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Feature: Don’t Be Surprised by H-1B Site Visits

Don’t Be Surprised by H-1B Site Visits

Enforcement has been stepped up, so H-1B employers are advised to prepare for site visits and to determine what information they will discuss with government contractors or agents. It is also critical that H-1B employers immediately intensify their focus on immigration compliance.

By Maggie Murphy and Delisa J. Futch

Employers across the country reported unexpected work-site visits in July and August from government agents or contractors with questions related to immigration compliance. In addition to work-site raids and investigations into the employment eligibility of the workforce, the government has begun aggressively reviewing the work status and working conditions of foreign-national employees who have been sponsored for H-1B work visas.

Unlike work-site raids conducted by the U.S. Immigration and Customs Enforcement, more commonly known as ICE, these visits are conducted mostly by contractors and are focused on information provided in H-1B petitions filed on behalf of H-1B employees. Although surprise site visits have been conducted randomly for the past several years, U.S. Citizenship and Immigration Services has confirmed that the government has expanded the agency’s Administrative Site Visit and Verification Program. Three compelling factors justify the program’s expansion:

• The accumulation of hundreds of millions of dollars in fraud detection and prevention filing fees collected thus far for all initial H-1B and L-1 petitions filed since March of 2005.

• The September 2008 findings of the Office of Fraud Detection and National Security division of the National Security and Records Verification Directorate, which reported that more than 20 percent of H-1B filings contain technical violations or are simply fraudulent.

• U.S. Department of Homeland Security Secretary Janet Napolitano’s very public commitment to increase enforcement of the H-1B program—specifically through fraud-prevention tactics and investigation, including site visits. “We’re going to keep at this to make sure that the intent of that program is being fulfilled,” she stated when asked about H-1B fraud and abuse.

Why all H-1B employers should be concerned

Eighty percent of the fraud or technical violations reported by U.S. Citizenship and Immigration

Services' Benefit Fraud and Compliance Assessment Program were discovered during site visits, according to the report. Some violations were technical, such as a job location not being listed on the labor condition application or I-129 petition. Others were obviously fraudulent, such as forged signatures on the labor condition application and/or I-129 petition.

One of the highest percentages of fraud (27 percent) among the test cases was the failure to pay the employee the prevailing wage for the position. While fraud may result in higher penalties and even potential criminal sanctions, even technical violations are subject to fines and other civil sanctions, which can include debarment from the H-1B program.

Based on reports from numerous employers of all sizes, Citizenship and Immigration Services has launched a full-scale operation designed to investigate H-1B employers. The operation involves scrutiny of all information provided with an H-1B filing. Although Citizenship and Immigration Services is not specifically authorized by regulation to enter the workplace and "investigate" H-1B employers, refusal to cooperate may trigger a larger-scale investigation if the agency alerts ICE or the Department of Labor to possible fraud allegations. Such investigations could lead DOL to scrutinize future petitions more heavily or even revoke them, thus revoking non-immigrant status and work authorization.

In most of the site-visit cases reported in July and August 2009, the investigators appeared with little or no notice to the employer. They normally had a copy of the H-1B petition, and they requested to speak to the person listed as the employer contact on the petition, the person who signed the petition, the employee and/or someone in human resources. Questions focused on both the employer and employee:

1. Investigators asked the employer questions relating to viability of the company and the accuracy of the employer information found on the H-1B petition (number of employees, office locations, number of H-1B employees, and general business operations). In short, was the company doing what is stated in the petition, and to what extent?
2. Investigators wanted to meet with the employee and discuss details of his or her job. Again, this is an effort to verify what is stated in the petition (wages paid, work-site locations, job duties and credentials to qualify for the position).

Against this backdrop, employers are advised to prepare for site visits and to determine what information they will discuss with government contractors or agents. It is also critical that H-1B employers immediately intensify their focus on immigration compliance.

And because the $500 fraud detection and prevention fee collected in each H-1B and L-1 case since March of 2005 was also intended to fund fraud investigations into L-1 cases, L-1 employers also should proactively review immigration paperwork for accuracy and compliance. (The L-1 classification applies to intracompany transferees who, within the three preceding years, have been employed abroad continuously for one year, and who will be employed by a branch, parent, affiliate, or subsidiary of that same employer in the U.S. in a managerial, executive or specialized knowledge capacity.)

How to prepare for a possible site visit

1. Decide in advance who the "first responders" will be and who will address any government visitors. The investigators will normally enter the work site through the main entrance, so whoever comes in contact with the public initially should be instructed to notify the first responder immediately and should

refrain from discussing any company or employee information with the investigator.

