

## USCIS to Increase Employer Visits to Deter Visa Fraud

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"Men must turn square corners when they deal with the government." Oliver Wendell Holmes, *Rock Island C.R.R. v. United States*, 254 U.S. 141, 143 (1920).

Employers seeking to hire nonimmigrant (e.g., H-1B, L-1, TN) workers or foreign national employees on a permanent (e.g., I-140, I-360) basis should be prepared to receive an unannounced visit by an officer or contractor from the Office of Fraud Detection and National Security and Records Verification (FDNS), a division of U.S. Citizenship and Immigration Services (USCIS).

The office that evolved into the FDNS was created in 2005 to evaluate the integrity of various immigration benefit programs requiring the adjudication of an application or petition. The FDNS is tasked with investigating and analyzing the fraud vulnerabilities of various benefits programs as well as customer compliance with program requirements.

FDNS' investigations include conducting internal and open source (e.g., Internet, print media) systems queries to verify information supplied in support of applications and petitions. It also includes domestic site visits and overseas verification to validate claimed relationships, employment and qualifications.

If the FDNS concludes that the petitioner or beneficiary of a petition or application for benefits committed fraud against the U.S. government, the FDNS will refer the matter to Immigration and Customs Enforcement (ICE), which will consider whether to institute a formal criminal investigation and/or prosecution. ICE has 60 days either to accept the case for investigation or decline it and return the matter to FDNS.

If ICE declines the case, the FDNS will forward the case and its administrative findings to a USCIS adjudications component to deny, revoke or approve the petition or application. A summary of the fraud investigation is also entered into the FDNS Data System, and that information may be accessed in the future by USCIS adjudicators, FDNS or ICE and be used to compare the indicators of fraud against other petitions or applications filed by the same petitioner or on behalf of the same beneficiary.

### Primary Objectives of Site Visits

The stated primary objectives of the FDNS site visits are:

- Verification of the existence of the petitioning employer.
- Verification of the stated employer/employee relationship between the petitioner and beneficiary.
- Verification that the beneficiary is or will be employed in the capacity specified and at the location(s) specified in the application or petition.
- Verification that the beneficiary has the requisite experience and/or qualifications.
- Reconciliation of any perceived discrepancies.
- Verification of the existence or nonexistence of multiple and/or duplicate filings by the same petitioner.

In addition to searching for incidents of willful fraud (which is defined as the willful misrepresentation, falsification or omission of a material fact), FDNS personnel are also looking for petitioners or beneficiaries that fail to comply with statutory and regulatory requirements of

particular immigration benefits programs (such as compliance with H-1B program wage and working conditions or labor condition application posting requirements) or otherwise engaging in abusive practices.

A pilot investigation program conducted by FDNS in 2006 identified an overall "violation rate" of 20.7 percent with 13.4 percent of the negative findings consisted of fraud (e.g., the petitioner did not exist or the beneficiary was not performing the job alleged in the petition or application, etc.) and 7.3 percent consisted of technical violations of the program (e.g., the beneficiary was not working within an area covered by a submitted labor condition application, the petitioner was not paying at least the prevailing wage for the occupation). Combined with the millions of dollars that are pumped directly into the FDNS' budget as a result of the \$500 Fraud Prevention and Detection Fee that is required with the filing of all new H-1B and L-1 petitions, these findings have created a substantial incentive for the FDNS to continue and expand its investigation of petitioners seeking to hire (or continue to employ) foreign national employees.

### **Investigation Triggers**

The FDNS has not officially announced the circumstances that will trigger an FDNS investigation. However, the following circumstances are more likely to result in an FDNS visit at the petitioning employer's work site. This list is not exhaustive, and the triggering circumstances can be expected to change as FDNS' investigatory database grows.

- The petitioner's gross annual income is less than \$10 million (presumably because the FDNS pilot investigation found that 41 percent of the cases where technical violations or fraud were identified were filed by employers having a gross annual income of less than \$10 million).
- The petitioner has less than 25 employees.
- Staffing or consulting companies whose contracts show no end-client.
- The SOC code listed on the labor condition application does not match the occupational category described in the petition.
- The petitioning employer does not have a web site on the Internet;
- Incomplete, inconsistent, evasive, ambiguous or misstated information on the petition or application, including excessive blanks, inflated figures, etc.
- Questionable educational documents from the beneficiary.
- A mismatch between the occupation for which the foreign national worker is sought and the employer's business needs (e.g., a small convenience store filing an H-1B for an accountant or business analyst).
- Petitioners with a history of abandoning petitions or applications after USCIS have issued a request for evidence.

Because this list is extremely broad, many legitimate and honest employers can be expected to fall within it and subjected to an unwarranted worksite visit by the FDNS. And unless the FDNS ensures that its staff operate under clear standards and are trained in the many legitimate, legal and accepted business entity and commercial formats, practices, procedures and transactions that exist within today's dynamic and global economy, an investigation could result in erroneous conclusions that will be costly to petitioners. The risk of erroneous conclusions will be heightened if the investigator has contact with someone at the petitioning employer who lacks the knowledge, training and authority to answer on behalf of the petitioner.

