Nonimmigrants - Material Changes and the USCIS Office of Fraud Detection and National Security – Defensive Lawyering in a Potential Era of Constructive Knowledge

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Darwin's theory of natural selection, often referred to as the "survival of the fittest,"[2] seems to be clearly evidenced from the present struggle of businesses in the United States (U.S.) to remain in operation with the challenges presented by our economy, the focus of U.S. Citizenship and Immigration Services (USCIS) on benefit fraud, as well as Immigration Customs Enforcement (ICE) actions related to employer I-9 audits. While immigration lawyers are used to advising employers as to civil and criminal penalty exposure related to potential constructive knowledge[3] of knowingly hiring or continuing to employ unauthorized workers, they are only beginning to appreciate the level of scrutiny placed on the legal profession in benefit applications from the perspective of potential fraud upon the government.

Since Secretary Napolitano became the Secretary of the Department of Homeland Security (DHS) earlier this year, it is clear that DHS has realigned its enforcement assets to focus more on employers. As evidence of this realignment of assets, on July 1, 2009 ICE launched a bold, new audit initiative by issuing Notices of Inspection (NOIs) to 652 businesses nationwide - which was more NOIs than ICE issued throughout all of the last fiscal year.[4] The notices alerted business owners that ICE will inspect their hiring records to determine whether they comply with employment eligibility verification laws and regulations. ICE is also continuing to utilize the criminal enforcement tools at its disposal regarding worksite as well as benefit fraud in cooperation with USCIS and the U.S. Department of Justice (DOJ). [5]

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[2] Yes, the author understands that the survival of the fittest phrase was coined by Charles Darwin's contemporary, Herbert Spencer. The phrase though appears quite applicable to the struggle to retain one's law license or the struggle for an employer to avoid possible asset forfeiture in the current administration's focus on employers and immigration benefit compliance.

[3] 8 CFR §274a.1(*l*)(1)

[4] *See* ICE Worksite enforcement press releases at:
http://www.ice.gov/pi/news/newsreleases/index.htm?top25=no&year=all&month=all&state=all&topic=16

[5] *See* U.S. Department of Justice, U.S. Attorney, Southern District of Iowa, Media Release "11 arrested, indicted in multi-state operation targeting visa an mail fraud, " February 12, 2009. This announcement referenced the indictment of Vision Systems Group, Inc., a New Jersey domestic profit corporation, with a branch office in Coon Rapids, Iowa for H-1B visa fraud, mail fraud, and conspiracy. The indictment indicated that, "The companies that are the subject of this investigation have asserted that the foreign workers have been brought to the U.S. to fill existing vacancies. However, the companies allegedly have not always had jobs available for these workers, thereby placing them in non-pay status after they arrive in the United States. In some cases, the foreign workers have allegedly been placed in jobs and locations not previously certified by the Department of Labor, displacing qualified American workers and violating prevailing wage laws. The companies and the foreign workers have allegedly submitted false statements and documents in support of their visa petitions. The false statements and documents were mailed and wired to state and federal agencies in support of the visa applications. The companies were suspected of visa fraud, mail fraud, wire fraud, money laundering, and conspiracy." An excellent reference tool on worksite enforcement is AILA's Guide to Worksite & Corporate Compliance.

In addition, signals from newly appointed leadership at ICE and USCIS only further underscore the future benefit fraud and worksite audit enforcement efforts to be expected. John Morton, Assistant Secretary for ICE, in his recent testimony at his confirmation hearing on April 22, 2009 noted that ICE will work with DOJ to investigate and prosecute employers committing serious violations using criminal penalties as well as cooperate with the Department of Labor (DOL) and the Department of State (DOS) to establish a more comprehensive approach to prosecute fraud in the labor certification program.[6] Morton also indicated in response to Senator Collins' statements about the October 8, 2008 USCIS report on H-1B fraud, which indicated that 13.4 percent of H-1B petitions involve fraud with another 7.3 percent containing technical violations, that he would take ICE's investigatory responsibilities seriously, and pointed out that he has prosecuted widespread fraud in the PERM program for permanent labor certifications, that Morton called a "sister program" with similar fraud issues. Morton stated that, "It makes no sense to allow for such a high degree of fraud. The CIS Office of Fraud Detection should have an even closer working relationship with ICE. This is about keeping the system honest and I will work with CIS to make this issue a priority," he added. Assistant Secretary Morton began his enforcement work with the Immigration and Naturalization Service (INS) in 1994 and is a career federal prosecutor. [7]

