

## **IMMIGRATION SITE VISITS: WHAT TO EXPECT AND HOW TO PREPARE**

In September 2008, the U.S. Citizenship and Immigration Services (USCIS) issued its H-1B Benefit Fraud & Compliance Assessment Report.<sup>1</sup> The report found that 20% of the reviewed H-1B petitions contained fraud or technical violations. As a result of the Assessment Report and other fraud initiatives, the Department of Homeland Security (DHS) has stepped up its monitoring and reviewing of H-1B petitions.<sup>2</sup>

DHS recently announced, and companies have reported, an increase in site visits by USCIS to companies petitioning for temporary work visas on behalf of employees, including the employer's principal place of business and the nonimmigrant's work location.

In the past, site visits took place but were not common and were usually focused on certain types of employers or certain types of nonimmigrant visas, such as R-1s (religious workers). Now, it appears the policy has shifted, and site visits will occur more regularly and can affect any type of employer that files an H-1 or L-1 visa petitions on behalf of a foreign worker.

### **Why Should You Be Prepared for a Site Visit?**

The USCIS Vermont Service Center has indicated that it recently transferred approximately **20,000 H-1B cases** to the Office of Fraud Detection and National Security (FDNS) for further review and possible site inspection. The USCIS California Service Center has likely transferred **another 20,000 H-1B cases** to FDNS for review and inspection.

FDNS is the USCIS office charged with detecting, deterring, and combating immigration benefit fraud. FDNS shares information and collaborates with other governmental agencies, including Immigration and Customs Enforcement (ICE). In addition to its approximately 650 immigration officers, research specialists, and analysts, FDNS contracts with private investigation firms to conduct site visits on behalf of FDNS.

FDNS has previously conducted assessments in the L-1, EB-1<sup>3</sup>, and R-1 programs, and now has turned its attention to the H-1B program.

The vast expansion of the number of cases being sent to FDNS, and the increase in the number of site visits, serves as a stark reminder that immigration petitions carry potential liability for the employer and the employee.

Senator Chuck Grassley recently sent an open letter to the director of USCIS, Alejandro Mayorkas, asking USCIS to hold employers accountable in the H-1B visa program and to take steps to restore the

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<sup>1</sup> [http://www.uscis.gov/files/nativedocuments/H-1B\\_BFCA\\_20sep08.pdf](http://www.uscis.gov/files/nativedocuments/H-1B_BFCA_20sep08.pdf) (last visited on 10/25/09).

<sup>2</sup> Additionally, USCIS has accumulated a hefty anti-fraud fund. A \$500 Fraud Prevention and Detection Fee (authorized by the H-1B Reform Act of 2004), must be paid by (1) most H-1B employers seeking a worker's initial grant of H-1B nonimmigrant status, and (2) any employer seeking to hire an existing H-1B worker currently employed by another employer. See Compliance Review Report, Job Aid for Employment (H1B) - Based, dated 12/05/08; posted at [http://imminfo.com/Library/employer\\_issues/Compliance%20review%20report.pdf](http://imminfo.com/Library/employer_issues/Compliance%20review%20report.pdf) (last visited on 10/25/09).

<sup>3</sup> Employment-based, first preference immigrant visas.

integrity of the program.<sup>4</sup> Sen. Grassley cited the internal USCIS report from 2008 that found more than 20% of H-1B petitions reviewed were based on fraud. Sen. Grassley stated:

“The United States is in need of an immigration overhaul. Porous borders, shoddy workplace enforcement, and fraud-heavy guest worker programs all contribute to our illegal immigration problems. We don’t need a long, arduous legislative process to get at some of the problems. The agency can take immediate steps to eliminate fraud in the H-1B program, including cracking down on the body shops that do not comply with the intent of the law. Employers need to be held accountable so that foreign workers are not flooding the market, depressing wages, and taking jobs from qualified Americans. Asking the right questions and requesting the necessary documents will go a long way in getting out the fraud in the H-1B program.”<sup>5</sup>

Facing pressure from all sides, USCIS will likely, in turn, put pressure on FDNS and its private contractors to conduct more site visits, and gather more information for use in future site visits and/or petition adjudications. Employers utilizing foreign workers must be prepared for such visits.

