

PRACTICE POINTER: USCIS' FDNS Commences Audit of H-1B Program, Including Unannounced Site Visits to H-1B Employers and Their Clients

The U.S. Citizenship and Immigration Services' (USCIS) Office of Fraud Detection and National Security (FDNS) has recently commenced an assessment of the H-1B program. The following is information that employers (and their immigration counsel) should know about FDNS, FDNS' current H-1B assessment program, and how to respond if an FDNS Officer visits the employer's (or its client's) office as part of this assessment program.

Background: USCIS created the FDNS in 2004 with a mission to detect, deter, and combat immigration benefit fraud and to strengthen USCIS' efforts ensuring benefits are not granted to persons who threaten national security or public safety. FDNS is USCIS' primary conduit for information sharing and collaboration with other governmental agencies, including Immigration Customs and Enforcement (ICE). FDNS currently consists of approximately 650 Immigration Officers, Intelligence Research Specialists, and Analysts located in field offices throughout the United States. Additionally, FDNS has contracted with multiple private investigation firms to conduct site visits on behalf of FDNS. FDNS' budget is derived from the Fraud Fee, which is paid by employers with each initial H-1B or L petition.

FDNS has previously conducted assessments in the L-1, EB-1-3 Multi-National Manager and Executive, and R-1 programs. As part of these assessments programs, FDNS officers collected information during site visits to verify information pertaining to petitions that were both pending and already approved. FDNS also used the information to develop databases to identify factors and trends that could indicate fraud. As previously indicated, FDNS has now commenced an assessment of the H-1B program.

Mechanics of a FDNS Site Visit: Unlike many of the site visits with the L-1, EB-1-3 and R-1 assessment programs, the H-1B site visits for the most part have been unannounced. The site visits may occur at the H-1B employer's principal place of business and/or at the H-1B nonimmigrant's work location, as indicated on the Form I-129 petition (regardless of whether the work location is controlled by the H-1B employer). The employer may request that its immigration attorney be present during the site visit. However, FDNS officers will not typically reschedule a site visit so that an attorney may be present. FDNS has stated that it will allow counsel to be present by phone, if requested.

FDNS has indicated that it does not need a subpoena in order to complete the site visit because USCIS regulations governing the filing of immigration petitions allow the government to take testimony and conduct broad investigations relating to the petitions. The instructions for the current version of the Form I-129 contain a section outlining the USCIS' Compliance Review and Monitoring Methods. In these instructions, the USCIS states that its verification methods may include but are not limited to: review of public records and information; contact via written correspondence, the Internet, facsimile or other electronic transmission, or telephone; unannounced physical site inspections of residences and places of employment; and interviews. The instructions also indicate that the USCIS will provide an opportunity to address any adverse or derogatory information that may result from a compliance review, verification, or site visit after a formal decision is made on the case or after the agency has initiated an adverse action, which may result in revocation or termination of an approval. If such information is not provided by USCIS when it issues the adverse action, FDNS has indicated that the employer may request a copy through the Freedom of Information Act (FOIA).

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During the H-1B site visit, the FDNS officer will normally verify information contained in a specific immigration petition, regardless of the number of H-1B petitions filed by the employer. The FDNS officer will normally have a copy of the petition. The FDNS officer will usually request to speak with the employer's representative who signed the Form I-129. However, because the site visit is unannounced, if this representative is not available, the FDNS officer will then ask to speak with another employer representative, such as a Human Resources Manager. When speaking with the employer's representative, the FDNS officer will ask the employer's representative for specific information about the company, including, but not limited to, the employer's business, locations, and number of employees. The FDNS officer may request to review a copy of the company's tax returns, quarterly wage reports, and/or other company documentation to evidence that it is a bona fide business. The FDNS officer may also request confirmation that the signature on the Form I-129 petition is genuine. The FDNS officer usually will request detailed information about the H-1B nonimmigrant's title, job duties, work location, and salary. The FDNS officer may also request to review a copy of the H-1B nonimmigrant's most recent paystub and last Form W-2. So far, FDNS officers have not been requesting to review the Labor Condition Application (LCA) Public Access file. The FDNS officer may also request information about the number of H-1B petitions that the employer has previously filed and information about the employer's immigration counsel.

