

Looking for Fraud in All the Wrong Places-- H-1Bs Working from Home

By Ted J. Chiappari and Angelo A. Paparelli*

Conferences at 7 a.m. and 7 p.m. on the same day prompt an employee's request, approved by her manager, to work from home that day. Cause for concern? There is, if the employee is a "specialty occupation" worker in H-1B visa status. In a case the authors recently encountered, U.S. Citizenship and Immigration Services (USCIS) moved to revoke the employer's H-1B petition because the employee happened to be working from home on the day USCIS conducted a worksite inspection.

Unannounced worksite inspections are now fairly routine for H-1B workers and their employers -- 14,433 H-1B site visits were conducted in fiscal year 2010.ⁱ While not every petitioner gets visited, that's a large enough pool that site visits are now a standard verse in immigration lawyers' litany on H-1B compliance. Since 2005, USCIS has collected \$500 from employers for every new H-1B (and L-1 intracompany transferee) petition filed. Congress introduced this fraud prevention and detection surcharge, as the name implies, to fund USCIS efforts to combat perceived fraud in the H-1B and L-1 visa programs. These funds, amounting to tens if not hundreds of millions of dollars collected each year,ⁱⁱ allowed USCIS to conduct a preliminary study, released in 2008, which was then used to justify hiring a crew of government contractors and assigning investigators from the ominously titled USCIS Directorate of Fraud Detection and National Security (FDNS) to pound the pavement and show up unannounced at the address indicated as the worksite on the H-1B petition.

Typically, the inspectors ask to speak with the H-1B worker or the employer representative who signed the petition papers, or both. They pose questions from a prepared list; in addition to asking about title, salary and number of employees, they may also ask to see payroll records and take pictures of the worksite location.

In principle, dispatching USCIS investigators out in the field to kick the tires makes a lot of sense. Voluntary compliance works best when there is consistent, transparent and not all too limited enforcement. But there is nothing consistent or transparent about an unannounced worksite inspection that results in an anxiety-producing notice of intent to revoke based on a list of erroneous legal conclusions including: the beneficiary is no longer employed by the petitioner in the capacity specified in the petition; the position is not a specialty occupation; the petitioner is not in compliance with the terms and conditions of employment; the statement of facts contained in the petition was not true and correct; the petitioner violated terms and conditions of the approved petition; and the petitioner violated H-1B requirements. USCIS leapt to all these conclusions simply because of an uninvestigated fact, namely, that the H-1B worker stayed home one day because of conference calls.

This article is reprinted with permission from the August 24, 2011 edition of the *New York Law Journal*. © 2010 ALM Properties Inc. All rights reserved. Further duplication without permission is prohibited. The authors thank the Journal for permission to reprint this article.

Proper determination and disclosure of the worksite is essential to H-1B compliance: the salary H-1B employers must pay; the working conditions they must meet, and the notice they must provide to other workers are all keyed in to the “place of employment” or physical location where the work is actually performed. This aspect of H-1B compliance is governed by Department of Labor (DOL) regulations and a “labor condition application” that the DOL must certify before the employer may file the H-1B petition with USCIS. The DOL regulations provide an extensive definition of “place of employment” – a definition which specifically excludes locations where work is performed “on a casual, short-term basis, which can be recurring but not excessive (i.e., not exceeding ... 10 consecutive workdays for any one visit by a worker who spends most work time at one location and travels occasionally to other locations.”ⁱⁱⁱ So the employer, by acceding to its H-1B employee’s request to work at home for a day behaved in complete compliance with DOL regulations. This makes USCIS’s attempt to revoke the H-1B petition particularly irksome, since under the DOL definition of worksite no violation arose.

Heavy-handed, misinformed and wasteful approaches to enforcement are unfortunately consistent with how USCIS conducted its initial study to justify more expansive worksite inspections.

