Trump Administration Series Part 1: When the Government Comes Knocking: Immigration Audits, LCA and Site Visits

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Trump Administration Immigration Plan

- “The Wall” and focus on enforcement/deportation actions against undocumented
- Two first points on immigration platform hint to enforcement of legal immigration, namely:
  - Prioritize the jobs, wages and security of American people
  - Establish new immigration controls to boost wages and to ensure that open jobs are offered to American workers first
Trump Administration
Immigration Plan

Donald J. Trump’s 10 Point Plan to Put America First, #10:

“Reform legal immigration to serve the best interests of America and its workers, keeping immigration levels within historic norms”
Quotes on H-1B Program

• The H-1B program “is neither high-skilled nor immigration: these are temporary foreign workers, imported from abroad, for the explicit purpose of substituting for American workers at lower pay.”

• “I remain totally committed to eliminating rampant, widespread H-1B abuse and ending outrageous practices such as those that occurred at Disney in Florida when Americans were forced to train their foreign replacements …"I will end forever the use of the H-1B as a cheap labor program, and institute an absolute requirement to hire American workers first for every visa and immigration program. No exceptions."
Quotes on H-1B Program

• Trump said will “direct the Department of Labor to investigate all abuses of visa programs that undercut the American worker.” This he recently reiterated as a task to be completed on the first day in office.

• During a primary debate, Trump said, “I know the H-1B very well. We shouldn’t have it, it’s very, very bad for workers.”
Quotes on H-1B Program

• Trump: “I’m changing. I’m changing. We need highly skilled people in this country, and if we can’t do it, we’ll get them in.

But, and we do need in Silicon Valley, we absolutely have to have. So, we do need highly skilled, and one of the biggest problems we have is people go to the best colleges. They’ll go to Harvard, they’ll go to Stanford, they’ll go to Wharton, as soon as they’re finished they’ll get shoved out. They want to stay in this country. They want to stay here desperately, they’re not able to stay here. For that purpose, we absolutely have to be able to keep the brain power in this country.
Suggested H-1B Reforms

• Higher minimum wages (e.g. minimum salary of $110,000 per year has been suggested)
• Recruitment, like PERM green cards, to ensure no US qualified US workers are available
• Replacing the lottery with a system where companies that pay the highest wages obtain the H-1B quota numbers
• Ban outsourcing companies from the H-1B program
• Reducing the H-1B quota further
Compliance, Compliance and Compliance

WE DON’T KNOW HOW IMMIGRATION PROGRAMS WILL BE REFORMED SPECIFICALLY, BUT WE DO KNOW THAT THERE WILL BE A FOCUS ON COMPLIANCE AND ENFORCEMENT ACTIONS

In the temporary visa context, this means focusing on audits, investigations and site visits with the ultimate goal of monetary and even criminal penalties

BEWARE WE LEAVE IN A REGULATED ENVIRONMENT! YOU MUST LEARN THE LAW!
Labor Condition Application (LCA) Attestations

- Pay the required wage rate (union wage or greater of “actual wage” or “prevailing wage”) – continuing requirement!
  - Requirements on what information must appear on payroll records
  - Requirements as to how and when the wage should be paid, and what deductions are legitimate
  - Requirements of paying the wage during non-productive status
  - Restrictions on penalty clauses for leaving H-1B employment early
  - Reimbursement and penalties (class actions)
LCA Attestations

- H-1Bs get same working conditions as U.S. workers, and employment of H-1Bs will not adversely affect the working conditions of similarly situated U.S. workers
  - Includes hours, shifts, vacation periods, benefits and work schedules

- There is no strike, lockout, or work stoppage in the course of a labor dispute for similarly situated workers where H-1B intended to work

- Provide notice of filing the LCA by posting at the worksite or providing notice to union
  - Requirements for where, when, how and what to post
Some Additional Requirements

- Provide certified LCA to H-1B worker
- Requirements on short-term placements – how long? Requirements for payment of wages, lodging, travel/food expenses, etc.
- Special requirements if too many H-1B workers
Public Disclosure File

• Only keep required documentation in this file – it is **not** part of an employment file (and should be stored separately from the employment file)
• Must be available for public examination within 1 working day after submitting LCA
• Must be maintained for 1 year beyond last date employee employed under LCA (even unused LCAs must be maintained for 1 year after expiry/withdrawal)
• Must contain:
  – Original signed and certified LCA
  – Memo stating wage rate of employee and system for setting the “actual wage” for all similarly situated employees
  – Prevailing wage source documentation
  – Evidence of satisfying notice requirements (notice of posting or union notification)
  – Summary of benefits for all similarly situated employees equal to the H-1B employee’s
  – Change in corporate structure declaration for new employer to take on obligations of the LCA, list of affected LCAs, new “actual wage” descriptions and FEIN, if applicable
  – H-1B dependency requirements

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Non-Public Documents

• These records should be kept in a separate, non-public file in case of site-visit/investigation:
  – Copy of H-1B petition filed with USCIS with all supporting documentation
  – Payroll records for the H-1B and other similarly situated employees (maintain for three years)
  – Memo confirming the employer provided a signed and certified LCA to the employee by start date
  – Memo of documentation of fringe benefits (including what was offered, selected, declined and actually provided)
• This file should also be separate from the employment file
Consequences of Non-Compliance

