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The Feds Are In The Lobby: And They Want To Review Your H-1B Records

By Sarah Hawk

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The number of H-1B audits will continue to rise in 2010, so H-1B employers should be prepared for unannounced site visits from U.S. Citizenship and Immigration Services (USCIS) to confirm the information submitted in H-1B filings. The USCIS Office of Fraud Detection and National Security (FDNS) has recently commenced an audit of the H-1B program.

Under H-1B regulations, FDNS does not need a subpoena to investigate H-1B employers. One of the USCIS Service Centers has already transferred approximately 20,000 cases to FDNS as part of the H-1B assessment program. As a result, it's clear that site visits will continue and all H-1B employers must be prepared for an unannounced site visit at anytime.

As a part of the audit program, investigators are verifying the accuracy of the information listed by employers in H-1B petitions. Since 2005, H-1B employers have paid a \$500 fraud-prevention fee, which assists in funding this investigative program. Fraud in an H-1B petition may include any intentional misrepresentation, falsification or omission of a material fact in the H-1B petition and supporting documentation.

Overview

The H-1B category allows an employer to sponsor a foreign national for employment in a specialty or "professional" position. To qualify for H-1B status, the position must be one that requires at least a bachelor's degree in a specific, relevant field and the foreign national must possess the relevant academic degree or the equivalent of a U.S. bachelor's degree by virtue of education or experience. As part of the H-1B petition process, you must provide information about an employee's specific job title, duties, wage, and location. Once the petition is approved, you cannot change the terms and conditions of the H-1B employee's employment without notifying USCIS.

Types Of H-1B Fraud

The purpose of the H-1B site visit is to discover H-1B petitions that were filed based on fraudulent information. Types of misrepresentations uncovered through the H-1B audit program include cases where the business did not exist, educational degrees or experience letters submitted were confirmed to be fraudulent, the H-1B employee was performing duties that were significantly different from those described in the H-1B petition, or the H-1B employee was not receiving the required wage that was stated in the petition.

"Benching" an H-1B employee due to lack of work is not allowed. You are obligated to pay the required wage to the H-1B worker if the unproductive status is at the direction of the employer. Terminating an H-1B worker prior to the expiration of their H-1B validity also triggers an employer's obligation to offer return transportation for employees to return to their last residence abroad.

The Site Visit

An FDNS investigator may arrive unannounced either at the employer's principal place of business or at the employee's worksite location listed on the H-1B petition. Upon arrival, the investigator will want to speak with the employer's representative who signed the H-1B petition.

The purpose of speaking to the employer's representative will be to verify:

- the employer's business, locations, number of employees, and revenue;
- the H-1B employee's date of employment, job title, duties, work location, and wage;
- the number of H-1B petitions the employer has filed; and
- the authenticity of company representative's signature on the H-1B petition.

To further confirm the accuracy of the information on the petition, the investigator may also ask for a copy of the company's tax returns, quarterly wage reports, and other company documentation to establish that the business is legitimate and information in the petition is accurate.

Next, the investigator may ask to speak with the H-1B employee to confirm:

- employment dates, job duties, salary, and work location;
- education background and previous employment experience;
- current address and information about dependents; and
- whether the H-1B employee paid any of the H-1B filing fees, and attorneys' fees.

In addition, the investigator may request to speak with the H-1B employee's direct supervisor or a co-worker to further confirm the H-1B employee's and representative's statements. The investigator may request a tour of the facility and ask to take photographs of the facility. This sounds like a lot, but a typical site visit should not last longer than one hour.

Here are some tips for preparing for a site visit:

Review your H-1B files

Ensure that all information provided in the H-1B petition is true and accurate. Check the Labor Condition Application public access file for each H-1B employee to verify that the file contains all required documentation.

Keep copies of H-1B petition documentation and be familiar with the information. During a site visit, if the company representative doesn't know the answer to a specific question, don't improvise or guess about the answer. Instead, determine the correct response and follow-up with the investigator later.

Consult your immigration counsel to amend any H-1B cases if there are substantial changes in work duties, location, or salary to determine whether an amended H-1B petition should be filed.

Withdraw an H-1B petition if an H-1B employee's employment ends before the end date listed on the H-1B approval notice. This requires written notification to USCIS and DOL.

Establish A Site Visit Policy

Designate an H-1B company representative, and make sure the representative is prepared to answer questions. It's a good idea to designate an alternative contact person if the company representative is not available.

Notify all of your H-1B employees of the possibility of a site visit. Instruct H-1B employees that they should not speak with an investigator without the company representative's knowledge.

If a H-1B employee is placed at a client's facility, notify the client of the possibility of a site visit. The client should be prepared to discuss the terms and conditions of the H-1B employee's placement at its facility, including the agreement between the H-1B employer and client for the placement.

During The Investigation

When an investigator arrives, obtain name, title, and contact information, and inform the investigator that you would like to contact your immigration attorney. You should immediately call your legal counsel for guidance during the visit. FDNS will allow counsel to be present by phone if requested but will not typically reschedule a site visit for counsel to be physically present during the site visit.

Take detailed notes of the meeting with the investigator and keep a list of all documentation you supply. If the investigator wishes to tour the facility or speak with the H-1B employee or other employees, the company representative or another designated individual should accompany the investigator. The investigator should be accompanied at all times during the visit and should not be permitted to roam freely throughout the employer's facility.

Penalties

Once the site investigation is complete, the investigator will make a determination about whether the petitioner or beneficiary committed fraud in the H-1B petition. If the investigator concludes that fraud has been committed, the case will be referred to Immigration Customs and Enforcement (ICE) for consideration of a formal criminal investigation and prosecution. This may lead to criminal or civil penalties.

If ICE does not accept the case for investigation, FDNS will forward its finding to USCIS which may deny or revoke the H-1B visa. H-1B employees who are in the United States will be placed in removal proceedings. A finding of fraud by an employer will detrimentally impact an employer's ability to sponsor other employees for immigration benefits in the future.

Summing It Up

The H-1B visa is a popular category for employers seeking to hire professionals. Whether you are an employer preparing to file a new H-1B petition or whether your company currently employs H-1B workers, you must ensure that the information provided in a H-1B petition is accurate and that the company remains in compliance with H-1B requirements. Audits are part of the program, however, and remember that an H-1B audit may also trigger an I-9 audit as well. For help with both contact any attorney in our Global Immigration Group.

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