DON'T BE "SURPRISED" BY GOVERNMENT SITE VISITS

Employers across the country have reported unexpected worksite "visits" in July and August from government agents or contractors with questions related to immigration compliance. In addition to worksite raids and investigations into the employment eligibility of the workforce, the government has begun aggressively reviewing the work status and working conditions of foreign national employees who have been sponsored for H-1B work visas.

Unlike worksite "raids" conducted by the U.S. Immigration & Customs Enforcement (ICE), these "visits" are conducted mostly by contractors, and are focused on information provided in H-1B petitions filed on behalf of H-1B employees. Although "surprise" site visits have been conducted randomly for the last several years, the U.S. Citizenship & Immigration Service (CIS) has confirmed that the government has expanded the CIS "Administrative Site Visit and Verification Program." Three compelling factors justify the program's expansion:

1. Accumulation of hundreds of millions of dollars in "Fraud Detection & Prevention" filing fees collected thus far for all initial H-1B and L-1 petitions filed since March of 2005;

2. September 2008 findings of the Office of Fraud Detection and National Security (FDNS) division of the National Security and Records Verification Directorate, which reported that over 20% of H-1B filings contain technical violations or are simply fraudulent; and

3. U.S. Department of Homeland Security Secretary Janet Napolitano's very public commitment to increase enforcement of the H-1B program – specifically, fraud prevention tactics and investigation, including site visits. "We're going to keep at this to make sure that the intent of that program is being fulfilled," she stated when asked about H-1B fraud and abuse.

As enforcement by ICE and CIS against employers exponentially increases – it is critical that employers immediately intensify their focus on immigration compliance.

CIS Study Finds Violations in Over 20% of H-1B Filings

CIS released findings from the Benefit Fraud and Compliance Assessment (BFCA) Program in September 2008, which indicated that over 20% of the H-1B petitions reviewed in the statistical sampling contained technical violations or actual fraud. The report concludes, "Given the significant vulnerability, USCIS is making procedural changes. . ." On-site visits are part of the change, as confirmed by Secretary Napolitano and CIS Spokesperson David Santos.

Eighty percent (80%) of the fraud or technical violations reported was discovered during site visits, according to the report. Violations range from the technical – job location not listed on the LCA or I-129 – to the obviously fraudulent – signatures on LCA and/or I-129 forged. One of

the highest percentages of fraud (27%) among the test cases was the failure to pay the employee the prevailing wage for the position. While fraud may result in higher penalties and even potential criminal sanctions, even technical violations are subject to fines and other civil sanctions, which can include debarment from the H-1B program.

Based on reports from numerous employers of all sizes, the CIS has launched a full-scale operation designed to investigate H-1B employers. The operation involves CIS scrutiny of all information provided with an H-1B filing. Although the CIS is not specifically authorized by regulation to enter the workplace and "investigate" H-1B and L-1 employers, refusal to cooperate may trigger a larger-scale investigation if the CIS alerts ICE or the Department of Labor to possible fraud allegations. Employers are therefore advised to prepare for such visits and to determine what information it will discuss with CIS contractors or agents.

Eliminate Surprise - How to Prepare for a Site Visit

In most of the site-visit cases reported within the last two months, the investigators appear with little or no notice to the employer. They normally have a copy of the H-1B petition, and they request to speak to the person listed as the employer contact on the petition, the person who signed the petition, the employee, and/or someone in human resources. Questions focus on both the employer and employee:

1. The Employer – Investigators ask questions relating to viability of the company and the accuracy of the employer information found on the H-1B petition (number of employees; office locations; number of H-1B employees; general business operations – is the company doing what is stated in the petition, and to what extent); and

2. The Employee – Investigators want to meet with the employee and discuss details about his/her job, again to verify what is stated in the petition (wages paid; worksite locations; job duties; credentials to qualify for the position).

As will be discussed in detail below, the employer should decide in advance who its "first responders" will be and who will address any "visitors" from the government. The investigators will normally enter the worksite through the main entrance, so whoever comes in contact with the public or with visitors initially should be instructed to notify the first responder immediately and should refrain from discussing any company or employee information with the investigator.

Ideally, any paperwork filed with the CIS will include only accurate, consistent information about the company. Files should be centrally located, so that the first responder may access information quickly and easily for verification purposes. Employers have found it useful to have payroll records, employee records showing date of hire and work location, and corporate financial information easily accessible.

