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3 Signals From USCIS About H-1B And L-1 Visas

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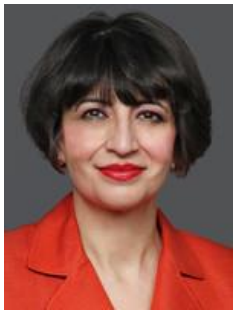

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In the brief period since L. Francis Cissna was sworn in as director of U.S. Citizenship and Immigration Services on Oct. 8, 2017, three government announcements have reinforced the administration's focus on policing abuses and preventing fraud in the H-1B and L-1 visa programs. USCIS is actively working to reinforce President Donald Trump's "Buy American, Hire American" directive and the White House's recently announced immigration priorities.[1] Together, the three announcements signal that employers can expect USCIS not only to second-guess the validity of H-1B and L-1 petitions but to search for opportunities to investigate and penalize employers, particularly when en masse technology talent is part of the work corps or the company's vendor personnel.

Announcement One: The U.S. Department of Homeland Security Office of Inspector General finds that USCIS site visits provide "minimal assurance that H-1B visa participants are compliant and not engaged in fraudulent activity."

On Oct. 20, 2017, the DHS Office of Inspector General submitted a report summarizing its audit of USCIS's "Administrative Site Visit and Verification Program" (ASVVP), concluding that "USCIS site visits provide minimal assurance that H-1B visa participants are compliant and not engaged in fraudulent activity."

The report concluded that USCIS's ASVVP program had multiple shortfalls related to the limited number of site visits conducted, a lack of training and a failure by inspectors to take proper action in instances where noncompliance is detected. The report further outlined a lack of agency tracking of visits, associated costs and outcomes.

Among the DHS OIG recommendations, which USCIS "concurred with ... and has begun corrective actions to address," are that USCIS should:

1. Enhance tracking of H-1B site visit activity, including tracking of targeted site visits and program costs, as well as analysis of adjudicative actions resulting from the site visits. The report said that USCIS should then leverage this data to develop performance measures to assess the effectiveness of ASVVP and assist with oversight improvements.

2. Further identify data and assessments obtained through ASVVP post-adjudication and implement measures to systematically share this information with external stakeholders.

3. Assess ASVVP to determine the best allocation of resources, including adjustments to the number of site visits per year, random sampling procedures, and the time and effort spent on each site visit. To ensure consistent approaches and documentation for site visits, the report recommended that the assessment also should identify policies, procedures and training requiring an update. The report also recommended developing a career path for site visit officers who wish to remain in investigatory positions.

4. Develop comprehensive policies across USCIS to ensure adjudicative action is prioritized on fraudulent or noncompliant immigration benefits identified by the H-1B ASVVP and targeted site visits.

As a result of the recommendations, with which USCIS concurs, site visits will be prioritized, with a more results-oriented and data-driven approach in the ASVVP program.

Announcement Two: Indian IT suppliers top L-1 usage.

Shortly before Cissna's confirmation, USCIS released data on the L-1 visa usage that confirm that the largest users of the L-1 visa category are India-based IT consulting companies. The report confirmed that the top companies submitting L-1 visa petitions to USCIS were India-based consulting companies that also are high users of H-1B visas, some of which are deemed "dependent" on H-1B visas because a high percentage of their U.S.-based work corps hold H-1B visas.[2]

Announcement Three: New USCIS director's first policy memorandum reverses longstanding policy to defer to previously approved H-1B and L-1 petitions, imposing de novo review standards to assure the integrity of these programs

On Oct. 23, 2017, USCIS released its first policy memorandum under Cissna, which eliminated a longstanding USCIS policy of deference in nonimmigrant extension petitions where the underlying parties and facts remained the same. In 2004 and 2015 memoranda, USCIS had instructed reviewing officers to give deference to the findings of a previously approved petition as long as the key elements were unchanged and there was no evidence of a material error or fraud related to the prior determination. The updated policy guidance rescinds the previous policy.

In the announcement of the revised policy, the USCIS director noted that "USCIS officers are at the front lines of the administration's efforts to enhance the integrity of the immigration system. This updated guidance provides clear direction to help advance policies that protect the interests of U.S. workers."

In practice, the change in policy increases the scrutiny on nonimmigrant extension petition adjudications, including in the H-1B and L-1 context.

Guidance for Employers in View of These Developments

With the addition of a seasoned agency veteran, Cissna, USCIS is poised to take multifaceted action to enforce its goals — eradication of fraud and abuse in the H-1B and L-1 visa programs. In light of this, employers should review each aspect of their visa programs: candidate selection, execution of visa

filings, maintenance of compliance records, and monitoring of ongoing compliance. Key actions to take include:

- Undertaking a close review of how candidates are selected and the standards that the company requires to qualify for a visa.
    - **H-1B:** In the H-1B area, USCIS will consider low-wage or entry-level skill positions to be an indicator that the employer is abusing the system.[3]

    - **L-1A:** Similarly, managerial duties for L-1A classification should be closely examined with realistic assessment of whether the level of direct production or delivery of duties compromises the stance that the person is a manager.

    - **L-1B:** Specialized knowledge qualifications for L-1B classification should be closely scrutinized, particularly if the candidate is relatively new to the company. While L-1 status may be premised on only one year's tenure for a foreign affiliated enterprise, the company's ability to demonstrate that the individual has acquired a level and depth of knowledge of its uniquely specialized processes, methods or systems in that short of a period is likely to raise challenges.

- Ensuring that legal, human resources and global mobility all have a line of sight into the use of H-1B and L-1 visas and creating escalation protocols that allow legal to monitor compliance.

- Considering adopting an "integrity" policy to demonstrate the company's commitment to appropriate use of the visa categories.

- If the company is placing its H-1B or L-1 visa holders at customer sites, ensuring the direct management, supervision and control of the workers is exclusively the domain of the company, not the customer. An audit trail that confirms this point is essential, and affirmation of that personnel authority and supervision should be maintained in the filing.

- When a material change occurs, including any site change outside of normal commuting distance in the H-1B arena, adhering to the amendment requirements in the regulations for each category. When in doubt, employers should consult with the company's experts on global mobility and outside counsel.

- When relying on third-party staffing of functions such as information technology (IT), using suppliers that are reliable and willing to certify their compliance with immigration and employment regulations. Employers should ensure that service agreements include the supplier's affirmation that it will only use subcontractors that are approved by the company and who supply similar certifications.

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information purposes and is not intended to be and should not be taken as legal advice.

[1] The executive order identified, among other priorities, creation of "higher wages and employment rates for workers in the United States, and to protect their economic interests." The immigration priorities confirmed the administration seeks to strengthen laws against visa fraud and expand enforcement.

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

- 25 or fewer full-time equivalent employees and at least 8 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.

[3] See Policy Memorandum, "Rescission of the December 22, 2000 Guidance memo on H1B computer related Positions," March 31, 2017, available at https://www.uscis.gov/sites/default/files/files/nativedocuments/PM-6002-0142-H-1BComputerRelatedPositionsRecission.pdf.