

H-1B Site Visits in Full Swing: What to Expect and How to Prepare

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As many employers have already experienced first-hand, unannounced H-1B site visits are in full swing through USCIS's Office of Fraud Detection and National Security ("FDNS"). Such 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 filed Form I-129 petition (regardless of whether the work location is controlled by the H-1B employer). They are targeting work sites that have brand new H-1B employees, but also workers whose H-1B status has been extended and who also may have filed PERM Labor Certification, or be in the process of preparing to file.

While employers are questioning the legitimacy of such an intrusion on the workplace without warning, FDNS has indicated that it does not require a subpoena to conduct these visits. Based on USCIS' interpretation of the regulations governing the filing of H-1B nonimmigrant petitions, USCIS has determined that it is permitted to make such unannounced inspections based on the language contained in the instructions to the Form I-129 Nonimmigrant Petition, which, by executing the document, the petitioner and beneficiary consent to allow USCIS to verify the information contained therein. The instructions provide for "unannounced physical site inspections of residences and places of employment and interviews".

So what should an employer do when faced with a surprise visit? Importantly, the employer may request that immigration counsel be present during the site visit. Thus far, such a request has been met with varied responses from FDNS. While some officers are willing to accommodate such a request, other officers have refused to reschedule the site visit to allow for counsel to be physically present. However, FDNS officers have generally had no objection to counsel being present by telephone, if requested by the employer.

How may an employer be proactive in anticipation of such an unannounced visit? The first step is to be fully compliant with the requirements of the H-1B program. During a typical H-1B site visit, the FDNS officer will likely seek to verify the information contained in a specific employee's H-1B nonimmigrant petition, regardless of the number of H-1B petitions filed by the employer. The FDNS officer will normally have a copy of the petition and will likely request to speak with the employer's representative who signed the Form I-129 or, if such representative is unavailable, with someone in the Human Resources Department or, in the case of a smaller business, someone with knowledge of the company's filings.

Typical questions or document requests may include: Specifics about the company (i.e. business locations, number of employees, etc.); the most recent quarterly wage report; confirmation that the signature on the Form I-129 petition is genuine; detailed information about the specific H-1B nonimmigrant's title, job duties, work location, and salary; a copy of the H-1B nonimmigrant's most recent paystub and, if applicable, last Form W-2; information about the number of H-1B petitions that the employer has previously filed; information about the employer's immigration counsel; and/or the opportunity to review the H-1B Public Access file.

More often than not, the FDNS officer will also request an interview with the H-1B beneficiary outside of earshot of the employer representative. During this interview, the 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 dependents, if any.

In general, employers who abide by the rules of the H-1B program and are diligent in maintaining proper records (including a Public Access File) should not worry about a possible unannounced intrusion by FDNS.