On July 28, 2009, Alejandro Mayorkas was recommended by the Senate Judiciary Committee for confirmation as the new USCIS Director. Mr. Mayorkas served as the U.S. Attorney for the Central District of California. During a June 24 hearing before the Senate Judiciary Committee, Mr. Mayorkas stated, "From my nearly 12 years as a federal prosecutor, I learned what it means to enforce the law and to do so in furtherance of our national security and public safety. If I am confirmed, I will conduct an overall review of the agency."[8]

What do these announcements signal for the immigration bar? Are there intake processes and engagement letter protocols, which should be revisited? As experienced immigration counsel is well aware, immigration law/procedure is a vast compilation of interpretative memoranda and impromptu policy interpretations in addition to regulations and statutes. "Simple" issues as to what duties are managerial in an L-1A function manager context or if experience and training equates to a degree are in constant flux. Lawyers must apply fact to law in their arguments, but where will the level of responsibility of a lawyer to verify those facts be fixed in the future? Is our new challenge on the horizon whether we have received "constructive knowledge" that the facts provided by an employer may not be accurate, and thus we may be alleged to have conspired with an employer to make material misrepresentations to the government? In an area of law as complex as immigration, what happens when the employer indicates to an investigator that he or she "did not understand" the representations made in the letter drafted for the employer by counsel? What is the responsibility of counsel preparing the petition to notify the government of error in the submission? When must the petitioner notify the government of changes in employment terms or conditions? Are we careful enough in assessing whether we can legitimately file extensions and changes of status based on status compliance issues?

This article will address the intersection point created by changes in nonimmigrant employment tied to cost cutting measures used by an employer in an economic downturn and the developing expectations and fraud investigations of the USCIS Fraud Detection and National Security (FDNS) Office.

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[6] BNA Daily Labor Report, "ICE to Focus Worksite Enforcement Efforts On Unscrupulous Employers, Morton Says, " April 23, 2009.
[7] *Id.*
[8] See Testimony of Alejandro Mayorkas before Senate Judiciary Committee on June 24, 2009 at: http://judiciary.senate.gov/hearings/testimony.cfm?id=3938&wit_id=8075.

I. Stories for Perspective - On Site Visits

Members of the American Immigration Lawyers Association (AILA)[9] often share stories regarding legal interpretations and developments on the association's Infonet Message Center. While the author was recently preparing for an AILA audio seminar presentation on USCIS benefit fraud investigations and site visits, one member relayed that in May of 2009 her client received a site visit from FDNS regarding whether the L-1B petitioner was a legitimate entity before the USCIS service center had even reviewed her reply to a voluminous Request for Evidence (RFE) on the petition. The FDNS officer subsequently requested a copy of the "job advertisement" used to advertise the position. Of course, no advertisement is required. Later, the officer tried to convince the client to withdraw the L-1B petition and file an H-1B, which the officer felt would be a better nonimmigrant category for the position. Obviously, the FNDS officer could use a little regulatory review, but it should cause immigration lawyers serious concern to have officers spotting fraud in a potential vacuum of knowledge of immigration law. These visits by FDNS often involve no notice to the lawyer whose G-28 may be on file with the agency, which action raises due process considerations. 8 CFR §292.5(b) provides that representation by counsel shall be allowed whenever an examination is provided by the regulations.

Another more disturbing story of an FDNS site visit relayed that after the employer was visited, a Notice of Intent to Deny (NOID) was issued by USCIS. In this visit, a manager who was interviewed about an H-1B petition stated that a team member did not have a bachelor's degree. The officer did not ask whether the particular team member had the equivalent of a degree via experience, education, and training as allowed for H-1B qualification. A second visit by FDNS was conducted while the lawyer was not present. The employer's letter to USCIS indicated that the job offered to the H-1B employee required a bachelor's degree. When the employer was asked by USCIS about this requirement, the employer (company president) stated that the letter was prepared by counsel and that the president merely signed it… The attorney is now facing allegations of potential material misrepresentation to the government. The H-1B regulations specifically allow equivalency to a degree to be evidenced by a combination of education, training, and/or experience. [10] Did counsel paper the file to reflect his or her homework done to determine if the H-1B offered position was held by other employees with the same title without a degree? Was there any analysis as to the evolution of the position duties or the experience level of the other current holders of the same job as the offered H-1B position? What training do these FDNS officers have and what should lawyers expect from their fraud reviews?

