



SHOWING UP WITHOUT WARRANT OR WARNING

Federal officials visit employers that hire foreign workers

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The U.S. Citizenship and Immigration Services (USCIS) has announced that its Office of Fraud Detection and National Security (FDNS) has begun an audit of employer compliance with H-1B non-immigrant visa requirements.

As part of the audit process, FDNS will conduct site visits at employers who file or have previously approved H-1B petitions, which allow businesses to temporarily employ foreign workers in specialty occupations.

While FDNS reportedly has conducted such audits on employers who sponsor various other non-immigrant visas, this new initiative targets employers sponsoring professional workers for the H-1B visa. These site visits are unannounced and, according to FDNS, do not require a subpoena or warrant for the investigators to enter and examine an employer's premises.

Connecticut has not yet experienced the disruptions of mass raids by Immigration and Customs Enforcement on employers who hire and retain unauthorized workers. However, the USCIS Vermont Service Center, which has jurisdiction over H-1B petitions for workers in Connecticut and surrounding states, reportedly has referred approximately 20,000 H-1B cases to the fraud detection office as part of the audit program. Connecticut has its fair share of H-1B workers. Therefore, out of the estimated 20,000 cases reportedly referred to the FDNS, it is a safe bet that at least some of the targeted H-1B employers that can expect an unannounced site visit are located in Connecticut.

What gives the FDNS authority to enter an employer's worksite without prior notice,

a subpoena, or a warrant? According to USCIS, the filing of the H-1B petition constitutes a waiver of an employer's Fourth Amendment rights. To obtain an H-1B visa, a sponsoring employer must complete and file a Form I-129, Petition for Nonimmigrant Worker, with USCIS. A portion of the final page of the 23-page instructions that accompany Form I-129 states: "The Department of Homeland Security has the right to verify any information you submit to establish eligibility for the immigration benefit you are seeking *at any time*. . . . Agency verification methods may include... unannounced physical site inspections of residences and places of employment; and interviews." The vast majority of H-1B sponsors are unaware of this right to verify buried within the Form



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I-129 instructions. Notably, the soundness of USCIS's position on the Fourth Amendment waiver is untested.

This "right to verify" also is interpreted by USCIS to give the FDNS permission to conduct site visits on clients of the sponsoring employer. If the H-1B petition indicates that the employee will work at a location other than the employer's principal place of business, FDNS may conduct its investigation at the employee's work location, although that location is not controlled by the H-1B employer.

As part of the site visit, an FDNS investigator will ask to interview a representative of the sponsoring employer and the H-1B beneficiary employee. The investigator is usually seeking verification that the information provided by the employer in the H-1B petition is accurate. The investigator may question the employer's representative extensively about its business, number of employees, and financials. He or she may request a tour and even take photographs of the facility.

The investigator will then usually request to speak with the H-1B beneficiary and proceed to question the employee about his or her job title, duties, employment locations, academic background, and experience. The investigator may also request the same information from the H-1B beneficiary's manager or supervisor. All this is to confirm that the employer is engaged in the business stated in its H-1B petition and the H-1B beneficiary employee is performing the professional job

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on which the H-1B petition is based.

To date, it does not appear that fraud detection office investigators have been reviewing the H-1B employer's Labor Condition Application file, which the employer must maintain in connection with its obligation to pay the H-1B beneficiary at or above the prevailing wage in the relevant geographical area.

An FDNS audit creates a potential pitfall for H-1B employers that fail to amend their H-1B petitions when the H-1B employee changes job functions or his or her job location. An approved H-1B petition is job-specific, meaning that it authorizes the beneficiary to work for the employer only in the particular position described in the H-1B petition and within the particular geographic areas supported with a Labor Condition Application.

While a mere promotion or advancement of position within the same job classification

may not require notification and pre-approval by USCIS, a change in the beneficiary's job function or job location requires the employer to file an amended petition. Therefore, sponsoring employers that fail to amend their H-1B petitions in a proper and timely manner risk facing an adverse outcome of a FDNS audit.

The penalties of an unfavorable audit include the denial of pending petitions or revocation of previously approved petitions. In addition, in cases of suspected fraud, FDNS will refer the case to Immigration and Customs Enforcement for investigation, which could result in civil penalties, a formal criminal investigation, and criminal prosecution for the employment of unauthorized workers and/or visa fraud.

Attorneys should warn their H-1B client employers about the prospect of an unannounced FDNS site visit and advise them to

seek legal assistance immediately if a FDNS officer arrives at their door. The sponsoring employer should request that its attorney be present for the site visit and interviews, at least by phone if not in person.

Your clients should prepare for such a visit by reviewing their pending and approved H-1B petitions to ensure that the H-1B beneficiary employee will work, or continues to work, in the position and on the same terms and conditions described in the petition. They should also verify that the position requirements and the beneficiary employee's academic degrees and prior work experience are accurately stated in the petition. H-1B visa sponsorship should not be taken lightly by Connecticut employers, as employers are now facing a real and significant risk that they will be held to their attestations by way of unannounced audits and site visits. ■