

POLICY ALERT: GOVERNMENT INITIATIVES TO COMBAT FRAUD AND ABUSE IN H-1B PROGRAM

Executive Summary

Over the last several days, the federal government has announced several initiatives to reduce fraud and abuse in the H-1B program. Specifically, the government is:

- Expanding U.S. Citizenship and Immigration Services (USCIS) site visits to target enforcement resources on H-1B dependent employers;
- Creating a database to share information about H-1B petitions submitted in the FY18 lottery;
- Making it easier for individuals to report suspected H-1B fraud or abuse to the federal government;
- Providing examples of H-1B fraud and abuse indicators;
- Warning companies that it will pursue discrimination claims when the H-1B program is used to discriminate against U.S. workers;
- Evaluating changes to the Labor Condition Application (LCA) to provide greater transparency.

How will USCIS target enforcement efforts against H-1B dependent companies?

USCIS will take a more targeted approach when making site visits across the country to H-1B petitioners and the worksites of H-1B employees. USCIS will focus on:

- Cases where USCIS cannot validate the employer's basic business information through commercially available data;
- H-1B-dependent employers (those who have a high ratio of H-1B workers as compared to U.S. workers, as defined by statute); and
- Employers petitioning for H-1B workers who work off-site at another company or organization's location.

USCIS will continue to conduct random audits, so a company that is not H-1B dependent may still receive a site visit. Companies that rely on vendors that are H-1B dependent should expect an uptick in site visits as the government will visit the location where the H-1B beneficiary works.

How will the government make it easier to report H-1B abuses?

The government has established an email address dedicated to receiving information about suspected H-1B fraud or abuse. Anyone, including both American workers and H-1B workers who suspect they or others may be the victim of H-1B fraud or abuse, can email the government to submit tips, alleged violations, and other relevant information about potential H-1B fraud or abuse.

What does the government consider to be indicia of H-1B fraud and abuse?

The government is providing examples of H-1B fraud indicators, which include:

- The H-1B worker is not or will not be paid the wage certified on the Labor Condition Application (LCA);
- There is a wage disparity between H-1B workers and other workers performing the same or similar duties, particularly to the detriment of U.S. workers;

- The H-1B worker is not performing the duties specified in the H-1B petition, including when the duties are at a higher level than the position description;
- The H-1B worker has less experience than U.S. workers in similar positions in the same company; and
- The H-1B worker is not working in the intended location as certified on the LCA.

Will the government release additional information regarding how companies use the H-1B program?

Yes. USCIS has announced that it will publish a report on H-1B petitions submitted for the FY18 lottery, including data submitted in such petitions. The agency will make such information available in a searchable format, but has not yet stated which data fields will be released.

The Department of Labor also announced that it is evaluating changes to the LCA to improve transparency in the labor market attestation process. The government has not yet indicated what changes are being considered to the data fields.

Will the Department of Justice consider use of the H-1B program when enforcing non-discrimination laws?

Over the past few years, there has been an increased focus on whether companies discriminate against U.S. workers when they disproportionately hire H-1B workers. The enforcement strategy is being pushed by IEEE (Institute of Electrical and Electronics Engineers), a union that represents U.S. tech workers and that is opposed to the H-1B program. Two leading outsourcing consulting firms who rely heavily on H-1B visa workers from South Asian countries are currently facing putative class action lawsuits on the basis that their reliance on foreign visa workers results in unlawful race and national origin discrimination.

Tom Wheeler, the Acting Assistant Attorney General for the Department of Justice, stated yesterday that the “[t]he Justice Department will not tolerate employers misusing the H-1B visa process to discriminate against U.S. workers.” He went on to say that “U.S. workers should not be placed in a disfavored status, and the department is wholeheartedly committed to investigating and vigorously prosecuting these claims.”