II. USCIS Office of Fraud Detection and National Security (FDNS)

FDNS is a division of the USCIS National Security and Records Directorate. It was created in 2004 to "enhance the quality, integrity, and security of the U.S. legal immigration system."[11] In early 2009, the office reached a workforce of approximately 650 officers located in every USCIS center, district, and asylum office.[12] Immigration benefit fraud had been defined as the "willful misrepresentation of material fact on a petition or application to gain a benefit.[13]

The current chief of FDNS is Don Crocetti and the current Chief of USCIS Field Operations is Jack Bulger. FDNS has four branches: Fraud Detection, National Security, Intelligence, and Mission Support. On July 29, 2009, Mr. Bulger and Mr. Crocetti conducted an outreach meeting with

[9] For more information about AILA, please refer to www.aila.org. AILA is an association of over 11,000 immigration attorneys.
[10] *See* 8 CFR §214.2(h)(4)(iii)(C)(4).
[11] USCIS, FDNS Office of Communications Fact Sheet (July 2009).
[12] *Id.*
[13] DHS OIG report, " Review of the USCIS Benefit Fraud Referral Process," OIG-08-09 (April 2008) at 2.

stakeholders in Chicago.[14] Mr. Crocetti noted that FDNS officers conduct pre-adjudication reviews to provide facts to USCIS adjudicators. An FDNS report should be referenced on any denial by an adjudicator, if the denial is based on report. Attorneys, however, may only obtain a copy of the report through a Freedom of Information Act (FOIA) request. In addition, Mr. Crocetti confirmed that there is no current policy to notify attorneys of an on site visit by FDNS. In the future, the plan is for FDNS to conduct post-adjudication fraud reviews for potential revocation recommendations.

Attorneys facing site visits are in the very difficult position of recommending appropriate levels of cooperation with USCIS. At present, USCIS FDNS officers do not typically present a subpoena or warrant for information or access at site visits. Even the most astute and conscientious employer though could be exposed to further intensive FDNS and/or ICE scrutiny based on contact with employees, who are not aware of the job duties or reporting responsibilities of a sponsored foreign national employee. Thus, allowing a USCIS FDNS carte blanche access to the worksite can be fraught with potential exposure to miscommunication.

In the USCIS report issued in September of 2008 entitled, " H-1B Benefit Fraud & Compliance Assessment," USCIS reviewed a sample of 246 H-1B cases and found fraud in 13.4% (33 cases), and technical violations in 7.3% (18 cases).[15] The report is very instructive as to the future course of FDNS in benefit fraud investigation. Some of the sample fraud indicators included in the report are: no website for an IT Consulting Company, questionable educational credentials of the beneficiary, filing by certain attorneys under investigation, zoning of the business site inconsistent with business purpose, not paying the claimed wage, contracts for consultants showing no end client, company's gross annual income of less than $10 million, company has less than 25 employees, company was established for less than 10 years, and the labor condition application employment site is not the same as the actual site for work.

The April 2008 DHS Office of Inspector General (OIG) report entitled, "Review of the USCIS Benefit Fraud Referral Process," noted that in FY 2006, FDNS referred 1,890 cases to ICE. Most cases involved single scope fraud tied to one petitioner.[16] Thus, 65 to 70% of the FDNS referrals to ICE were declined. ICE investigated 5,351 immigration related benefit cases in FY 2004, which resulted in 533 convictions. Some leads for ICE investigations come from USCIS adjudicators, but the majority come from informants and other leads. FDNS received 7,738 fraud adjudicator referrals in the first 5 months of 2007. Only 131 service center Notices to Appear (NTA) related to fraud from October 2005 to February 2007. Adjudications in FY 2006 included 4, 995,445 approvals and 804,967 denials for more perspective on the fraud findings.[17] Approximately 27,377 of these denials were fraud denials.

During recent site visits, AILA members have been requested to provide the following regarding their client's pending petition with USCIS:

- Copy of all W2s for all U.S. earnings.
- Copies of contracts and/or work orders between the employer and the end-client; including contracts as to intermediaries.
- Human Resource records showing the employee's job description, worksite location, and supervisor.
- Employee's most recent resume.
- Copies of all degrees/diplomas of employee.

