



u.s. employers should prepare for on-site visits by uscis

MSK Client Alert

February 2, 2012

By Frida P. Glucoft and Janice K. Luo

The U.S. Citizenship and Immigration Services ("USCIS") has increased its antifraud staff with contractor inspectors to perform thousands of on-site visits to U.S. companies that employ H-1B and L-1 foreign workers. These on-site inspections illustrate the U.S. Department of Homeland Security's new attitude and enforcement efforts focusing on employer prosecution for noncompliance with U.S. immigration laws. These visits are performed by the USCIS Fraud Detection and National Security (FDNS) unit funded by the mandatory antifraud fee of \$500 that U.S. Employers must pay the USCIS when filing H-1B and L-1 visa petitions for temporary foreign workers. These ongoing USCIS visits to H-1B and L-1 employer sites occur regardless of whether the employers are large well-known corporations and nonprofit institutions or smaller companies. It is important that U.S. employers understand and prepare for these unannounced visits.

The objective of the USCIS visits is to confirm the bona fide nature of the petitioning U.S. employer as an operating company, verify the identity of the U.S. employer and foreign worker beneficiary, and ensure compliance with the terms and conditions of the nonimmigrant work status. Simply put, the USCIS wants to confirm that the H-1B or L-1 foreign worker is actually working for a bona fide U.S. employer in the position and location and earning the salary stated in the corresponding petition filed with USCIS. Without statutory or regulatory authority, search warrants, or subpoenas, USCIS is required to obtain employer consent to conduct the site visit and review the H-1B and L-1 files of the employer. The USCIS agents must also request employer consent to interview the H-1B or L-1 foreign worker, to review documents in support of the petition, and to enter the employer's premises to visually confirm that the foreign worker is employed in compliance with the terms of his visa category. An employer may request that it be given a reasonable period of time to produce the relevant documents. However, it is best to be prepared.

attorneys

Frida P. Glucoft

Janice Luo

practice areas

employment litigation & counseling

immigration

immigration

labor & employment

labor litigation & counseling



u.s. employers should prepare for on-site visits by uscis

Designate a Company Representative to “Host” the USCIS Site Visit

In preparation for one of these surprise site visits, U.S. Employers should designate one person in the company to host the USCIS agent. It is preferable that this company representative be in Human Resources and have knowledge of the H-1B and L-1 foreign workers and the immigration process. The company receptionist and any other relevant employees should be notified of the possibility of site visits so that, when the USCIS agent comes to the U.S. employer site, the designated employer representative will be immediately notified to meet with the agent and host the visit. Usually, the USCIS inspectors arrive for the visit with a uniform checklist of questions for the employer, and they ask to meet with specific individual H-1B or L-1 visa employees to verify compliance with immigration laws.

Maintain Complete and Updated H-1B/LCA and L-1 Visa files

With regard to H-1B foreign workers, the required Labor Condition Application (“LCA”) files should be reviewed and ready for presentation to USCIS and Department of Labor agents, if requested. The LCA files should contain attestations regarding the H-1B wage paid, which must be no less than the greater of either the actual wage paid to the employer’s other employees at the worksite with similar experience and qualifications for the specific employment in question or the prevailing wage level for the occupational classification in the area of intended employment; notification to the workforce for nonunionized employers or notice to the bargaining representative for unionized employers; maintenance of documents related to working conditions and lack of labor disputes, among other LCA requirements promulgated by the U.S. Department of Labor. In addition, the employer should have proof in the LCA file that it provided the H-1B employee with a copy of the certified LCA.

In addition, the notice of posting that is part of the LCA file should be readily available with the dates posted.

With regard to L-1 foreign workers, the executive, managerial, or specialized knowledge nature of the job duties should be clear in the petition documentation and correspond with the job duties of the individuals at the worksite. In addition, the corporate structure detailed in the petition should continue to meet L-1 visa requirements.

Under immigration regulations, if any material changes have occurred in the H-1B or L-1 employment, the employer must file amendments to the respective petitions with USCIS. For H-1B workers, the LCA file must also be updated with a new LCA if there are changes in the employment, such as worksite location. Employers should review their immigration policies regarding layoffs and terminations and maintain proper documentation of these layoffs and terminations, particularly with regard to H-1B layoffs and terminations, which often require the employer to provide return transportation abroad and proof of compliance.

Perform Internal Audits

As a broader precaution, employers should perform regular internal audits of their immigration compliance practices, including Forms I-9 and H-1B Public Access files. Typically, when immigration attorneys conduct internal audits on behalf of employers, many technical violations and often more serious problems are discovered. Performing voluntary internal audits provides employers with the necessary confidence that they are



u.s. employers should prepare for on-site visits by uscis

properly complying with immigration regulations and I-9 requirements in case of an I-9 audit by Immigration Customs Enforcement (ICE), an H-1B or L-1 audit by the USCIS, or an H-1B (LCA) audit by the U.S. Department of Labor.

If you have any questions about this alert, please contact the authors.