

H-1B Site Visits Soon to Become Routine Protocol

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For employers of foreign-born scientists, the H-1B visa is the visa of choice. The H-1B category is versatile insofar as it permits U.S. employers to hire highly educated employees for a broad range of “specialty occupations” (positions that require at least a Bachelor’s Degree in a specialized field). Examples include research associates, professors, and engineers. However, employers of H-1B visaholders have come under increased scrutiny of late.

In recent 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 United States. These site visits began as part of the CIS’ goal to decrease H-1B violations and fraud as reported by the H-1B Benefit Fraud & Compliance Assessment from CIS’ Office of Fraud Detection and National Security (FDNS). 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.

The FDNS has indicated that it does not need a subpoena to conduct the site visit because USCIS regulations gov-

erning the filing of immigration petitions allow the government to 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 if the attorney is not available on the day of the unscheduled visit, he or she may be present via telephone instead.

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, first any employer who has filed an H-1B petition can be subject to a site visit. According to CIS, at this point employers are randomly chosen for a site visits. Approximately 25,000 employers’ names have been selected for site visits this year.

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 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.

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 instances where the H-1B worker paid the \$1,500 ACWIA fee.

How can you prepare yourself and your company for a possible site visit? First, ensure that you have Public Access Files (PAF) for each H-1B worker, and that the PAF documents are accurate and up to date. 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, you may wish to consider having your documents reviewed by legal counsel.

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