[14] Notes from this meeting were kindly provided to the author by Paul Zulkie and Susan MacLean of Chicago, who were in attendance at the meeting.
[15] USCIS report*: H-1B Benefit Fraud & Compliance Assessment* (posted October 10, 2008 as AILA Document 08100965).
[16] DHS OIG report, *supra* at 8.
[17] *Id. at 11*.

- Company taxes for the last three years.
- Company payroll records.

Questions being asked of employees on site visits often include:

- Name of Company you work for?
- Who pays your salary?
- Address of your actual work location?
- Name of the company where you perform your job duties?
- On what date did your employment begin? (with petitioner and with contract company – if relevant)
- Who is your immediate supervisor – name and telephone number?
- How often are you in contact with your immediate supervisor?
- What are your job duties/what type of work do you do? (be specific – current job/project work)
- What is your work schedule?
- What is your job title?
- What is your current salary? (monthly or annually)
- What was your salary when you started?
- Are you working for a contractor? If so, for whom?

These requests have been made in pre-adjudicative situations typically, but as noted above regarding the FDNS briefing in Chicago, Mr. Crocetti indicated that FDNS is moving to more post-adjudication reviews in the future. What is the obligation of counsel, who filed a nonimmigrant petition, upon receipt of information which makes the prior information submitted to USCIS materially incorrect?

III. Background Reports

In February of 2005, FDNS commenced eight benefit fraud assessments (BFA), which included:

- Form I-360 petitions for immigrant religious workers.
- Form I-90 applications to replace a lost, stolen, or destroyed permanent resident "green card."
- Form I-140 petitions for skilled and unskilled immigrant workers.
- Form I-589 applications for asylum and withholding of removal.
- Form I-130 spousal petitions.
- Form I-130 Yemeni family petitions.
- H-1B nonimmigrant work petitions.
- L-1A nonimmigrant work petitions.

The H-1B report resulting from one of these BFA assessments should be mandated reading for all attorneys, who work on H-1B petitions.[18] It is important to remember that this report was only generated from a sample of 246 cases from a total population of 96,827 approved, denied, or pending I-129 petitions. This Benefit Fraud Compliance Assessment (BFCA) report notes that, "Fraud is a willful

[18] USCIS report, "H-1B Benefit Fraud & Compliance Assessment," September 2008 (posted October 10, 2008 as AILA Document 08100965).

misrepresentation, falsification, or omission of material fact."[19] The definition provided is compared in the report with the definition contained in §212(a)(6)(C)(i) of the Immigration and Nationality Act, as amended (INA), which provides that "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or who has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible."

The H-1B BFCA notes that even though FDNS might find no willful misrepresentation in some situations, technical violations found included such examples as:

- H-1B employer improperly required the beneficiary to pay the ACWIA fee.[20]
- Employer failed to pay the prevailing wage.
- Beneficiary was not working in a geographical location covered by the Labor Condition Attestation (LCA) filed with the Department of Labor (DOL) as required by 20 CFR §655.730(c)(4)(v).
- Employer benched employee when no work was continuously or immediately available.[21]

The implications are clear that typical decisions made by companies in times of economic hardship are listed as possible fraud indicia in the report. In a December 2008 Business Management Daily report by the "HR Specialist," results from a Watson Wyatt survey entitled, "Effect of Economic Crisis on HR Programs," outline the following actions taken by employers in response to the financial crisis in the prior twelve months:

- Hiring Freeze 55%
- Raise employee health care premium contributions 46%
- Layoffs/reductions in force 45%
- Eliminate or reduce hiring seasonal workers 35%
- Eliminate or reduce training 28%
- Salary freeze 16%
- Freeze/close pension plans 15%
- Reduce workweek 8%
- Salary reductions 7%
- Reduce employer 401K or 403(b) match 6%

The H-1B fraud assessment report noted that 27% of the overall violations involved the following:

- Financial records established that the beneficiary is or was being paid below the prevailing wage.
- During site visits, the beneficiary claimed payment of less than the prevailing wage.
- Non-productive status or benching was practiced by the employer.

