

IMMIGRATION

INTERAGENCY COOPERATION: RAISING THE BAR FOR IMMIGRATION COMPLIANCE

by Kathleen Campbell Walker¹

On April 2, 2018, U.S. Citizenship and Immigration Services (USCIS) should again be open for business for a flood of H-1B petition filings, which are subject to the annual cap. Employers are required to pay [the higher of the actual or prevailing wage](#) for the area of intended employment to sponsor an H-1B specialty occupation visa. Last year, USCIS received enough petitions ([199,000](#)) to meet the numeric cap (85,000) on [April 7, 2017](#).

Based on developments which followed the execution of the [“Buy American, Hire American” \(BAHA\) Executive Order \(EO\)](#) on April 18, 2017, both employers and employees have a new list of compliance considerations to review as part and parcel of their H-1B petition process.

One of the key considerations is tied to increased oversight of submissions by an H-1B visa applicant and the petitioning employer with the various applicable branches of government. Stove-piped legal representation is not advisable. (e.g., only focusing on one agency segment or one portion of a filing process) While USCIS still [struggles with its transformation project](#) to achieve electronic filing for its petitions, attorneys and employers must make sure that representations made to USCIS and to the Department of Labor (DOL) in the petition process are also being addressed with any Department of State (DOS) consular visa application, which is also an adjudicative process. In addition, employers must be ready for increased site visits as well as inquiries from federal agencies regarding ongoing compliance with terms stated in visa applications and petitions. Just as employers must prepare for increased Form I-9 form compliance visits,² they must be equally ready for visa/petition based agency oversight visits or inquiries as to compliance with visa/petition representations.

Background:

On [June 6, 2017](#), the Wage and Hour Division (W&H) of the Department of Labor (DOL) announced actions to increase protections of American workers and an intent to increase pursuing entities aggressively that commit visa program fraud and abuse, particularly in the H-1B context. Subsequently, on January 5, 2018, DOL launched a [new H-1B enforcement website](#), which states that the DOL’s policy is to enforce *vigorously* all laws, within its jurisdiction, concerning nonimmigrant visa programs. Some of the enforcement actions listed are:

- W&H is using all of its tools in conducting civil investigations to enforce labor protections provided by the visa programs.
- The Employment and Training Administration (ETA) is developing proposed changes to the Labor Condition Application (LCA – used in H-1B related filings) and new investigatory forms to better identify systematic violations and potential fraud and to provide

greater transparency for agency personnel, U.S. workers, and the general public.

- W&H, ETA, and the DOL Office of the Solicitor are coordinating the administration and enforcement activities of the visa programs and making referrals of criminal fraud to the Office of the Inspector General (OIG).
- DOL is establishing a working group made up of senior leadership from ETA, W&H, and the DOL Solicitor’s office to supervise this effort and coordinate enforcement to avoid duplication of efforts and maximize the efficiency of the department’s activities regarding the visa programs.

There is also a reference to the new USCIS e-mail address for the report of H-1B fraud or abuse at ReportH1BAbuse@uscis.dhs.gov on the website as well as a link to how U.S. workers [may report discrimination](#) against them based on their citizenship or national origin by employers preferring to hire an H-1B worker to the Immigrant and Employee Rights (IER) section of the Department of Justice’s (DOJ) civil rights section.

This potential website development was outlined in the prior [OIG Brief of the DOL back on May 24, 2017](#). The Brief notes that OIG agents of the DOL received special deputation from the DOJ, in conjunction with the multi-agency Anti-Trafficking Coordination Teams (ACTeams) Initiative, to investigate labor trafficking violations and other federal crimes. Enforcement cases described in the Brief include examples of those entering guilty pleas for submitting false documents to the DOL and to USCIS as well as those requiring the payment of unlawful kickbacks and the creation of false payroll records.