After speaking with the employer's representative, the FDNS officer may then request a tour of the employer's facility. During the tour, the FDNS officer may take photographs of the facility. The FDNS officer will then normally request to interview the H-1B beneficiary. During this interview, the FDNS officer may ask the beneficiary about his/her job title, job duties, responsibilities, employment dates, position location, requirements for the position, his/her academic background and previous employment experience, his/her current address, and information about his/her dependents, if any.

After speaking with the H-1B beneficiary, the FDNS officer may then request to speak with a colleague of the beneficiary and/or the beneficiary's manager. When speaking with these individuals, the FDNS officer will again request information about the beneficiary's position title, the position duties, and the requirements for the position.

After conducting the interviews and receiving any requested documentation, the FDNS officer will complete the site visit. H-1B site visits usually last for less than an hour.

Practice Pointers for FDNS site visits:

1. Prior to execution and filing, counsel should obtain written confirmation that the petitioner has reviewed the petition in its entirety and confirmed the accuracy of all information material to the employer's sponsorship eligibility, the beneficiary's eligibility for the status benefit, the nature of the job offer, and the terms and conditions of employment specified in the petition and any supporting documents. If the employer's representative lacks personal knowledge of any material fact, counsel should insist upon such additional investigation as is necessary to confirm the accuracy of such fact prior to accepting the signed petition for filing.
2. If counsel learns at any time that material facts contained in the petition or supporting documents are false, counsel must advise the client of the need to file an amended petition in order to correct the record or to withdraw the petition and otherwise comply with the H-1B regulations with respect to termination of the beneficiary's employment. If the client refuses to agree to accept these recommendations, counsel should withdraw from representation of the client with respect to the petition containing the fraudulent representations and otherwise terminate the client.
3. Although most H-1B site visits have occurred post adjudication, a USCIS adjudications officer may refer an H-1B petition to FDNS for a site visit prior to the completion of an adjudication. This may be especially true with H-1B extensions with the same H-1B employer.

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4. Whether government agents or contractors require a warrant or subpoena in order to enter the private areas of a business to conduct H-1B investigations has not yet been tested. USCIS appears to take the position that submission of the petition by the employer constitutes a knowing waiver of Fourth Amendment rights. Whether or not the agency's position is upheld, if agents are admitted to the premises by representatives of the employer, such action is sufficient to constitute a waiver of Fourth Amendment rights. In general, personnel responsible for greeting visitors should be advised that it is company policy not to admit any unauthorized persons to the private areas of the business, including government agents or contractors, without the approval of a designated company official. In the case of agents or contractors investigating a visa sponsorship petition, the designated official should be knowledgeable of the petitioner's immigration program and the conditions under which the beneficiaries are employed. Generally speaking, counsel who prepared a petition should not volunteer to vouch for the accuracy of the information in the petition, unless he or she has personal knowledge of the facts at issue.
5. Clients should be advised to request the name, title, and contact information for the site investigator. There are multiple governmental agencies that may audit in the H-1B program, including ICE, the USCIS Department of Labor's Wage and Hour Division, and/or the USCIS' National Threat Assessment Unit. Therefore, it is critical that the client determine which agency it is providing information to in the event follow up is needed. If the investigator identifies himself as a USCIS FDNS contractor, request a business card with a toll free number to obtain confirmation of his credentials prior to providing any information.
6. Counsel for the petitioner should be advised of the visitation prior to the conduct of any interviews of petitioner representatives and should attend in person or by phone, if possible.
7. Clients should be advised not to speak with government agents or contractors without a witness present. Both the witness and the interview subject should be debriefed as soon as possible by counsel following the interview. If this is not possible, both the witness and the subject should prepare notes of what transpired at the interview, label them "Privileged and Confidential/Prepared at the Direction of Counsel," and submit them to counsel for review and retention.
8. Clients should be advised to retain complete copies of their I-129 petitions and supporting documents in a confidential file maintained by the designated company official. Should the company elect to submit to interview by an FDNS officer, the designated official should retrieve this documentation and review it prior to meeting with the officer. Some clients may find it advantageous to stage a mock visit under the supervision and direction of counsel and subject to the attorney client privilege, so as to better prepare the designated official for possible interrogation regarding a random petition selected by counsel. Be careful to refrain from coaching the witness during the mock session and always have a firm representative present to memorialize the session in the event you are later accused of coaching.
9. Clients should be advised of the benefit of providing a redacted copy of the I-129 petition and supporting documents to the beneficiary relating to the nature of the job opportunity, the terms and conditions of employment, and the beneficiary's education and prior work history. A mock interview of the beneficiary, with counsel for petitioner and the designated company official present, may be beneficial to relax the beneficiary and prepare him for possible interview. Again, refrain from coaching the witness and have a third party prepare a memorandum documenting what transpired at the session.
10. If the beneficiary has been placed at a client site not controlled by the client, the client should notify the end user about the current FDNS H-1B assessment program and the possibility of a site visit. If there are multiple companies between the H-1B employer and the end user, the end user should be made aware of the identity of the H-1B employer and review the terms of the assignment. The employer should request that the end user company contact the employer at the beginning of an FDNS site visit so that the employer and/or its representative may be present either in person or by telephone during the site visit at the end user's location.

