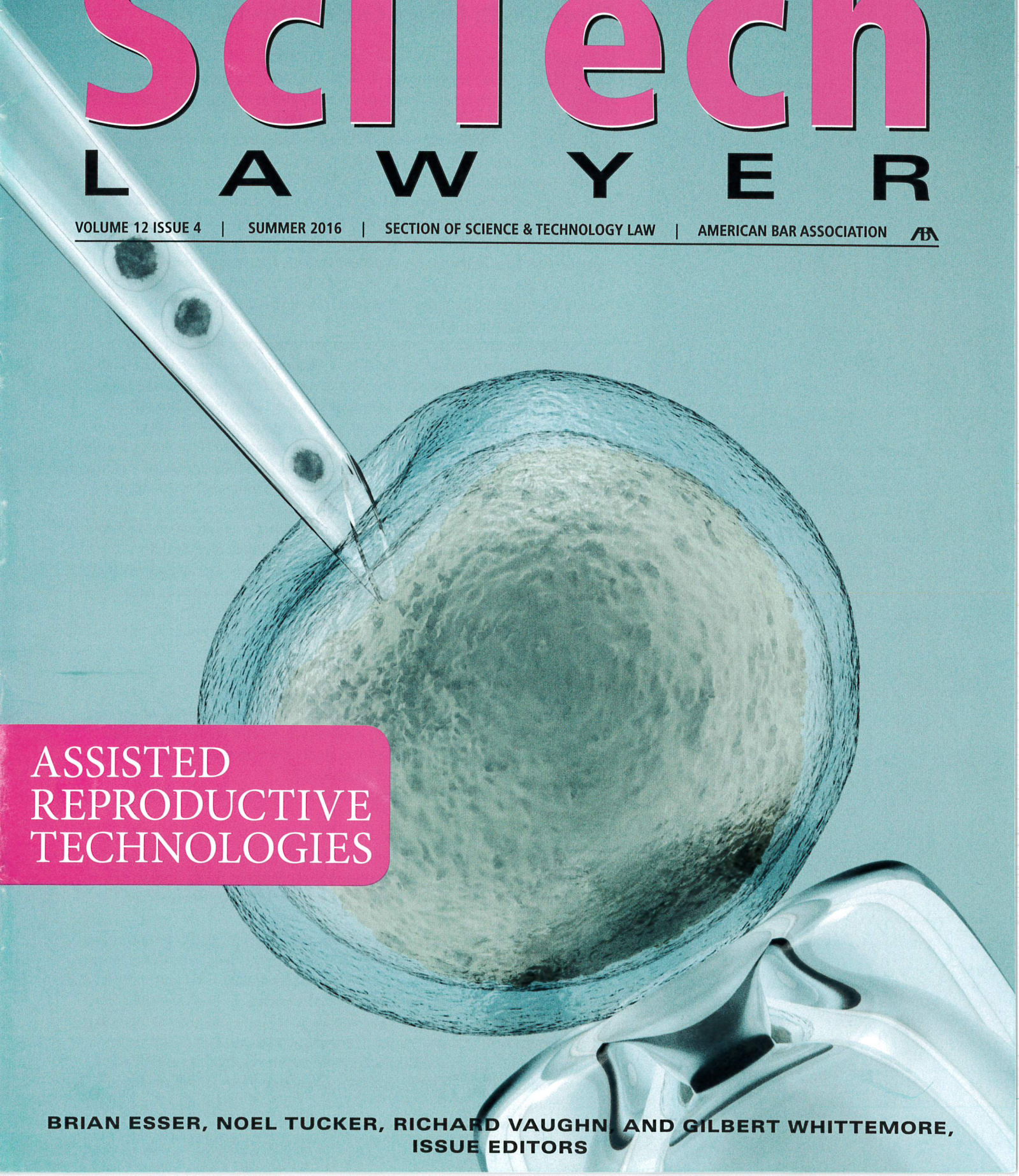
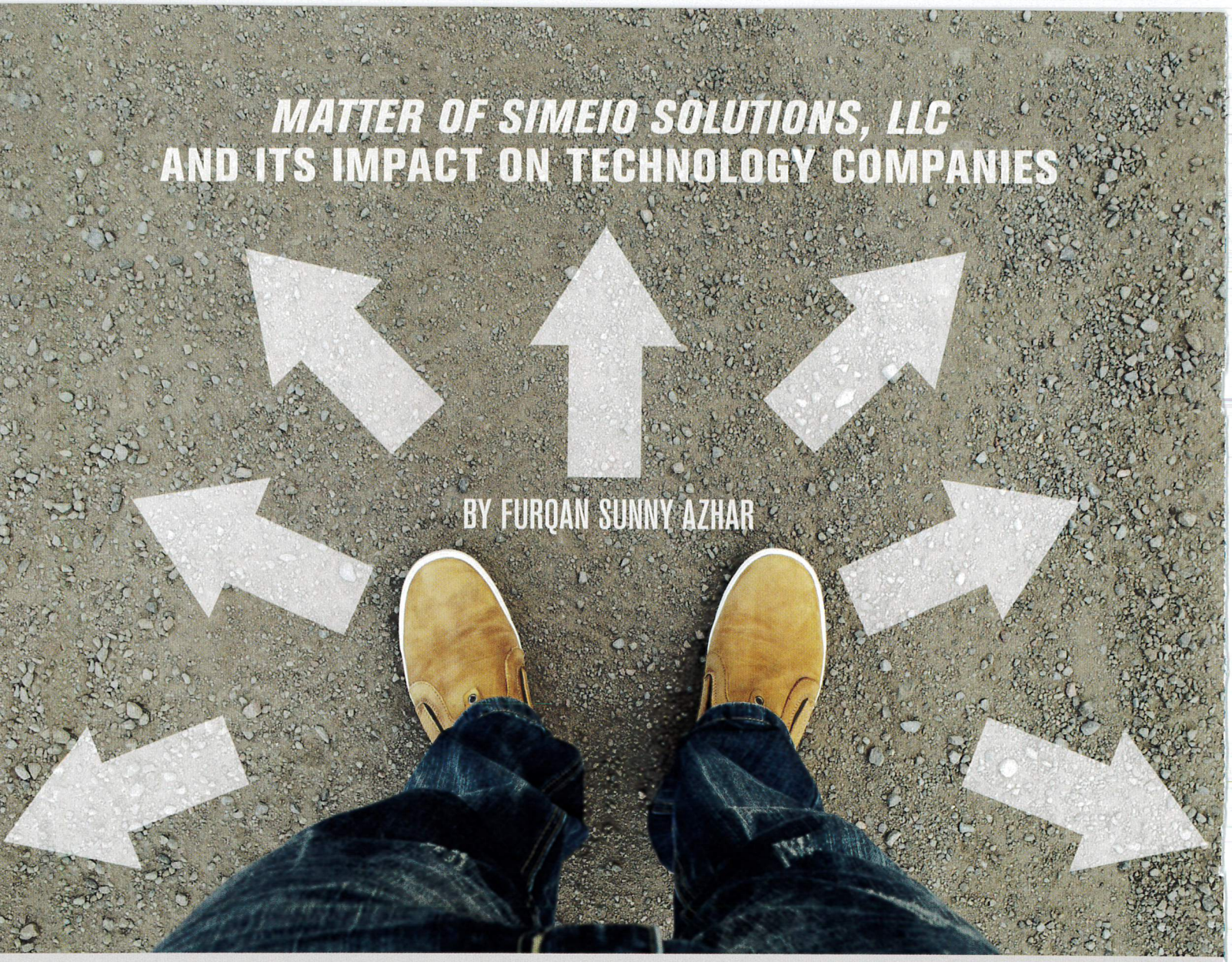