### **Can USCIS Do This?**

USCIS takes the position that a subpoena or warrant is not required in order for FDNS officers to enter the private areas of a business and conduct H-1B investigations because investigators are typically asking for the consent of the business to conduct the investigation. Additionally, the investigators Compliance Review Report states, “[i]f an individual requests the presence of an attorney, and the attorney is not immediately available, the ASV [the Administrative Site Visit] will be terminated.”<sup>6</sup>

However, immigration petitions, like many applications for government benefits, carry potential liability for the petitioning employer and the beneficiary employee. The instructions on the Form I-129 state that USCIS has broad compliance review and monitoring rights. USCIS’s verifications methods may include, but are not limited to: review of public records and information; contact via written correspondence, e-mail, fax, or telephone; unannounced physical site inspections of places of employment; and interviews.<sup>7</sup>

### **What Happens During a Site Visit?**

Sites visits will either be triggered by information in the petition itself or information from an outside source. Alternatively, some companies may be randomly selected for a site visit. In most cases, inspectors have been arriving for site visits unannounced and the employer has no notice before the investigator arrives. The inspecting officer should present his or her credentials upon arrival and employers should examine and record this information.

During the visit the FDNS immigration officer (or FDNS contractor) will attempt to verify that the facts and information in a specific immigration petition are true. Usually, they will want to confirm that the employer/organization exists, that the employer knowingly filed the petition, that the facts submitted regarding the employee’s job duties and salary are accurate, and that the employee is qualified for the position.

<sup>4</sup> Press Release, “Grassley works to ensure accountability in H-1B visa program,” dated September 29, 2009; posted at [http://grassley.senate.gov/news/Article.cfm?customel\\_dataPageID\\_1502=23410](http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=23410) (last visited on 10/25/09).

<sup>5</sup> *Id.*

<sup>6</sup> Compliance Review Report, Job Aid for Employment (H1B) - Based, *Supra* at note 2.

<sup>7</sup> Form I-129 Instructions (rev. 06/12/09), posted at <http://www.uscis.gov/USCIS/Services%20&%20Benefits/Immigration%20Forms/i-129instr.pdf>

At the site, the FDNS officer will confirm that the facility visually appears to be that of the organization. The officer might inspect signage, speak with neighboring businesses, and take photographs of the exterior of the facility.

The FDNS officer will usually ask to speak with the employer representative who signed the petition; however, if that person is not available, the officer will usually speak with another employer representative, such as a Human Resources Manager. The FDNS officer will usually have a copy of the specific petition that triggered the site visit, but the officer may ask to see the employer's copy of the petition.

The FDNS will ask the employer's representative basic information about the company, such as its area of business, the product and/or service the company provides, the number and list of locations, and the number of employees (including the number of full and part-time H-1B employees). The officer may ask to review company documents such as tax returns, quarterly wage reports, invoices, and any other documentation to prove the company is a legitimate business. The officer may also ask about the number of H-1B petitions the company has previously filed.

With regard to the petition, the officer will usually confirm that the signature on the petition is genuine and that the employer's representative reviewed the petition to ensure its accuracy.

As to the beneficiary, the officer will want to know whether the beneficiary actually works for the company. The officer will usually ask detailed questions about the worker's job title, job duties, hours of work, work location, qualifications and salary. The officer may review documents pertaining to the nonimmigrant worker, including but not limited to, the worker's personnel file, paystubs or Forms W-2, business cards, and employee ID card.

In addition to speaking with an employer representative, the FDNS officer might take a tour of the facility. The officer may take photographs, including photos of any company signage, at the facility. The officer may speak with other employees he or she encounters on the tour.

The FDNS officer will usually request to speak with the H-1B beneficiary. The officer will ask questions to confirm the worker's job title, duties, employment dates, work site location, background and qualifications, previous employment, and current contact information. The officer might request supporting documentation, such as business cards or other company materials listing the beneficiary's role in the company. The officer may also speak to some of the beneficiary's co-workers to verify the information listed above.

The H-1B site visit will typically last one hour.

Information obtained through the site visit will be used to assess the employer's compliance with immigration laws and, possibly, to determine eligibility for the benefits sought.<sup>8</sup> USCIS is supposed to provide the employer/petitioner and employee/beneficiary an opportunity to address any adverse or derogatory information that may result from a compliance review, verification or site visit after a formal decision is made. A decision can include revocation or termination of a petition approval.<sup>9</sup> If USCIS does not provide such information, the employer can make a Freedom of Information Act Request.

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<sup>8</sup> Compliance Review Report, Job Aid for Employment (H1B) - Based, *Supra* at note 2.