The USCIS’s Benefit Fraud and Compliance Assessment (BFCA) report, released in September 2008, purported to find a 13.4% fraud rate and a 7.3% technical violation rate, or a total violation rate of 20.7%.^{iv} Critics of the H-1B program and immigration opponents cited to the study, in particular, the alleged 20.7% violation rate.^v Shortly thereafter, government contractors began to be dispatched to numerous H-1B worksites to ask questions. The fact that contractors – and not government employees – conduct the onsite inspection is relevant because those conducting the investigation have no adjudicatory or programmatic experience and no decision-making or further investigatory authority: they merely generate a report for USCIS to use in deciding whether to move to revoke the petition or not. (USCIS has apparently chosen to limit its contractors to a single site visit per petition, and to limit its range of responses to the site visit report to three options: reaffirm the petition approval; move to revoke the petition; or refer the case to Immigration and Customs Enforcement for further investigation of fraud.)

The 2008 BFCA report was based on a tiny pool of petitions selected for the study: only 246 petitions were chosen randomly from 96,827 petitions filed between October 1, 2005, and March 31, 2006.^{vi} According to other data published by USCIS, 295,915 petitions were filed (and 270,981 approved) in the 2006 fiscal year (running from October 1, 2005, to September 30, 2006),^{vii} and no mention was made in the study that the period studied accounted only for approximately 1/3 of the petitions filed in that fiscal year. So USCIS’s conclusions in 2008 about fraud and noncompliance rates were based on a selection of approximately 1/4 of 1% (0.25%) of the petitions filed during that six month period and less than 1/10 of 1% of petitions filed (0.08%) and approved (0.09%) in one year. While USCIS claims that such a sampling was statistically valid, the Department of Homeland Security Office of Inspector General [OIG], in its Review of the USCIS Benefit Fraud Referral Process (published incidentally five months before USCIS published its BFCA report) reported other problems with the benefit fraud assessments conducted on the H-1B and other visa programs. The problems cited by the OIG included:

- “[T]he methodology FDNS [the Office of Fraud Detection and National Security] developed had substantive weaknesses.”^{viii}
- “Insufficient planning and incomplete information on the caseloads under review, coupled with modifications of the original random samples, limited the reliability and relevance of the results of the benefit fraud assessments.”^{ix}
- “[T]o meet assessment deadlines, FDNS substituted files when the original [randomly selected] files could not be located within one to two weeks. The number of missing and substituted cases was not reported with the assessment results...”^x
- “FDNS limited the credibility of its findings.... [M]ost of the FDNS officers who were conducting the complex H-1B and L-1A temporary employment visas had never adjudicated these petitions, and did not have sufficient training or experience to evaluate them.”^{xi}
- “FDNS officers at headquarters and in the field disagreed on whether the assessment had documented the level of fraud accurately.”^{xii}
- “FDNS had no written standards on what constituted fraud specific to each visa type, and had no specific test for the standard....”^{xiii}
- In fairness, the OIG report also pointed out that some within FDNS thought the USCIS assessment underreported fraud: “FDNS initiated its review of employment visas and selected its sample before realizing that the petitions sampled included only approved petitions, leaving FDNS to speculate that actual levels would have been higher if it had reviewed denied cases as well.”^{xiv} Oddly, in USCIS’s BFCAs published five months later, it is stated that the H-1B sample was “drawn from a total population of 96,827 approved, denied, or pending I-129 petitions filed between 1, 2005 and March 31, 2006.”^{xv}

In the case of the conscientious – and hapless – H-1B worker highlighted above, simple bad luck admittedly also played a role. The H-1B employee works from home only approximately one day every other month and had worked from home on only two occasions since the petition had taken effect, so the inspection on one of those rare days was truly an unfortunate coincidence. In addition, the human resources representative who had signed the H-1B petition papers had left the company, which the inspector also considered a negative factor. On the other hand, the employer is a well-established company with over 10,000 employees in the United States and multi-billion dollar annual revenues.