ASSISTED REPRODUCTIVE TECHNOLOGIES

BRIAN ESSER, NOEL TUCKER, RICHARD VAUGHN, AND GILBERT WHITTEMORE, ISSUE EDITORS

MATTER OF SIMEIO SOLUTIONS, LLC AND ITS IMPACT ON TECHNOLOGY COMPANIES



BY FURQAN SUNNY AZHAR

Though the information technology (IT) sector is recovering from the economic downturn of 2008, it continues to face obstacles in the form of U.S. immigration laws. One of the newest obstacles faced by the IT sector is a recent precedent-setting decision handed down by the Administrative Appeals Office (AAO), which affirmed that a change in an H-1B employee's worksite location is considered a "material change," thereby necessitating the filing of an H-1B amendment petition.

Background

IT consulting companies are unique in that when they assign their employees to a project, the "end client" that they are serving will often limit the project to a term of six to 12 months, with an option to renew. When a project is either completed or forced to stop due to funding issues (which is far more common than one might expect), the company is faced with the task of immediately marketing their employees and assigning them to another project as quickly as possible to avoid unpaid "bench time," which is considered a violation of U.S. immigration laws.[1]

The United States Citizenship and Immigration Services (USCIS) has not been clear when issuing either formal or informal guidelines as to whether an H-1B amendment petition is required when an H-1B employee is placed at a new worksite location. Practitioners are aware that, at a minimum, a new labor condition application (LCA) is required when the worksite location changes. However, until now, whether an H-1B amendment petition was also required depended in large part on whether the H-1B employee's place of employment fell under the jurisdiction of the USCIS California Service Center (CSC) or the USCIS Vermont Service Center (VSC); their separate approaches led to differing results. For example, the CSC took a more hardline approach and found any change in worksite location to be a "material change"[2] requiring not only a new LCA, but also an H-1B amendment petition. In contrast, the VSC only required that a new LCA be filed when a worksite location changed.