• Civil money penalties with maximums ranging from $1,000 to $35,000 per violation, depending on the type and severity of the violation
• Back wages
• Disbarment from future access to the H-1B program for 3 years depending on the nature of the violation
• I-9 violations
• Criminal sanctions?
• Audits leading to sanctions can emanate from disgruntled employees’ complaints or randomly
USCIS Fraud Detection and National Security Directorate (FDNS) Workplace Site Visits

- Site visits randomly on H-1B and L-1 petitions (after adjudication) and R-1 petitions (before adjudication) – triggers?
- FDNS officers make unannounced visits to collect information as part of a compliance review to verify the truthfulness of petitions and continuing eligibility
- Process includes researching information in government systems, reviewing public records and evidence accompanying the petition, and interviewing the petitioner and beneficiary
- Participating in a site visit is voluntary, but failure to cooperate may have negative effects on the compliance review – right to counsel?
FDNS Workplace Site-Visits

- At any point, if the petitioner/beneficiary is unwilling to participate, inspector will terminate the visit, and complete the report using the data available.
- The compliance review will usually include a follow-up with the petitioner and beneficiary by phone, fax or email – **do not respond without consulting counsel!**
- Inspectors record their observations on a Compliance Review Report, which are submitted to USCIS for appropriate action, including revocation and further investigations.
- Site inspectors are not adjudicators and do not make decisions on applications.
FDNS Workplace Site-Visits

Inspector perform the following tasks:

• Verify the information, including supporting documents, submitted with the petition
• Verify petitioning organization exists
• Review public records and information on petitioner
• Conduct unannounced site visits to the worksite
• Take photographs
• Interview personnel to confirm the beneficiary’s work location, physical workspace, hours, salary and duties
• Interview the beneficiary
• Request additional documentation (e.g. payroll records)
Strategies for Site-Visits

Be prepared and have a strategy!!

- Designate in advance which employer representative will handle site visit
- Inform other staff members they are not authorized and should refer any investigators to responsible person
- Employer representative should be familiar with the contents of petitions or have easy access to them (if number of petitions are voluminous)
- Provide the beneficiary with a copy of the petition and have them review typical questions
- Check officer’s credentials and document them
- Always accompany the officer while onsite, if wants to take a tour or photograph
- Take detailed notes of visit, specifically any questions answered and any documentation submitted
- Outsourced petitions?
Questions

Don’t answer questions unless you are sure of the answers. Rather, inform the officer that you would need to check on the information first.

Standard list of questions:

- About the petitioner: type of business, revenues, number of employees, locations
- About the petition: position title/duties, salary, work location, job requirements, hours per week, payment of petition’s fees
- If L-1, will ask about the management functions or specialized knowledge
- About the beneficiary: confirmation of continued employment, qualifications, hire date
Changes During Employment

- Minor changes, no new petition (salary increase, some promotions, etc.)
- Change in employee location (not already included in LCA)
- Material changes, new petition required (hours, wages, job duties, non-productive employment, corporate restructuring)
- Termination
The following documentation is requested by the Administrative Site Visit and Verification Program in order to close the report in reference to the L1A Visa Petition.

Please email documents to Immigration Officer, John Doe @ JohnDoe@uscis.dhs.gov

- Copy of the 2 most recent Paystubs or Copies of the Paychecks
- Copy of the W-2 or 1099
- Copy of the Job Description (Abroad and in the U.S.) IN YOUR OWN WORDS
- Organizational Chart
- Copies of your Degree, NO Transcripts, just the Degree
- How many people did you supervise abroad; how many do you currently supervise? What are their job titles?
- What is the relationship with your job duties abroad, compared to your job duties in the U.S.
- Hire date abroad; hire date in the U.S.
- Current Salary
- Do you manage a function, if so what?
- Current work location
- What authority do you have over the employees you supervise?

Return documents by close of business on: 01/05/2017

Please Note: Failure to return documents on date specified could result in an incomplete report

www.uscis.gov
• To Donna Willis, or appropriate HR representative,

I am an Immigration Officer with the Department of Homeland Security, US Citizenship and Immigration Services (USCIS). I am conducting a routine follow-up inquiry into an Administrative Site Visit Verification Program (ASVVP) site visit that was attempted on 12/6/2016, at the petitioning organization location, LULU LLC, 1029 Smith St., Lancaster, PA, for the beneficiary as listed on the USCIS petition.
• Please respond by close of business on Monday, January 9, 2017.

For more information about the USCIS Administrative Site Visit Verification Program, please click on the hyperlink (ASVVP) above.

The ASVVP site visit is related to a Petition for a Nonimmigrant Worker (Form I-129) filed by your organization, LULU LLC. The relating USCIS receipt number and beneficiary’s name are WAC1618751596 / John Smith.

At the time of the site visit, the Site Inspector (SI) was unable to reconcile the Beneficiary’s yearly gross salary. Consequently, results of the site visit were inconclusive and the SI recommended Further Review. In lieu of an additional site visit, USCIS requests verification of the terms of the beneficiary’s employment. Your voluntary participation will facilitate the compliance review. By signing the Form I-129 Petition for a Nonimmigrant Worker, the petitioner agrees to release information from your records that USCIS may need to determine eligibility for the benefit sought. A decision to not participate will result in an independent review by USCIS to determine what, if any follow-up action is taken.
I am attempting to complete the Compliance Review via e-mail and would like your help with the following question(s):

1) Please explain based on the pay statements provided to the Site Inspector at the time of the site visit, how the beneficiary’s yearly gross salary of $200,000, as listed on the I-129 petition, will be met by year end.

Thank you
Officer Jones