The USCIS website describes the site visit process in this way: “If FDNS cannot verify the information on the petition or finds the information to be inconsistent with the facts recorded during the site visit, the ISO [Immigration Services Officer] may request additional evidence from the petitioner or initiate denial or revocation proceedings.”^{xvi} It appears that “requesting additional evidence” in this context is a euphemism for giving the employer 30 days

to respond to a notice of intent to revoke the petition. Given the resources wasted by both the USCIS to generate the notice of intent to revoke (and review the employer's response to that notice), not to mention the resources wasted by the employer responding to the notice, a follow-up visit or phone call by the government contractor or investigator conducting the site visit would be a more sensible approach.

Litigators, pay heed. There are numerous potential grounds to challenge the USCIS visit policies and practices:

- Presumably, USCIS conceived and implemented its massive site visit program in consultation with its legal counsel. Since the H-1B employer and worker are both typically represented parties, unilateral direct or indirect contact by USCIS with the acquiescence or active encouragement of its counsel would seem to violate the rules of professional conduct. The “tainted fruit” of the field site visit, the investigator’s report, should therefore be excluded from the administrative agency record.^{xvii} USCIS recognizes that the prohibited-contact rule applies to its counsel.^{xviii}
- Unlike its policy involving R-1 site visits involving religious organizations found at 8 CFR § 214.2(r)(16), USCIS did not publish an initial or final rule or a regulatory flexibility analysis allowing public comment on its field site visit policy. As a result, the agency seemingly has violated the notice-and-comment provisions of the Administrative Procedure Act, 5 U.S.C. § 553, and the Regulatory Flexibility Act, 5 U.S.C. §§ 601, *et seq.*, that requires agency to conduct an initial and final regulatory flexibility analysis in order ultimately to determine whether the policy would have a significant economic impact on small entities.
- Despite USCIS reliance on the petitioner’s consent provided on the H-1B petition Form I-129 (“I also recognize that supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.”) USCIS site visits are routinely made in contravention of existing agency regulations, i.e., without prior notice to counsel of record or to the “petitioner” or “beneficiary” and without the scheduling of an interview as required by 8 CFR § 103.2(b)(9): “[A] petitioner [or] a beneficiary may be required to appear . . . for an interview . . . A petitioner shall . . . be notified when . . . an interview notice is mailed or issued to a beneficiary”
- Immigration precedent decisions prescribe minimum due process standards of evidence required for an immigration appellate tribunal to fulfill its reviewing function and for a party seeking immigration benefits to respond to derogatory information challenging the party’s credibility. In *Matter of S-S-*, 21 I & N Dec. 121 (BIA 1995), the Board of Immigration Appeals (BIA) rejected a report of an immigration officer’s interview that was inadequate for review. Similarly in *Matter of Arias*, 19 I & N Dec. 568 (BIA 1988), the BIA rejected observations in an officer’s memorandum that were “conclusory, speculative, equivocal, and . . . irrelevant” to the legal issue.

* * *

As part of its review of USCIS's 2008 Benefits Fraud and Compliance Assessment, the OIG included interviews of USCIS employees involved in the BFCFA study. One of the interviewed FDNS officers concluded: " "Congress has been told by FDNS that there is a bunch of fraud, so Congress is asking for the proof. HQ FDNS is asking the field to find the fraud so it can be shown to Congress. And I sense HQ FDNS' frustration with the field because we aren't finding it.... Some of the leadership personnel have never been adjudicators, so they are completely out of touch with reality.""^{xix}

In light of the recent spate of worksite visits and follow-up "assessments" leading to issuance of petition denials and notices of intent to revoke approved petitions, USCIS officials seem to be taking that frustration to heart – looking for fraud in too many wrong places and finding noncompliance where it likely does not exist.

* Ted J. Chiappari is a partner at Satterlee Stephens Burke & Burke LLP in New York City. Angelo A. Paparelli is a partner in Seyfarth Shaw LLP in New York and Los Angeles.

ⁱ USCIS Fraud Detection & National Security (FDNS) Director Answers AILA Administrative Site Visit & Verification Program (ASVVP) Questions (June 7, 2011), available to American Immigration Lawyers Association (AILA) members at AILA InfoNet (Doc. No. 11062243, posted June 22, 2011); copy on file with authors.