If upon a quick review of company H-1B files, it is evident that the information provided to CIS has been inconsistent, or that there have been significant changes to the company profile (mergers, name changes, extreme growth or downsizing, publicized layoffs, etc.), it is a good idea to complete an audit of all immigration files and outline discrepancies, so that the first responder can be prepared to discuss any possible discrepancies. It is often prudent to have an immigration attorney prepare the company for such a review. Finally, if identified discrepancies are simply

errors, or material facts have changed over time, it may be necessary to amend the H-1B petition to accurately reflect the new facts.

Get Organized - Audit H-1B Public Access Files for Compliance

All H-1B employers are required to maintain "Public Access" Files for each H-1B petition filed. These files must be housed at the work location or at the company's primary place of business, and they must be available for public review. Employers are required to keep specific documentation in the Public Access Files as evidence that the employer is paying at least the prevailing wage for the position. This information, including all worksite locations at which the employee will be performing work for longer than what is considered a "short-term placement," must be certified by the Department of Labor via the Labor Condition Application (LCA). The LCA must be posted by the employer for ten days, and the employee must be given a copy of the LCA.

Requirements regarding documentation to be maintained in the Public Access Files are very specific, as are the regulated time frames for how long the file must be retained, even after the employee is no longer working for the company.

Compliance violation rates related to Public Access File maintenance are typically very high. For this reason, and because these files are subject to review at any time, it is critical that employers review their records to ensure their Public Access files are complete. Independent, supervised Public Access File audits are recommended, so that experts can outline regulatory requirements and analyze each file for compliance. Any violations which are subject to remedy should be remedied immediately.

Update Compliance Policies Now

The American Immigration Lawyer's Association has released information that over 25,000 U.S. businesses will be subject to surprise H-1B site visits as part of this new fraud-investigation initiative. In particular, H-1B employers are advised to do the following:

1. Review compliance policies immediately to ensure that Public Access Files for H-1B employees are compliant;

2. Designate one or two employees to respond to government investigators – all employees should know to direct any outsiders to those designees; and

3. Review immigration files to ensure that all H-1B immigration paperwork is accurate and that the information is easily accessible.

Because the $500 Fraud Detection and Prevention Fee collected in each H-1B and L-1 case since March of 2005 was also intended to fund fraud investigations into L-1 cases, it L-1 employers should proactively review immigration paperwork for accuracy and compliance, as well. Although the CIS is not authorized by regulation to directly impose fines on employers, the CIS may: notify the U.S. Department of Labor (DOL) of violations, in order to initiate a DOL investigation; scrutinize future petitions more heavily; revoke petitions, thus revoking nonimmigrant status and work authorization.

Revisit Staffing Decisions and Methodologies

On-site visits may uncover temporary or contract workers whose employment situations could raise factual disputes regarding the requisite employer/employee relationship and contractual agreements between the staffing agency and the employer. Further, the presence of employees of staffing companies and contract workers on employer premises in H-1B, L-1 or E visa status, and who are working in positions fundamental to the company's operations could lead to additional, more serious lines of inquiry. There are legal restrictions on placing these types of nonimmigrant workers on job sites other than those of the employer named in the nonimmigrant visa petition. Under existing practice, ICE will often hold the employer/premises owner responsible for the immigration violations or omissions of sub-contractors with respect to "temp workers." While the law may or may not support the government's legal posture, industry practice has capitulated in tacit agreement under what is now referred to as "the Wal-Mart Standard."

Therefore, it is critical to review the factual and contractual employment situation of all contract, temporary, or other "non-employee" workers placed at each job site. An audit of the contracts governing such work is required, to ensure the following:

1. The entity providing contract or temporary workers specifically certifies that it has verified the identities and employment authorization of all workers, and that it is, and will remain, compliant with all relevant state and federal regulations; and

2. That any foreign national contract or temporary workers that require employment-based sponsorship for employment in the U.S. (most commonly, H-1B and L-1 workers) are specifically authorized by the Department of Homeland Security to work at a third-party job site and to perform the duties required.

Finally, all employers should ensure that Form I-9 compliance policies and protocols are current and consistently applied in all offices for all employees. Foster Quan attorneys have confirmed that CIS and ICE are working in coordination with the Social Security Administration and the DOL on several enforcement initiatives, especially related to Form I-9 enforcement, and it is expected that such coordinate initiatives will become more prevalent.

Compliance starts with comprehensive policies, a trained, well-informed staff, and consistent practice. Legal experts can assist with efficient file audits and policy implementation and training, and can offer peace-of-mind in an enforcement-rich environment.

For more information on this topic, please see:

http://www.fosterquan.com/bulletins/uscisreportedlytoconductrandomvisits.pdf

http://www.fosterquan.com/bulletins/texasemployershithardbynewiceinitiative.pdf