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11. If the employer and/or end user company has secure areas which are not accessible to the public and the FDNS officer requests access to these secure areas, the employer should explain to the FDNS officer about the secure areas and possibly suggest other less sensitive areas in order to conduct interviews with the beneficiary. Although employers should comply with reasonable requests from the FDNS officers regarding the examination of the employer's premises or work areas, the employer should explain if it (or its client when the site visit is occurring at an end user client location) has strict policies against tours or photographs in such areas.
12. If an FDNS officer requests information from the employer and the employer can not provide accurate information without further research, the employer should indicate this to the FDNS officer. The employer should not "guess" about any information provided during the site visit. If the employer is unsure about some requested information, the employer may want to indicate that he/she will follow up with the FDNS officer to provide accurate information after such information is obtained. This is especially important for representatives who do not have access to information being requested by the FDNS officer and there are no other company representatives available to answer the questions during the unannounced visit.
13. A representative of the petitioner (and/or counsel) should accompany the FDNS officer during his/her review of the facilities and request to be present during the interviews of any of the company's employees. This request may be denied in order to obtain the most candid responses from the employee. The interests of the beneficiary and the petitioner are not necessarily the same, and historically, government investigators have refused access to employer representatives and attorneys at employee interviews. The representative should take notes of all information requested and provided – verbally or in writing, the locations visited, the pictures taken (obtain copies), and/or any other relevant information from the site visit. Additionally, a record should be kept of any documentation provided to the FDNS officer during the site visit.
14. Employers should remember that any derogatory information obtained during the site visit could be used to deny a petition if the site visit occurs re-adjudication, could result in revocation of a previously approved petition in the post-adjudication process, and/or could be referred to ICE for further investigation, which could lead to civil penalties or criminal prosecution.

The USCIS Vermont Service Center has indicated to AILA that it has transferred approximately 20,000 cases to the FDNS as part of the H-1B assessment program. It is assumed that the USCIS California Service Center has also forwarded a comparable number of cases for review. This is an addition to the cases that are referred to the FDNS based on a standard profile worksheet, which is completed by the USCIS adjudicators as part of the regular H-1B adjudication process. Therefore, it appears that FDNS officers will be appearing at the offices of numerous H-1B employers (and their clients if the beneficiary is assigned to one of the employer's clients) within the next few months to gather information about their compliance with the H-1B program.

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