2. Review immigration files to ensure that all H-1B immigration paperwork is accurate and that the information is easily accessible. Ideally, any paperwork filed with Citizenship and Immigration Services will include only accurate, consistent information about the company. Files should be centrally located, so that the first responder may access information quickly and easily for verification purposes. Employers have found it useful to have easy access to payroll records, corporate financial information and employee records showing date of hire and work location.

If upon a quick review it is evident that the information provided to Citizenship and Immigration Services has been inconsistent, or that there have been significant changes to the company profile (such as mergers, name changes, extreme growth or downsizing, or publicized layoffs), it is a good idea to complete an audit of all immigration files and outline discrepancies so that the first responder can be prepared to discuss them.

It is often prudent to have an immigration attorney prepare the company for such a review. Finally, if identified discrepancies are simply errors, or if material facts have changed over time, it may be necessary to amend the H-1B petition to accurately reflect the new facts.

3. Review compliance policies immediately to ensure that "public access" files for H-1B employees are compliant. All H-1B employers are required to maintain "public access" files for each H-1B petition filed. These files must be housed at the work location or at the company's primary place of business, and they must be available for public review. Employers are required to keep specific documentation in the public access files as evidence that the employer is paying at least the prevailing wage for the position. This information, including all work-site locations at which the employee will be performing work for longer than what is considered a "short-term placement," must be certified by the Department of Labor via the Labor Condition Application.

The notice must be posted by the employer for 10 days in accordance with regulatory requirements, and the employee must be given a copy of the application. Requirements regarding documentation that must be maintained in the public access files are very specific, as are the regulated time frames for how long the file must be retained, even after the employee is no longer working for the company. Compliance-violation rates related to public access file maintenance are typically very high.

For this reason, and because these files are subject to review at any time, it is critical that employers review their records to ensure their public access files are complete. Independent, supervised public access file audits are recommended, so that experts can outline regulatory requirements and analyze each file for compliance. Any violations that are subject to remedy should be remedied immediately.

4. Revisit staffing decisions and methodologies. Temporary or contract workers may pose particular risks for H-1B employers. On-site visits may raise questions about such workers—specifically, whether the requisite employer/employee relationships and contractual agreements between the staffing agency and the employer are in place. Further, employers could face additional, more serious lines of inquiry if there are employees of staffing companies and contract workers on employer premises who hold H-1B, L-1 or E visa status and are working in positions fundamental to the company's operations.

The foundation for these lines of inquiry is the additional legal restriction on placing these types of non-immigrant workers on job sites other than those of the employer named in the non-immigrant visa petition. Under existing practice, ICE will often hold the business owner/premises owner responsible for the immigration violations or the omissions of subcontractors with respect to temporary workers. While the law may or may not support the government's legal posture, industry practice has capitulated in tacit agreement under what is now referred to as "the Wal-Mart standard." (In 2005, Wal-Mart paid $11 million and revised its vendor policies to settle a claim that it was responsible for immigration law violations stemming from its contract with a cleaning vendor that used unauthorized workers.)

For this reason, it is critical to review the factual and contractual employment situations of all contract, temporary or other "non-employee" workers placed at each job site. An audit of the contracts governing such work is required, to ensure that:

• The entity providing contract or temporary workers specifically certifies that it has verified the identities and employment authorization of all workers, and that it is, and will remain, compliant with all relevant state and federal regulations.

• Any foreign-national contract workers or temporary workers who require employment-based sponsorship for employment in the U.S. (most commonly H-1B and L-1 workers) are specifically authorized by the Department of Homeland Security to work at a third-party job site and to perform the duties required.

Finally, all employers should ensure that Form I-9 compliance policies and protocols are current and consistently applied in all offices for all employees. Foster Quan attorneys have confirmed that U.S. Citizenship and Immigration Services and ICE are working in coordination with the Social Security Administration and the DOL on several enforcement initiatives, especially related to Form I-9 enforcement, and it is expected that such coordinated initiatives will become more prevalent.

Compliance starts with comprehensive policies, a trained, well-informed staff and consistent practice. Legal experts can assist with efficient file audits and policy implementation and training, and can offer peace of mind in a very active enforcement environment.

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The information contained in this article is intended to provide useful information on the topic covered, but should not be construed as legal advice or a legal opinion. Also remember that state laws may differ from the federal law.

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