ⁱⁱ In 2005, USCIS estimated annual revenues of \$39 million in connection with H-1B petitions, but based this estimate only on new H-1B petitions filed. USCIS Interim Rule with Request for Comments, Allocation of Additional H-1B Visas Created by the H-1B Visa Reform Act of 2004, 70 Fed. Reg. 23775, 23781 (May 5, 2005). Given that the \$500 surcharge is also collected on H-1B petitions filed for a change of employer where the beneficiary is already in H-1B status, and on new L-1 petitions, the actual revenues are much higher.

ⁱⁱⁱ 20 C.F.R. § 655.715. Where an H-1B worker is employed more than just casually at a location, the DOL regulations also include extensive provisions at 20 C.F.R. § 655.735 for short-term placement of H-1B workers at places of employment outside the areas listed on the labor condition application.

^{iv} USCIS, H-1B Benefit Fraud & Compliance Assessment (Sept. 2008), available, e.g., at <http://grassley.senate.gov/news/upload/100820082.pdf>. See also, Angelo A. Paparelli and Ted J. Chiappari, "Immigration Risks Imperil the New Government," *New York Law Journal* October 27, 2008, and Angelo A. Paparelli, "Immigration Mission Creep and the Flawed H-1B Report on Fraud and Abuse," available at: <http://www.nationofimmigrants.com/general/immigration-mission-creep-and-the-flawed-h-1b-report-on-fraud-and-abuse/>.

^v See, e.g., 2009 press release from Senator Chuck Grassley, announcing proposed legislation targeting the perceived fraud, at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=20327.

^{vi} USCIS, H-1B Benefit Fraud & Compliance Assessment (Sept. 2008), at 5.

^{vii} USCIS, Report on H-1B Petitions, Fiscal Year 2006, Annual Report, October 1, 2005 – September 30, 2006 (March 2008), available on the USCIS website at [http://www.uscis.gov/USCIS/New%20Structure/2nd%20Level%20\(Left%20Nav%20Parents\)/Resources%20-%202nd%20Level/h1b_fy06_petitions_report_17mar08.pdf](http://www.uscis.gov/USCIS/New%20Structure/2nd%20Level%20(Left%20Nav%20Parents)/Resources%20-%202nd%20Level/h1b_fy06_petitions_report_17mar08.pdf).

^{viii} Department of Homeland Security Office of Inspector General, Review of the USCIS Benefit Fraud Referral Process (Redacted – Revised), OIG-08-09 (April 2008), p. 14. The OIG Review is available on the Department of Homeland Security website at http://www.dhs.gov/xoig/assets/mgmttrpts/OIGr_08-09_Apr08.pdf.

^{ix} Id. at 15.

^x Id.

^{xi} Id.

^{xii} Id.

^{xiii} Id. at 15-16.

^{xiv} Id.

^{xv} USCIS, H-1B Benefit Fraud & Compliance Assessment (Sept. 2008), at 5.

^{xvi} See the page titled Administrative Site Visit and Verification Program, at <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD>.

^{xvii} See ABA Model Rule 4.2, “Communication With Person Represented By Counsel.”

^{xviii} See undated Memorandum of Jeff Conklin, USCIS Chief Information Officer accessible at: <http://bit.ly/pG80HI>. For cases adopting the “tainted-fruit” analysis, see, e.g., *Microsoft Corp. v. Alcatel Business Systems*, Civ. No. 07-090-SLR, 2007 WL 4480632 (D.Del. Dec. 18, 2007); *Commonwealth of Massachusetts v. Louhisdon*, No. CIV.A. 01-201-B, 2001 WL 360047 (Mass.Super. March 29, 2001); *Holdren v. General Motors Corp.*, 13 F. Supp. 2d 1192 (1998).

^{xix} Department of Homeland Security Office of Inspector General, Review of the USCIS Benefit Fraud Referral Process (Redacted – Revised), OIG-08-09 (April 2008), p. 15.