

Employer Steps For Avoiding Business Travel Mishaps

By Elizabeth Espín Stern, Paul Virtue and Grace Shie

Law360, New York (June 23, 2017, 10:25 AM EDT) -- In the first several months of his term, President Donald Trump and his administration have taken a number of steps to further his campaign promise to tighten U.S. border security. These efforts have included a widely publicized travel ban that remains enjoined by the courts as well as so-called “extreme vetting” measures designed to heighten scrutiny of U.S. visa applicants and inbound travelers.

The steps taken by the Trump administration have signaled a new era in global mobility, both in the United States and throughout the world, in which cross-border travelers should expect more advanced investigation techniques by immigration officers as well as increased scrutiny and examination for even seemingly routine international travel.

Visa Applications

The enhanced scrutiny has taken several forms affecting U.S. employers and business travelers and is evidenced by recent delays in the U.S. Department of Homeland Security’s approval of employees’ visa petitions and review of applications for visa-free travel through the Electronic System for Travel Authorization (ESTA). U.S. employers and their workers have experienced similar delays in the consular approval of visa applications by the U.S. Department of State.

- **DHS:** DHS components, including U.S. Citizenship and Immigration Services and Customs and Border Protection, have increased their scrutiny of eligibility requirements for the most common nonimmigrant visa categories, including the H-1B visa for professionals working in specialty occupations and the L-1 visa for intracompany transfers working in managerial or specialized knowledge positions.

Before foreign workers may begin employment, employers generally must first obtain approval of a nonimmigrant visa petition from USCIS. Employers should now expect increased processing times for this petition process. For instance, the elimination by USCIS of its premium processing



Elizabeth Espín Stern



Paul Virtue



Grace Shie

service for H-1B petitions has significantly changed processing times in this visa category. The premium processing service guaranteed a response from USCIS within 15 calendar days of petition filing, while regular, nonpremium processing of H-1B petitions requires up to nine months. Employers also have faced more detailed inquiries regarding the eligibility of workers in both the H-1B and L-1 categories. With more frequency, USCIS has been responding to petitions with comprehensive requests for evidence (RFEs) that require the petitioning employer to submit additional evidence of eligibility.

DHS has also increased scrutiny of visa-free ESTA travel, which entitles qualifying nationals from 38 countries to travel to the United States for up to 90 days for purposes of business, pleasure or transit. ESTA applications are submitted electronically to CBP, which has the ability to approve applications instantaneously. Of late, applicants have been subject to additional verifications by CBP with more frequency, even where no indication for heightened scrutiny is present. These additional verifications may delay ESTA approval by several weeks or trigger denial of an ESTA application even for an applicant who appears facially qualified and has been approved for ESTA travel in the past.

- **DOS:** The DOS maintains jurisdiction over the issuance of visas for purposes of travel authorization to the United States. Travelers must generally complete an online visa application and then schedule a visa interview at a US consular post abroad before traveling to the United States for purposes of employment. Following the visa interview, the consular post will normally review the visa application and render a decision in approximately five business days. In this new era of scrutiny, however, the DOS has increased its use of “administrative processing,” i.e., background checks, to conduct further verifications of visa applicants, even for applicants who seem facially qualified for visa issuance. DOS administrative processing review generally requires up to 60 days to be completed.

The DOS has also suspended the Visa Interview Waiver Program, which had permitted certain classes of visa applicants to renew visas without an in-person visa interview. The in-person interview requirement has increased visa processing time for these individuals.

As outlined in the “Then and Now” table below — which highlights the top trends affecting employee travel — employers should budget additional time for workers to secure U.S. work and travel authorizations, regardless of visa category or country of origin.

Travel Category	Then (pre-2017)	Now (2017)
ESTA	72 hours or less (possibly immediately), with routine approvals	Up to 3 weeks, with more security checks and denials in the past 60 days, including for frequent travelers with travel to or origin from the Middle East
B-1	3–5 business days	Up to 60 calendar days, with a high volume of security checks and higher rate of denials (for either security or “immigrant intent” reasons)
Visa applications based on H-1B, L-1 or other work-authorized approvals	Relatively short processing, unless country of origin is or recent travel was tied to a high-security country	Unpredictable processing times due to increasing volume of security checks, including for individuals with family who have traveled to the Middle East or other countries of concern
US-Canada border travel	Easy entry unless a traveler had a legacy visa denial or criminal background or was applying for a problem category (e.g., TN management consultant)	High scrutiny even for relatively short business travel. Multi-year TN holders questioned about “immigrant intent.” L-1 border applicants rigorously questioned about job role and duties. NEXUS card holders pulled into secondary inspection more frequently to validate eligibility.

Employers should adjust their U.S. immigration practices to take into account the effects of the increased scrutiny and processing delays noted above.

- Employers should submit visa petitions for L-1 workers at least nine weeks in advance of the workers' proposed start date to ensure sufficient time for DHS and DOS processing. For workers from Middle Eastern or Muslim-majority countries, submission up to 16 weeks in advance is recommended.
- Employers with employees traveling to the United States for business travel should also reserve additional time to ensure approval of ESTA or a B-1 visitor visa. ESTA applications may require up to three weeks for a decision to be rendered by CBP, and B-1 visa applications may require up to 60 days of administrative processing by the DOS.

Additional Scrutiny for Business Trips

Following visa issuance, travelers arriving in the United States for a business trip should expect additional questioning and review of admission criteria upon their arrival. Business travelers should prepare to have the details of their trip scrutinized by CBP upon arrival and, therefore, be ready to answer questions and provide documentation to prove the following:

- The purpose of the trip is to conduct business for a short period of time and not to serve as a substitute for productive employment in the host country.
- The activities that the business visitor will perform in the host country will benefit the employer in the home country.
- The home country employer maintains exclusive personnel authority (hire/fire/evaluate/promote) and will pay the business visitor's wages.
- The business visitor's time in the host country will not be billed out to a customer, as billable services are typically prohibited.
- The business visitor maintains his/her home country residence and has continuing intent to maintain residence there.

Heightened Scrutiny in Other Countries

The Trump administration's implementation of increased security measures and heightened scrutiny of foreign travelers coincides with similar changes in Western Europe, Canada and Australia. Travelers visiting these regions for business also should prepare for enhanced scrutiny by immigration officials. In particular, employers should provide the international traveler with a letter verifying the purposes of travel, as well as confirming details of the traveler's home-country employment and salary.

On the Horizon

Hand-in-hand with the Trump administration's steps to tighten U.S. border security are reciprocal

initiatives being undertaken by other countries. Employers should anticipate enhanced border controls and scrutiny of travelers worldwide, regardless of jurisdiction, and enhance their own preparation of workers for international travel accordingly.

Elizabeth Espín Stern, Paul W. Virtue and Grace Shie are partners at Mayer Brown LLP in Washington, D.C.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

All Content © 2003-2017, Portfolio Media, Inc.