

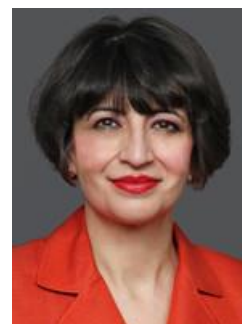
Employers Can Anticipate Aggressive H-1B Inquiries

Law360, New York (April 5, 2017, 1:49 PM EDT) -- On Tuesday, the opening day of the fiscal year 2018 new, quota-subject H-1B visa filings, U.S. Citizenship and Immigration Services announced that the agency is launching multiple additional measures to combat H-1B visa fraud and abuse. The measures form part of the Trump administration's policy to put "American Workers First." As noted on the "Combating Fraud and Abuse in the H-1B Visa Program" section added to the USCIS website: "[pr]otecting American workers by combating fraud in our employment-based immigration programs is a priority for USCIS."

Protection of Wages and Job Opportunities for U.S. Workers

USCIS provides five indicators of fraud and abuse, each of which supports its stated mandate to protect U.S. workers by preventing all employers from abusing the H-1B program by "decreasing wages and job opportunities [for Americans] as they import more foreign workers." (See *id.*) The H-1B fraud indicators highlighted are:

- The H-1B worker is not or will not be paid the *wage certified on the labor condition application (LCA)*.
- There is a *wage disparity* between H-1B workers and other workers performing the same or similar duties, particularly to the detriment of U.S. workers.
- The H-1B worker is *not performing the duties specified in the H-1B petition*, including when the duties are at a higher level than the position description.
- The H-1B worker has *less experience than U.S. workers* in similar positions in the same company.
- The H-1B worker is not working in the intended *location as certified on the LCA*.



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(See id (emphasis added).)

The emphasis on potential wage disparities, misrepresented job duties or locations, and experience shortfalls signify a notable departure from the more straightforward audits USCIS has conducted in the past. With a clear mandate to protect U.S. workers and detect fraud and abuse, employers should anticipate aggressive inquiries. They will need to be prepared to demonstrate how their wage-setting, staffing and performance management systems are consistently applied to all workers.

New Vehicles for Fraud and Abuse Detection

USCIS has addressed three principal vehicles for enhanced fraud and abuse detection and prevention: (1) provision of a new email address for individuals who suspect H-1B fraud and abuse to report their information; (2) an “extraordinary circumstances” provision allowing individuals whose status has lapsed to file for H-1B status or to change their nonimmigrant status if they indicate they may face retaliatory action from their employer for reporting an LCA violation; and (3) expansion of site visits to target specific employers and worksites (see below). (See id.)

1. Inviting the Public to Report Suspected Fraud and Abuse

USCIS is inviting policing of infractions by the public through a virtual tip line to report H-1B fraud and abuse. Any individual, including American workers and H-1B workers “who suspect they or others may be the victim of H-1B fraud or abuse” are invited to email ReportH1BAbuse@uscis.dhs.gov to submit tips, alleged violations and other relevant information about potential H 1B fraud or abuse, with the petitioning employer name, the worksite or employer address, a full description of and other information that may be useful to investigate the alleged fraud or abuse, and the reporting individual’s email.

In addition, individual’s are encouraged to report issues to the U.S. Department of Labor’s Wage and Hour Division — which oversees compliance with LCAs of employers, including that they are paying H-1B workers the required wage (i.e., the greater of the prevailing market wage or the actual wage paid by the employer to other workers with similar experience and qualifications performing the specific job) — by submitting Form WH-4. In addition, USCIS invites the public to contact U.S. Immigration and Customs Enforcement by completing the HSI tip form. The latter is reserved for reporting of suspected criminal activity.

2. Protecting H-1B Whistleblowers Who Have Had or Currently Have Lapses in Their H-1B Status

Individuals who report violations, in cases where the individual has lost his or her H-1B status and “indicates that they faced retaliatory action from their employer because they reported an LCA violation,” are now eligible for an “extraordinary circumstances” exception to allow them to extend their lapsed H-1B status or change to another nonimmigrant status. While USCIS has discretion to forgive such status lapses in specific and limited circumstances, this application of “extraordinary circumstances” appears to be unrestricted provided the individual alleges retaliation. This provision was included in the final rule published on Nov. 18, 2016, which took effect on Jan. 17, 2017.

3. Site Visits Target Workplace Scenarios USCIS Considers Most Problematic

USCIS has conducted random administrative site visits since 2009 to review if employers and foreign

worker are complying with the requirements governing the H-1B classification, verifying wages, job duties and work locations. As of April 3, 2017, USCIS will expand its site visits and target three particular types of employment:

- **Employment by “H-1B-Dependent” Employers:** Employers will be targeted who have a high ratio of H-1B workers as compared to U.S. workers — typically 15 percent for large employers[1] — and who the agency believes may be evading their obligation to make a good faith effort to recruit U.S. workers or, alternatively, to pay the H-1B workers a statutory minimum of \$60,000 per year and derive an exemption from the recruitment obligation by virtue of that minimum payment.[2]
- **Employment Placing H-1B Workers at Third-Party Workplaces:** Employers who place H-1B workers at third-party, e.g., client, sites will be reviewed. Two key issues are likely to be addressed by USCIS. First, has the sponsoring employer maintained a bona fide employer-employee relationship, including the right to control the work of the H-1B worker? Second, has the sponsoring employer complied with its LCA obligations, including provision of notice of hiring of the H-1B workers, at the third-party worksites?
- **Employment for a Company Lacking Confirmation of Its Business Through Commercially Available Data:** Employers whose business information cannot easily be validated through commercially available data will be targeted by USCIS in order to assess if the sponsoring employer has a legitimate business with the ability to employ and pay H-1B workers.

Guidance for Employers

In view of this new announcement, and its immediate effect, employers will need to engage in several actions:

1. Review company audit protocols and educate security and reception personnel regarding whom to contact and advise of an auditor visit.
2. Review H-1B public access files (PAFs) to ensure the company has maintained the records required by the regulations, including those regarding wage-setting, prevailing wage assessment, annual salary, and bonus consideration, benefits and notices of the posting of the H-1B LCA. In addition, employers should ensure the PAFs do not have other information not required for inclusion. Including an index to the materials in the PAFs that tracks the regulations is a best practice.
3. Prepare a list of other documents that the employer plans to provide if requested, such as payroll records, location/amendment information and underlying H-1B petition filings.
4. Provide H-1B workers and their managers with a communication that additional site audits may occur and advise the workers to collaborate and affirm their job duties, title, wage and location. Provide an email “hotline” for employees to notify the employer or seek support.
5. Reinforce escalation protocols for any internal complaints and review any external audit or complaint activity that may affect H-1B workers and the employer’s use of H-1B workers.

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[1] An employer is considered H-1B-dependent if it has:

- 25 or fewer full-time equivalent employees and at least eight H-1B nonimmigrant workers; or
- 26-50 full-time equivalent employees and at least 13 H-1B nonimmigrant workers; or
- 51 or more full-time equivalent employees of whom 15 percent or more are H-1B nonimmigrant workers.

8 U.S.C. § 1182(n)(3)(A); 20 C.F.R. § 655.736(a).

[2] An employer is exempt from the attestation requirements associated with H-1B dependency if the sponsored employee: (1) receives wages at an annual rate of at least \$60,000; or (2) has gained a master's or higher degree or its equivalent. 8 U.S.C. § 1182(n)(3)(B); 20 C.F.R. § 655.737(b).