Immigration Law in Foodservice

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H-1B Employer Audits On The Rise

by Becki L. Young

The Immigration Service's Office of Fraud Detection and National Security (FDNS) has recently commenced an assessment of the H-1B program. It is expected that FDNS officers will be appearing at the offices of numerous H-1B employers in the upcoming months to gather information about their compliance with the H-1B program.

The H-1B program assessment was initiated, in part, due to the findings of a September 2008 USCIS report on "H-1B Benefit Fraud & Compliance Assessment."

This report relates to an audit of H-1B cases filed during the first two quarters of FY2006. USCIS found fraud or technical violations in 21 percent of the 246 cases it audited.

The primary objectives of the site visits including verifying the existence of the petitioning employer; verifying the stated employer/employee relationship between the petitioner and beneficiary; verifying that the beneficiary is or will be employed in the capacity specified and at the location(s) specified; and verifying that the beneficiary has the requisite experience and/or qualifications.

In some cases the violations found did not rise to the level of fraud, and employers were charged with technical violation(s). *Examples of technical violations include:*

- The H-1B employer required the beneficiary to pay the ACWIA fee or deducted certain fees associated with filing the I-129 petition, effectively lowering the beneficiary's wages to less than the required prevailing wage *(NOTE: There are three filing fees associated with the H-1B petition ($320 base fee; $750/$1500 ACWIA fee; and $500 Fraud Prevention and Detection Fee).* Employers should remember two rules regarding these fees (1) the ACWIA fee must be paid by the employer and cannot be charged back to the employee, and (2) the employer may not take deductions from the employee's pay to recoup an employer's business expense, to cover the costs incurred in the petition process, or to recover the $500 Anti-Fraud Fee if it depresses the alien's wages below the prevailing wage);
- The employer failed to pay the beneficiary the prevailing wage, as noted and attested to on the LCA;
- The beneficiary was working in a geographical location not covered by the LCA; or
- The employer placed the beneficiary in a non-productive status, commonly referred to as "benching." "Benching" occurs when an employer temporarily decides to place a beneficiary in non-productive status without pay, or with reduced pay, during periods of no work. It should be noted that even H-1B workers without a current work assignment (i.e., benched) must be paid the prevailing wage.

On the other hand, *fraud was found when:*

- The business did not exist;
- The educational degrees or experience letters submitted were confirmed to be fraudulent;
- Signatures had been forged on supporting documentation;
- The beneficiary was performing duties that were significantly different from those described on the LCA and I-129 petition. (In one instance, the position described on the petition and LCA was that of a business development analyst. However, when USCIS conducted its review, the petitioner stated the H-1B beneficiary would be working in a laundromat doing laundry and maintaining washing machines);
- Beneficiaries misrepresented their H-1B status by reentering the U.S. as H-1Bs after they had quit or were terminated from their authorized jobs; or
- The beneficiary ported (i.e., transferred to a new employer) under the provisions of AC21 to work for a new H-1B employer. However, the beneficiary started work with the prospective (new) employer before that employer had even filed the I-129 petition.

The USCIS report concluded with the following findings:

1. Firms with 25 or fewer employees have higher rates of fraud or technical violation(s) than larger-sized companies;
2. Firms with an annual gross income of less than $10 million have higher rates of fraud or technical violation(s) than firms with an annual gross income greater than $10 million;
3. Firms in existence less than 10 years (i.e., 1995 and after) have higher incidences of fraud or technical violation(s) than those in existence for more than 10 years (i.e., before 1995);
4. H-1B petitions filed for accounting, human resources, business analysts, sales and advertising occupations are more likely to contain fraud or technical violation(s) than other occupational categories; and
5. Beneficiaries with only bachelor's degrees had higher fraud or technical violation(s) rates than did those with graduate degrees.

These findings suggest an uphill battle for smaller and less established companies in filing H-1B petitions, as well as a more stringent climate for all H-1B petitioners.

Should you have any questions about H-1B fraud assessments or site visits, please contact our office.

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