

Are You Ready for USCIS H-1B Site Visits or Department of Labor Audits?

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April 9, 2018

Now that the FY 2019 H-1B cap has been reached, make sure you have a strong immigration compliance programs in place, particularly when it comes to Department of Homeland Security's H-1B Site Visit program and Department of Labor H-1B/Labor Condition Application Audit program. As reported earlier this year, the government plans to step up targeted site visits and audits for H-1B cases in 2018.

Background

This enhanced enforcement effort is due in part to a report published last fall by the Inspector General and its audit of the USCIS Administrative Site Visit and Verification Program (ASVVP). According to the report, the Inspector General's office stated that USCIS approved more than 330,000 new, extended or amended H-1B visa petitions during FYs 2014-2016, but only conducted an average of 7,200 H-1B site visits during those fiscal years, which represents only 3 percent of all approved H-1B petitions and fell short of the USCIS goal. In addition, the report recommended that USCIS improve its information-sharing relationships with other agencies such as the Department of Labor, Department of State and Immigration and Customs Enforcement to better identify high-risk employers for targeted site visits.

As a result of the 2017 report, USCIS indicated that it would implement a more targeted approach when making site visits at the worksites of H-1B employees, focusing on:

- Cases where USCIS cannot validate the employer's basic business information through commercially available data;
- H-1B-dependent employers (those who have a high ratio of H-1B workers as compared to U.S. workers, as defined by statute); and
- Employers petitioning for H-1B workers who work off-site at another company or organization's location.

Targeted Site Visits

Targeted site visits will allow USCIS to utilize its resources more effectively at employers where fraud and abuse of the H-1B program may be more likely to occur. At the same time, USCIS will continue random and unannounced visits nationwide.

These site visits are not meant to target nonimmigrant employees for any kind of criminal or administrative action, but rather to identify employers who are abusing the system. USCIS has also established an email address which will allow individuals (including both U.S. workers and H-1B employees who suspect they or others may be the victim of H-1B fraud or abuse) to submit tips, alleged violations and other relevant information about potential H-1B fraud or abuse. Information submitted will be used for investigations and referrals to law enforcement agencies for potential prosecution.

The visits are primarily conducted by the USCIS Office of Fraud and Detection and National Security ("FDNS"). These site visits are being done without advance notification to the employer. Although the actual site visit will vary in each case, the primary goal is to verify that the facts contained in the underlying H-1B petition are true. The Officer may want to confirm that (1) the employer exists, (2) the employer knowingly filed the petition, (3) the facts submitted regarding the job duties and salary are accurate and true, (4) the employee is qualified for the position, and (5) the employee is being paid the offered wages. Typically, the site visits will take about 30 minutes to complete.

Increased Audits

In addition to USCIS site visits, the Department of Labor will be conducting more audits to ensure that H-1B petitioners are complying with the Labor Condition Application (LCA) wage obligation attestations and keeping accurate Public Access Files (PAF). Therefore, it is important to carefully review the PAF requirements and develop procedures and processes to ensure consistency and accuracy. Employers must also take note of the specific retention requirements relating to the PAF – an especially important consideration when preparing for an audit.

Under the DOL regulations, an employer must retain copies of PAF records for a period of one year beyond the last date on which any H-1B nonimmigrant is employed under the LCA or, if no nonimmigrants were employed, one year from the date the LCA expired or was withdrawn. In addition, the employer must maintain required payroll records for a period of three years from the date(s) of the creation of the record(s). Recently, DOL confirmed that H-1B employers can maintain a PAF file electronically.

How Can You Prepare Your Company for a Site Visit or a DOL Audit?

- Designate a lead employee to serve as the “coordinator” for the site visit or audit (you may want to have more than one person so that you have a backup).
- Inform your receptionist or front desk person who the “go to” person is.
- Maintain good record keeping so that the petition materials are easily accessible.
- Let H-1B employees know about the possibility of a site visit or audit and the possibility that they may be interviewed to verify specific information in connection to their employment.
- Although the site visit program is voluntary, we suggest you respond to the officer’s questions.
- In either scenario it is important to consult with your Foley attorney prior to responding.

The many compliance initiatives this year, and particularly the Site Visit Program by USCIS, serve as a reminder that the immigration petition process carries with it a potential liability for the employer and its employees. It is therefore important to ensure that the immigration petition process is monitored carefully and that the petition preparation and document maintenance procedures are consistent with the organization’s standard compliance protocol. If you should have further question regarding the site visit program or other immigration compliance related issues, please contact our office.

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