<sup>9</sup> *Id.*

If FDNS concludes that an employer/petitioner or employee/beneficiary has committed fraud, FDNS refers the case to ICE for consideration of formal criminal investigation and prosecution.<sup>10</sup> ICE then has 60 days to accept the case for investigation or decline it and return it to FDNS.<sup>11</sup> If ICE declines to open a criminal investigation, FDNS forwards the case with its administrative findings to a USCIS adjudications component for denial or revocation of the petition or application as appropriate.<sup>12</sup>

### **What Should You Do Before and During an H-1B Site Visit?**

#### ***Before an H-1B Site Visit:***

- Review all H-1B petitions in their entirety to ensure the accuracy of all information material to the employer's sponsorship eligibility, the beneficiary's eligibility for the status benefit, the nature of the job offer, and the terms and conditions of employment as specified in the petition.
- For each filed H-1B petition, ensure you have a corresponding Labor Condition Application (LCA) and "Public Access File" containing all required source documents.
- Conduct additional investigation if any facts or information in the petition do not appear accurate.
- If you cannot resolve the inaccuracy, speak with counsel regarding the filing of an amended petition, or the withdrawal of the inaccurate petition.
- Most H-1B site visits occur post-adjudication. Be aware of the adjudication status of all H-1B petitions, and H-1B extensions.
- Appoint a designated company official to serve as the "go-to" person for site visits.
- Retain complete copies of all I-129 petitions and all supporting documentation in a confidential file maintained by the designated company official. Copies should be readily identifiable and accessible to the designated company official in the event of a site inspection.
- Consider appointing one or two back-up employees in case the lead designated company official is unavailable during the (unannounced) site visit. The lead designated company official, and any back-ups, should be trained regarding site visits.
- Inform reception staff and other personnel who may first encounter the FDNS officer, or be called upon in the event of a site visit, to direct all inquiries to the designated company official.
- Consider staging a mock site visit under the supervision and direction of Squire Sanders immigration counsel (subject to the attorney-client privilege). This gives the designated company official, as well as other employees that might encounter the FDNS officer, a better understanding of what might happen at the site visit. During the mock site visit, also consider

<sup>10</sup> U.S. Citizenship and Immigration Services H-1B Benefit Fraud & Compliance Assessment, September 2008; Supra at note 1.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

conducting a mock interview with the beneficiary to help him or her relax and prepare for a possible interview with a FDNS officer.

***During an H-1B Site Visit:***

- Request the name, title, and contact information for the site investigator (remember, the investigator may be a FDNS officer or a private contractor). It is important to note that other governmental agencies may visit the work site (for example, ICE, the Department of Labor's Wage and Hour Division, state agencies), and some of these agencies might also conduct audits in the H-1B program with regard to LCA compliance and other issues. It is of utmost importance to determine which agency is conducting the site visit.
- Ask for the inspector's business card, make sure it contains current contact information and a toll free number to obtain confirmation of his credentials, *prior* to providing any information or documentation to the investigator.
- Do not speak with government agents (such as the FDNS officer) or contractors without a witness present. The employer's representative can request that the company's immigration attorney be present during the site visit, however, the officer is not likely to reschedule the site visit so that the attorney can be present. In this case, request that counsel be present by phone.
- Do not hesitate to contact your Squire Sanders attorney if a FDNS officer or contractor arrives unannounced at your work site. If the attorney with whom you work does not answer the phone, contact his or her assistant, or the office receptionist, and explain that the attorney you are looking for must be urgently located.
- You have a right to have legal counsel present before you speak with an investigator. If you so choose, inform the investigator you would like to have your attorney present before you speak. That is your right.
- If you speak with the officer without counsel present, make sure another witness is in the room. Both the witness and the interview subject should contact counsel as soon as possible, following the interview.
- If the FDNS officer requests access to tour secure areas (not accessible to the public), politely explain to the officer that the particular area is not accessible to the public and suggest a less-sensitive area the officer may tour.
- If the FDNS officer requests information that the designated company official cannot provide right away, or without further research, tell the FDNS officer - **do not guess** about any information provided during the site visit.
- Have someone accompany the FDNS officer during his or her tour of the facility. Request to be present during any and all interviews of company employees. The officer may deny this request on the ground that he or she will get more candid responses without the company-designated official present. If they refuse to let you be present, record that refusal in the notes you are keeping of the event.

- Take notes of all information and documents requested by the FDNS officer, as well as the information and documents actually provided to the officer. Take notes of each place the FDNS officer visits at the facility and whether he or she took pictures.
- Remember that any derogatory information obtained during the site visit can be used to deny a petition or revoke a previously-approved petition. Additionally, information may be referred to ICE for further investigation, which can lead to civil and criminal penalties.
- If counsel is not already present, contact immigration counsel as soon as the site visit is completed.
- Have everyone that observed or participated in the site visit prepare a memorandum of their observations in as much detail as possible, and provide that to the company legal counsel.

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