Therefore, it is critical that all employers who file petitions or applications with USCIS be aware of the possibility of a visit by FDNS to their worksites and be prepared to properly respond to the investigation.

Employers do have the right to have a lawyer assist them with the petitions and applications they file with USCIS and may also insist that their legal counsel be present during any FDNS onsite investigation. However, to date, FDNS has not provided advance notice of a worksite investigation to either petitioners or their lawyers.

Immigration regulations specifically provide that while it is adjudicating a petition or application for benefits, USCIS may conduct an on-site inspection, including a tour of the employer's facilities, interviews of the employer's officials, a review of selected organizational records, and an interview or inspection of any other document or person pertinent to the integrity of the petitioning employer.

The petitioner is not required to speak with or admit an FDNS investigator, but the failure to cooperate with the investigator could lead to a denial of the requested benefit. Therefore, petitioners must balance their desire to obtain the requested benefit with the potential complications with current and future petitions and applications for benefits that a failure to cooperate could cause. On the other hand, cooperating with the investigator where the petitioner has a novel, yet legitimate, business arrangement or model that might be misunderstood by the investigator after a brief on-site visit that may not include discussions with knowledgeable employees is also risky and could result in future complications for such petitioners.

### **Prudent Steps**

So what to do when an investigator from FDNS comes knocking on your door? How should an employer prepare for the possibility of an on-site visit from FDNS triggered by the employer's filing for immigration benefits?

First, employers should centralize all of their immigration activities with a single individual or office within its organization. Centralizing immigration activities will ensure that one central individual or office is aware of the content of and representations made within each of the employer's immigration filings as well as the employer's standard policies and practices as they relate to the recruitment, hiring, retention and dismissal of foreign workers.

Second, employers should consolidate all of their immigration work with one law firm or a small number of law firms chosen by the employer. Consolidating immigration work with one or a small number of immigration service providers will allow the employer to better track the petitions and applications filed on its behalf. Developing an ongoing working relationship with trusted outside legal counsel will also ensure that the petitioner's interests are the immigration-related filings.

Third, employers should develop consistent overall policies, practices and procedures related to the recruitment, hiring, retention, movement, job change and/or assignment and termination of foreign workers. Employers should ensure that all stakeholders in the processes understand these policies and procedures and are held accountable for following them.

Fourth, employers should designate one person primarily responsible to speak with FDNS investigators if a worksite visit occurs. A back-up person should also be designated. The designated persons must be kept aware of all of the petitioner's pending immigration filings. Larger organizations having many separate worksites should designate people to speak with FDNS investigators at their headquarters and at each worksite where there may be employees for whom a petition or application for benefits has been filed.

Fifth, employers should train the people designated to speak with FDNS investigators on the employer's policy in responding to an FDNS worksite visit. Such a policy should include verifying the FDNS' investigator's identity and authority prior to speaking with him, requesting that the employer's immigration counsel be permitted to participate in person or by telephone when the employer, the employer's staff or the beneficiary is being questioned. The policy should also direct designated representatives to take detailed notes identifying the questions asked and responses given during the investigation, worksite areas investigated and any documents delivered to the FDNS investigator. Prior to giving documents to the FDNS investigator, the employer should make a list of the documents. The FDNS investigator should sign the list to memorialize his or her receipt of the documents.

Finally, employers should always contact their immigration counsel immediately to discuss the

on-site visit. This will allow legal counsel to determine whether and how to respond to the government.

Employers may not prevent and should not take steps that may appear to the FDNS investigator to prevent employees (including the beneficiary of the pending petition or application) from speaking with the FDNS investigator. Any employer may, however, offer to pay for the employee to have legal counsel present during questioning and may advise employees of their right to request to have legal counsel present during any investigation.

### Expect More Worksite Investigations

In sum, the trend and the government's intentions are clear—there will be more worksite investigations and increased data mining of employers who file petitions and applications for immigration benefits. These steps should reduce the number of fraudulent filings and other violations, leaving more of a limited number of immigration benefits (i.e., H-1B slots and immigrant visa numbers) available for the legitimate filers and will increase confidence in the immigration benefits system. Still, there is a risk that USCIS will reach an erroneous conclusion that an honest employer has committed fraud, and overcoming such erroneous conclusions will be a difficult and expensive process.

To minimize the risk, each employer should make sure that all of the information and documentation included in a petition or application is well-founded and well-supported. Each employer should also make sure that it is familiar with and confident of the integrity of each and every foreign national on whose behalf it files an application or petition. Finally, each employer must be prepared for the possibility of a worksite investigation.

So far, FDNS on-site investigations have been reported to be professional, not overly invasive and completed quickly, with the requested benefit being issued within a short period after the time of the visit. Therefore, there is no reason for the legitimate employer to be deterred from hiring and working with foreign national employees even under this increased government scrutiny. As with most things, it is just a matter of being prepared.

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