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USCIS' Site Visit Guide -- Some Key Points

As reported in previous *Immigration Insights*, the U.S. government is conducting more frequent visits to locations where H-1B workers are employed in an effort to find instances of immigration fraud.

The government's instructions to its contractors who conduct site visits are now available. A few points from the instructions are worth stressing:

- First, if the H-1B employer requests the presence of an attorney (in person or by phone) and the attorney is not immediately available, the site visit must be terminated. We recommend that employers always contact their immigration lawyer as soon as a site inspector arrives, and consider postponing the interview if counsel is not immediately available.

- Second, a major focus of the instructions is to investigate whether the physical location of the organization is legitimate and not just a "store front" or "shell."

- Third, site inspectors seek to match up the title, duties, location and salary listed by the employer in its H-1B petition with the answers elicited during the site visit. Site inspectors may ask for business cards, pay records, job descriptions, and so on.

There is a clear focus on whether discrepancies exist. A site inspector may incorrectly come to the wrong conclusion if the employer and employee are not familiar with the title and duties described in the H-1B petition, especially if the petition was filed a long time ago. Always take a moment to review the H-1B petition before agreeing to a site visit. Always notify your immigration counsel if an employee has changed his or her job, so that you can receive advice regarding whether your organization should file an amended H-1B petition with USCIS.

Office of Special Counsel Releases Fact Sheet

The U.S. Justice Department's Office of Special Counsel for Immigration-Related Unfair Employment Practices has released a top-10 list of things for employers to remember when recruiting, hiring, complying with I-9s, and terminating persons authorized to work in the United States. The OSC's do's and don'ts is available here. A key point to remember is not to demand different or additional documents, provided the documents presented prove identity and work authorization, are listed on the back of Form I-9, and reasonably appear genuine. Another key point is that if a job applicant is authorized to work in the United States, avoid requiring the applicants to have a particular citizenship status, such as U.S. citizenship or U.S. permanent residence, unless mandated by law or federal contract.

Recent Decisions by the Board of Alien Labor Certification Appeals Shrink the Scope of the *HealthAmerica* Case

In *Matter of HealthAmerica*, the Board of Alien Labor Certification Appeals (BALCA) decided that the U.S. Department of Labor abused its discretion in denying a PERM labor certification application due to a typographical error. However, recent BALCA decisions indicate a trend away from *HealthAmerica* and toward a "zero tolerance" of any kind of error in either the PERM application itself or in the required PERM audit file that employers must compile.

In *Matter of Hawaii Pacific University*, BALCA affirmed denial of a PERM application because the employer had provided the incorrect address on the notice of posting during the recruitment process. The address was a correct Department of Labor (DOL) regional office address, but not the one which the employer should have listed. BALCA said that even though the DOL office listed by the employer could have forwarded any complaint to the correct DOL office, the regulations state that the employer should have listed the address of the "appropriate" office which was no longer the one that the employer listed. BALCA effectively held that listing the regional office by mistake was inexcusable.

In *Matter of Noll Pallet & Lumber Co.*, the employer mentioned in its print advertisement that the employer conducts criminal and background checks of job applicants. The employer did not specifically mention these checks on the PERM application form that it filed with DOL. BALCA decided that the print advertisement (that referred to these checks) was more restrictive than the PERM application, which was a fatal violation of the regulations.

These decisions are representative of a zero tolerance approach to PERM applications that coincides with the economic recession and the stubbornly high unemployment rate. Because many of the denied cases took years to wend their way through the PERM process and then further time for a BALCA appeal to be decided, employers and their employees unfortunately have one more thing to worry about.

Some Modest Advancement in the April 2010 Visa Bulletin

While the employment-based priority dates, especially in the employment-based third (EB3) category, continue to demand legislation to alleviate the very significant wait, there continues to be some steady progress. In the recently released April 2010 Visa Bulletin, the EB3 worldwide category advanced by six weeks (to February 1, 2003), as did the EB3 category for China. Click here for more details.

Comprehensive Immigration Reform Comes Off Life Support

Under pressure from a variety of groups, Senators Charles Schumer (D-NY) and Lindsay Graham (R-SC) have presented a blueprint for immigration reform legislation. The road ahead for any new bill will likely be arduous but these efforts gives hope to those who believe that action is required to address the many challenges that employers, employees and others face when dealing with the U.S. immigration system.