The report also cited that 12% of the H-1B case samples reviewed involved a beneficiary performing inconsistent job duties with the position described by the petitioner. 6% of the sampled cases involved ports under the provisions of AC 21[22] to work for a new employer before the I-129 petition had even been

[19] *Id* at 5.
[20] 1998 American Competitiveness and Workforce Improvement Act, Pub. L. No. 105-277, div. C, §§401-31, 112 Stat. 2681, 2681-641 to 2681-658.
[21] H-1B report, *supra* at note 18, at 5-6.
[22] §214(n)(1) of the Immigration and Nationality Act, as amended (INA). From the American Competitiveness in the Twenty-First Century Act of 2000 (AC21), Pub. L. No. 106-313, §§ 101-16, 114 Stat. 1251. 1251-62.

filed, and cases in which beneficiaries misrepresented to Customs and Border Protection (CBP) that they were still in H-1B status post termination or after they quit their jobs upon application for readmission to the U.S.

IV. FDNS Referral Process

When FDNS determines that a petitioner or beneficiary has committed fraud, the following protocol is used typically:

- FDNS refers the case to ICE for consideration of formal criminal investigation and prosecution based on the February 2006, USCIS/ICE Memorandum of Agreement (MOU).
- ICE has 60 days to accept the case for investigation or to decline it and return it to FDNS.
- If ICE declines the referral, FDNS forwards the matter with its administrative findings to a USCIS adjudications office for denial or revocation of the petition or application.
- If the beneficiary is in the U.S., he or she is to be placed in removal proceedings.
- A lookout summarizing the fraud is also posted to the database, if the beneficiary fails to appear at his or her removal proceeding or attempts to pursue other immigration benefits.
- An FDNS Information Officer (IO) enters the case into the FDNS Data System (FDNS-DS) for tracking.[23]

It is constructive as well as very troublesome to see in the April 2008 DHS OIG referenced above, that due to a lack of training, FDNS officers did not understand what "met the adjudicative threshold for a denial on a particular petition..."[24] The OIG report outlined that current site visit training is limited to a 31-slide Powerpoint presentation. In addition, only 22% of ICE officers felt that FDNS referrals provided accurate, current, and actionable information. [25] One particularly compelling example in the report from ICE relayed that ICE received a message from FDNS headquarters that FDNS "received a message where a person from FDNS inserted a Google image indicating it was OK to go to the area because 'Aerial reconnaissance of the area, reveals numerous avenues of approach, two lane roads and relatively debris free areas.' When did USCIS obtain an airplane to conduct aerial reconnaissance? Who knows how many years have passed since this photo was taken?"

Presently, we are undergoing a spate of RFEs from service centers apparently creating new regulations overnight. In addition, we have FDNS officers seeking fraud with little training in the law and expect that FDNS will contract out the function of such reviews more in the future. What additional protective mechanisms should lawyers filing such petitions put in place facing these anticipated challenges?

V. Amendments and Material Change

A. Material Change One important consideration for counsel attempting to prepare for an FDNS site visit is to establish the litmus test for a material change in facts, which may merit notice to

[23] H-1B Report, *supra* at note 18, at 2.
[24] DHS OIG report, *supra* at note 2, at 31.
[25] *Id.* at 29.

the government, an amendment filing, or a decision as to counseling a nonimmigrant to leave the U.S. There are numerous excellent articles on this complex issue in the nonimmigrant context of when change requires action for compliance.[26] Unfortunately, clarity of direction on this critical issue is murky at best. When the petitioner executes the I-129 though, the petitioner is certifying under penalty of perjury that the contents of the petition and all evidence submitted with it, either at the time of filing or later, is true and correct. [27]

In the H-1B context, an employer and foreign national (FN) must have a valid petition for the position, which accurately describes the duties, rate of pay, work schedule, and job location.[28] An LCA must be certified for the location(s) where the employee will work.[29] There are various exceptions tied to this worksite related requirement in the regulations based on the time of the performance of services. If any changes in the terms or conditions of employment occur which may affect eligibility under section 101(a)(15)(H) of the INA and paragraph (h) of 8 CFR §214.2, the petitioner must immediately notify USCIS.[30] In addition, the petition is subject to revocation, if the beneficiary is no longer employed by the petitioner in the capacity specified in the petition.[31] The regulations also require an amended or new petition to be filed when there is any "material change" in the "terms and conditions of employment or training or the alien's eligibility as specified in the original approved petition."[32] According to a 1996 Immigration and Naturalization Service (INS) memorandum, a "material change" is one that may affect the FN's eligibility for the classification. [33]