In addition to these DOL enforcement developments, DHS entered into a number of cross-agency agreements to improve inter-agency cooperation and access to data regarding H-1B compliance in particular. Most of these agreements were referenced in the October 20, 2017 DHS OIG report entitled, [“USCIS Needs a Better Approach to Verify H-1B Visa Participants.”](#) In the report, the USCIS Fraud Detection and National Security (FDNS) division indicated that it plans to **double** site visits in fiscal year 2018 depending on budget and resources. (i.e., 10,000 to 20,000) The report also outlined a higher level of coordination for compliance purposes between DOS and USCIS to enhance the sharing of USCIS site visit information through the External Source Site Visit and Verification Program of FDNS. In addition, on [October 11, 2017](#), [DOS announced a partnership with the Civil Rights Division](#) of the Department of Justice (DOJ) to protect U.S. workers from discrimination and to combat fraud by employers who misuse visas. USCIS also indicated that it would use its Targeted Site Visit and Verification Program (TSVVP), which was launched in April of 2017, to provide more focus on:

- Cases in which the employer’s basic business information cannot be verified through commercially available data;
- H-1B dependent employers who have a high ratio of H-1B workers compared to U.S. workers; and

- Employers petitioning for beneficiaries who work offsite at another company or organization's location.

It is important to note that DOS is using the Visa Office in Washington, D.C. to make inquiries in the U.S. to H-1B employers regarding H-1B compliance. The e-mail address used is clientverification@state.gov. Please refer to Attachment 1 for typical questions. Information provided to FDNS or to the DOS verification unit is shared between the agencies.

If an individual responding for an employer to any of these agency inquiries is not trained as to the importance of why job duties, compensation, and location are critical for compliance, it is not difficult to imagine confusion being created with potentially serious repercussions. So, just as one might prepare for a Form I-9 audit visit from Immigration and Customs Enforcement (ICE), Homeland Security Investigations (HSI) officers, such compliance protocols are equally applicable for nonimmigrant work related visa compliance, particularly as to H-1B employees.

Some Must Dos:

1. Employers should conduct an internal compliance audit to make sure that they have procedures in place to monitor that the terms of the nonimmigrant visa as to location, duties, and compensation remain unchanged.
2. Employees should be a part of the compliance process and must know the scope of their authorized duties and the locations authorized. Reporting to human resources regarding possible changes must be encouraged.
3. Any communications with compliance agents from the government should be documented and addressed by those with training and responsibility as to compliance with the nonimmigrant visa requirements.
4. Each interaction with an agency, whether USCIS, DOL, or DOS should be treated as an adjudication. (There is no just going to get a stamp at the consulate.) It is critical that benefit applicants and their employers be prepared for compliance related questions. A visit with competent legal counsel should also be on the list.

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² Immigration Customs and Enforcement (ICE) Director Thomas Homan announced on October 17, that he planned to increase I-9 form [worksites](#)

[compliance operations by four to five times.](#)

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DW Immigration: Global Mobility with a Personal Touch!

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Attachment 1 – Compliance Questions

What is the current/ongoing relationship between [end user] and [contractor]?

If there is no direct relationship between, [end user] and [contractor please provide the name and contact information of any intermediary staffing agencies.

Looking at the letter we sent to you – can you verify that this is your company's letterhead or stationery? If it is not, please describe what is different.

- After reviewing the information contained in the letter –
- Has it been altered?
- Does the job description mentioned correspond to the individual named in the letter?
- Are the services listed ones your company expects to receive?
- Are the dates of service correct?

Looking at the signatory of the letter – (If you are the signatory, it is preferred that the following questions be answered by another person within the company. Also, please provide their name, title and contact information.)

- Is _____ employed by your company? If yes, what is her title?
- If the person is not a current employee, has she ever worked there? If yes, what were the dates of employment?
- Is _____ authorized to sign this type of letter?
- Does the signatory have the authority to send the attached letter on behalf of your company?
- Can you confirm the signature belongs to _____?
- Does your company use stamped or electronic signatures?

Does [end user] anticipate receiving the services of [H-1B employee]? If the services of [H-1B employee] are not anticipated, is it that the services of this particular individual are not anticipated or is it because the nature of your contract does not require [end user] to know the names of specific individuals assigned to provide the service?

- Regarding the services of the visa applicant, [H-1B employee]-
- What are the beginning and ending dates of his employment?
- What are his job description/duties?
- Provide a project description of the task to which [H-1B user] has been assigned.
- Where is [H-1B user's] physical work location and what company operates at that location?

How many people from the [Contractor/H-1B petitioner] work at the worksite? Are these people working on the same project? If not, what other projects are [Contractor] employees working on at this location? Support Contractor –PAE U.S. Department of State Visa Services Office