

GOVERNMENT ENFORCEMENT OF THE H-1B IMMIGRATION PROGRAM: H-1B Site Visits are in Full Swing.

For the past few months, the U.S. Department of Homeland Security, Citizenship and Immigration Services ("CIS") has conducted an investigation program aimed at visiting H-1B petitioner worksites throughout the U.S. These site visits began as part of the CIS' goal to decrease the number of H-1B violations and instances of fraud reported by the H-1B Benefit Fraud & Compliance Assessment from CIS' Office of Fraud Detection and National Security ("FDNS"), published this past September. According to the FDNS' findings, as many as one in five H-1B applications were affected by either fraud or "technical violations" of the H-1B program.

Why should employers care? Any employer who sponsored a foreign national worker for an H-1B visa can be subject to an unannounced site visit. What this means is that an investigator can randomly show up at a worksite and demand to see a copy of the H-1B petition, interview the person who represented the company in connection with the H-1B as well as the H-1B employee or other employees presently on site. Any inconsistencies found can mean big trouble for employers.

FDNS has indicated that it does not need a subpoena in order to complete the site visit because USCIS regulations governing the filing of immigration petitions allow the government to take testimony and conduct broad investigations relating to the petitions. However other sources say that employers are not required to give in to the investigators' demands without a subpoena. What to do? Our office recommends that you always comply as much as possible with any investigative agency that shows up at your door. CIS has indicated that attorneys can be present during an inspection, but the investigator is not likely going to come back another day if the attorney is not available on the day of the unscheduled visit. Attorneys may be present via telephone in these circumstances.

Some common questions that have been raised by employers include: "how are companies selected to be investigated," "if I am visited, should I be concerned," "what type of violations are the investigators looking for," and "how can I prepare for a site visit from a CIS/FDNS investigator?"

To address these issues in order, firstly any employer who has filed an H-1B petition can be subject to a site visit. While CIS claims the employers are chosen at random, close to 40,000 employers' names have been selected for site visits. Some factors that may have been taken into consideration when selecting these 40,000 employers include: companies with less than 15 employees; companies with less than \$10 million in sales; companies less than 10 years old; accounting, HR, business analyst, sales and advertising positions; and petitions where the beneficiary merely had a bachelor's degree, not an advanced degree.

If your company is visited and your records are in order, you have nothing to worry about. Generally speaking employers are aware of inconsistencies before any investigative agency may catch wind of it. That being said, if the investigators uncover any inconsistencies or instances of fraud, the case may be referred to U.S. Immigration and Customs Enforcement (ICE), or the Department of Labor (DOL) for further

investigation depending on the offense. This could mean there will be monetary, and if egregious offenses, possible criminal penalties for the employer.

The objective of the unannounced on-site visits is clear: to detect fraud and abuses of the visa program. According to USCIS, the offenses range from technical violations to outright fraud, with the most common violation being the non- payment of a prevailing wage to the H-1B beneficiary. More specifically, the investigators may be looking for the following types of violations: job location not listed on the H-1B petition and/or LCA; H-1B worker not receiving the required wage; fraudulent H-1B documents or H-1B worker credentials; non-existent business or office location; job duties significantly different from those listed on H-1B petition/LCA; misrepresentation of H-1B status by the H-1B worker (e.g., had been terminated from previous H-1B position prior to new employer H-1B being filed); and H-1B worker paid the \$1500 ACWIA fee.

How can you prepare yourself and your company for a possible site visit? Step one is to ensure that you have Public Access Files (PAF) for each H-1B worker, and that the PAF documents are accurate and up to date. In general, it is a good idea to review and audit your H-1B/LCA records to make sure everything is in order and all information is readily available. Designate a specific individual at each H-1B worker location to meet the investigator should he/she arrive. Prepare a quick list of facts about the company and also a listing of H-1B workers, work locations, title and salary information so you don't need to search frantically for this information while the investigator is there. If you are not sure what a PAF is, or if you'd like to have your documents reviewed by legal counsel, you may contact our office at the number or e-mail below.

About Nachman & Associates, P.C.

The Business and Corporate Immigration Attorneys at our Firm have focused their practice, for over a decade and a half, on assisting companies that employ highly-skilled foreign nationals in visa applications. We serve our clients' business objectives. A natural extension of that service is counsel that helps the client to avoid the disruption and expense of ICE audits, recent CIS actions and the consequences of being found to be out of compliance with any number of regulations related to immigration and employment.

Our Business Immigration Attorneys can organize and conduct a review of records, assist in establishing procedures to reduce exposure to liability, and participate in training of managers to comply with the numerous requirements imposed by the US Department of Homeland Security.

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