Immigration regulations may provide poor guidance on the topic of what is a material change to trigger certain actions/consequences, but it is important to remember that there are other "material" definitions in play. FDNS, ICE, and the DOJ are looking at material fraud.[34] In specific, 18 USC §1001 addresses false statements to an agency. In Title 9 of the DOJ *U.S. Attorney's Manual*, it states that materiality under 18 USC §1001 is not whether the false statement actually influenced the government function, but whether it had the capacity to influence. 9 *Foreign Affairs Manual* (FAM) 40.63 N6 indicates that "materiality does not rest on the simple moral premise that an alien has lied, but must be measured pragmatically in the context of the individual case as to whether the misrepresentation was of direct and objective significance to the proper resolution of the alien's application for a visa." The FAM provision further states that the Attorney General has declared the definition of "materiality" with respect to INA 212(a)(6)(C)(i) to be as follows:

> "A misrepresentation made in connection with an application for a visa or other documents, or with entry into the United States, is material if either:

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[26] See N. Schorr and S. Yale Loehr, "*Corporate Cuts: Reductions in Pay and Hours for Nonimmigrants," 2* AILA Immigration and Nationality Law Handbook (2002-03 ed); Y. Robertson, "*Avoiding the Abyss: H-1B Strategies When Facing Reductions in Force*, " 2 AILA Immigration and Nationality Law Handbook (2001-02 ed).; and P. Nallainathan, K. Selking, et al., "*Weighing When to Amend or to Terminate H-1B Petitions*," AILA Immigration and Nationality Law Handbook (2007-08 ed) among many others.

[27] 8 CFR §103.2(a)(2).

[28] *See* 8 CFR §214.2(h)(4)(i).

[29] 8 CFR § 214.2(h)(4)(i)(B)(1).

[30] 8 CFR § 214.2(h)(11)(i)(A).

[31] 8 CFR § 214.2(h)(11)(iii)(A)(1).

[32] 8 CFR § 214.2(h)(2)(i)(E).

[33] INS Memorandum, T. Aleinikoff, "*Amended H-1B Petitions,"* (August 22, 1996), reprinted in 73 Interpreter Releases 1231-32, App. III (September 16, 1996)*; See* L. Grossman, "*The Effect of Changed Circumstances on H-1B Nonimmigrant Workers,"* 2 AILA Immigration and Nationality Law Handbook (1997-98 ed).

[34] *See* R. Juceam, "Safeguarding Against Criminal Prosecution and Malpractice in Immigration Law – An Outline of Key Topics, " Ethics in a Brave New World – Professional Responsibility, Personal Accountability, & Risk Management for Immigration Practitioners 57 (AILA 2004).

The alien is excludable on the true facts; or

The misrepresentation tends to shut off a line of inquiry which is relevant to the alien's eligibility and which might well have resulted in a proper determination that he be excluded." (Matter of S- and B-C, 9 I&N 436, at 447.)

B. ***Nonimmigrant Examples*** The H-1B category contains the most obligations for an employer. Other nonimmigrant categories provide some expectations for affirmative action regarding changes as well. In the E category, prior service approval is required, if there is a substantive change in the terms and conditions of E status.[35] The term "substantive change" is defined as "a fundamental change in the employing entity's basic characteristics, such as a merger, acquisition, or sale of the division where the alien is employed.[36] As an E employee versus E principal, there is no prevailing wage payment requirement, but at the same time, a consular officer may decide that an offered job is not executive or supervisory in nature or requires essential skills with a low wage. Thus, the attorney is left with a vague balancing act of what may be substantive in the eyes of USCIS and ICE.

In the O category, the regulations require the petitioner to "immediately notify the Service of any changes in the terms and conditions of employment of a beneficiary which may affect eligibility under section 101(a)(15)(O)" of the INA and 8 CFR §214.2(o).[37] As with the H-1B category, a petition may be revoked if the statement of facts contained in the petition was not true or correct or the petitioner violated the terms and conditions of the approved petition.[38]

The L category does not provide the immediate notice language referenced above as to terms and conditions of employment, but it does require the filing of an amendment if there is a change in capacity of the employment (e.g. from specialized knowledge to managerial) or if there is a change, which would affect the beneficiary's eligibility under section 101(a)(15)(L) of the INA.[39]

The Trade Nafta (TN) category is tied to the list of occupations described in Appendix 1603.D.1 to Annex 1603 of the North American Free Trade Agreement (NAFTA).[40] The regulations state that "no action" shall be required by a Mexican or Canadian citizen in TN status who is transferred to another location in the U.S. by the same employer to perform the "same services."***[41]***