The Decision

On April 9, 2015, the AAO resolved the split between the CSC and the VSC by issuing a precedential decision in *Matter of Simeio Solutions, LLC*.[3] This case originated from the CSC, and involved an approved H-1B petition issued to a technology company in which the CSC, true to form, required the employer to file an amended LCA and an amended

H-1B petition, due to a change in the H-1B employee's worksite location.

The AAO affirmed the CSC's decision and reasoned as follows:

> Having materially changed the beneficiary's authorized place of employment to geographical areas not covered by the original LCA, the petitioner was required to immediately notify USCIS and file an amended or new H-1B petition, along with a corresponding LCA certified by DOL [Department of Labor], with both documents indicating the relevant change. 8 C.F.R. § 214.2(h)(2)(i)(E), (h)(11)(i)(A). By failing to file an amended petition with a new LCA, or by attempting to submit a preexisting LCA that has never been certified to USCIS with respect to a specific worker, a petitioner may impede efforts to verify wages and working conditions. Full compliance with the LCA and H-1B petition process, including adhering to the proper sequence of submissions to DOL and USCIS, is critical to the United States worker protection scheme established in the Act and necessary for H-1B visa petition approval.[4]

What the Decision Means

To conform to *Matter of Simeio Solutions, LLC*, technology companies should review their current policies to determine when an amended LCA and an H-1B amendment petition is required.[5] In addition, technology companies should review their budgets, because an H-1B amendment petition must also include USCIS filing fees, which are typically in excess of $1,000 per case.

The decision is especially troubling when considering that USCIS is expected to increase the number of site visits. Site visits can take place at the employer's place of business, or at the end client's place of business, and they are often random and unannounced. The purpose of the site visit is for the USCIS site inspector to determine if the H-1B employee is complying with the terms of his or her H-1B status, which may include a review of the employee's worksite location, hours, salary, and duties. Willful violators can be fined and prevented from filing future H-1B petitions.

Note that there are situations in which an IT consulting company is not required to file an amended H-1B petition, despite the change in worksite location. For example, if the H-1B employee is moving to a new job location within the same metropolitan statistical area (MSA), a new LCA is not required. However, the IT consulting company would still need to post the previously approved LCA in a conspicuous area at the new worksite location.[6]

Other exceptions to the H-1B amendment rule include situations in which the H-1B employee is required to work at a new worksite location for less than 30 days. For example, if the H-1B employee is placed at a nonworksite location, or when the work is "peripatetic in nature," such as situations in which the primary job is at one location but the H-1B employee occasionally travels for short periods to other locations "on a casual, short-term basis, which can be recurring but not excessive,"[7] then an H-1B amendment petition does not need to be filed.

Conclusion

Matter of Simeio Solutions, LLC creates a major headache for technology companies that use H-1B employees to staff short-term projects, while at the same time conforming to the current H-1B regulations and overcoming the limitations of the annual H-1B cap.

What is particularly troubling about the decision, and the impediments it creates for technology companies, is that it flies in the face of the conventional wisdom among U.S. immigration practitioners and experts alike, which is that there is a direct positive correlation between the number of H-1B nonimmigrants and employment gains in the United States. In fact, the reform advocacy group Partnership for a New American Economy (PNAE) conducted research that analyzed various economic and statistical factors regarding high-skilled workers and concluded:

> [T]he 178,000 visas for computer workers that were randomly denied to U.S. employers in the country's 236 metropolitan areas due to the 2007 and 2008 visa lotteries came at a huge cost to our economy. If those visas had been successful, U.S. cities would have boasted as many as 231,000 additional jobs for U.S.-born computer workers by 2009–2010, including as many as 188,000 jobs for less-skilled Americans—a group that was particularly impacted by the recent recession. This report demonstrates why the country—and the tech sector in particular—is urgently in need of immigration reform. The hundreds of thousands of jobs—and millions more in wages—that could have been created for U.S.-born workers in the absence of the H-1B visa lotteries represent much more than just well-paid positions and professional opportunities for tens of thousands of American families.[8]

It appears, though, that efforts are being made by the American Immigration Lawyers Association (AILA) and numerous other national technology associations to convince USCIS to reverse the AAO's decision. Should those efforts be successful, technology companies and practitioners alike may finally find some reprieve. Stay tuned.

Endnotes

1. 20 C.F.R. § 655.731(c)(6)(ii), (7)(i).
2. 8 C.F.R. § 214.2(h)(2)(i)(E).
3. 26 I. & N. Dec. 542 (AAO 2015).
4. *Id.* at 549 (footnote omitted).
5. *See* U.S. Citizenship & Immigration Servs., PM-602-1020, USCIS Final Guidance on When to File an Amended or New H-1B Petition after *Matter of Simeio Solutions, LLC* (July 21, 2015).
6. 8 C.F.R. § 214.2(h)(4).
7. 20 C.F.R. § 655.715.
8. Giovanni Peri et al., P'ship for a New Am. Econ., Closing Economic Windows: How H-1B Visa Denials Cost U.S.-Born Tech Workers Jobs and Wages during the Great Recession 26 (2014).

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