Living in a border area intensifies the immediacy of the impact of "substantive" or "material" changes. Each application for admission to the U.S. is a review of admissibility. Please note the earlier comment in the BCFA regarding the H-1B category as to using H-1B

[35] 8 CFR § 214.2(e)(8)(iii).
[36] *Id.*
[37] 8 CFR § 214.2(o)(8)(i)(A).
[38] 8 CFR § 214.2(o)(8)(iii)(A).
[39] 8 CFR § 214.2(l)(7)(i)(C) and 214.2(l)(9)(A).
[40] *See* 8 CFR §214.6 (c).
[41] *See* 8 CFR §214.6(i)(3).

visas to reenter the U.S. post termination of H-1B employment. The same issue obtains in the context of a material change in the H-1B category. In this uncertain environment, it is prudent to err on the side of disclosure at the port or with USCIS, if the change would legitimately impact eligibility for the category. We routinely advise clients that changes in terms and conditions of employment must be considered from an immigration viewpoint before implementation, but this information is often provided after the fact by clients. Although there is no LCA in these other nonimmigrant categories, there is the execution under penalty of perjury of the I-129 petition affirming that the facts contained in the petition are true and correct. If an FDNS site visit occurs post a material change in duties, the employer must be potentially armed to explain its actions and for the lawyer, to back up any counsel provided to the employer regarding material changes.

The vagaries of immigration law aside, employers and lawyers need a safe harbor from these challenges.

VI. Making a Defensive Plan

Immigration lawyers constantly face the difficulty of explaining incredibly complex and evolving legal interpretations of standards to clients, and then attempting to translate facts into supporting arguments for approval by adjudicators. Personnel charts can change and potentially cause an L-1A manager to no longer qualify as a manager. Job duties can change and cause a TN to no longer be in a qualifying Annex 1603 job. The impact of worksite changes is more complex in the H-1B context. The AR-11 address notice requirement though is yet another consideration for counsel on employment condition/terms related issues. We need a best practices list recommendation of defensive lawyering options for immigration counsel to help try to reduce potential misrepresentation or malpractice claims in the current FDNS era. Some suggestions for consideration are as follows:

- Include a notice in all benefit application engagement letters warning as to the possibility of FDNS site visits. Outline the criminal penalties tied to benefit fraud in the notice and ask the employer's authorized representative to sign this notice as part of the engagement.
- Require the employer to sign an intake statement that all information provided to the lawyer in the process shall be true and accurate to the best of his or her knowledge and belief.
- Counsel the employer to contact counsel before any changes in the terms and conditions of employment and outline the risks of failure to provide this information.
- Remember that conscious avoidance can expose the lawyer as well as the client to potential criminal penalty.[42]
- If counsel advises the employer to notify the government of a material change and the client refuses, document this fact to the file, and potentially terminate representation depending on the case facts.

[42] Conscious avoidance happens when a person deliberately closes his eyes to avoid having knowledge that would otherwise be obvious to him. Deliberate ignorance does not establish innocence. *See U.S. v. Finkelstein, 229 F. 3d 90 (2d Cir. 2000).*

- Be slower to engage new clients and conduct your own Google and Lexis/Nexus people searches before proceeding to accept a new client petitioner.
- Document verbal communications to the file from the client and save all e-mail communications.
- Conduct staff training to create a heightened awareness of benefit fraud indicia.
- Do not be complacent if provided information that an employer has not been accurate in its representations to you as to a petition submitted under your name as legal counsel.
- Establish a protocol for employers to use if an FDNS officer or an FDNS contractor appears on site. Employers should have points of contact for benefit application inquiries to make sure that someone with knowledge is the respondent.
- Educate employers further on the legal elements of petition requirements. A memorandum outlining those elements and signed by the employer might be another avenue to consider.

These BFCAs from FDNS are possible harbingers of a new era in which immigration lawyers will be exposed to a different potential liability as to fraud or misrepresentation to the government similar in some ways to the exposure of employers to knowing hire violations via the amorphous constructive knowledge standard as to knowingly hiring or continuing to employ undocumented workers. Both constituencies, employers and lawyers, need greater certainty as to compliance standards to allow for good faith compliance efforts. In addition, poor training of enforcement officers for FDNS can only lead to increased risks of wrongful accusations by the government against employers as well as their counsel. It appears litigation will be a growth industry.