LEGAL UPDATES

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H-1B Employers Face Increased Scrutiny

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U.S. Citizenship and Immigration Services (USCIS) recently declared a more rigorous vetting process for H-1B computer programmers and announced it will conduct more site visits to catch alleged H-1B visa fraud. Meanwhile, the Department of Labor (DOL) warned employers hiring foreign talent not to discriminate against American workers. In light of the federal government's increased scrutiny of foreign workers, employers are advised to pay careful attention to compliance requirements.

Computer Programmers as H-1Bs

Under the USCIS policy memorandum issued March 31, 2017, companies that want to sponsor a foreign computer programmer for an H-1B visa will have to go to greater lengths to prove that the employee is performing a "specialty occupation" as required under H-1B rules. The memorandum states that the duties performed by computer programmers, such as writing or testing code, can be done by someone with less than the required bachelor's degree, and it would therefore be improper in many cases for USCIS to consider computer programming as an H-1B specialty occupation. Computer programmers are the third-largest category of H-1B visa recipients, after computer systems analysts and software developers, so the ramifications could be wide-reaching.

Three days later, USCIS announced it will take a more targeted approach when making fraud-related 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 (e.g., Dun & Bradstreet).

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Employers that have a high ratio of H-1B workers as compared to U.S. workers, as defined by statute.

Employers petitioning for H-1B workers who work off-site at another company or organization's location.

These investigations are expected to land particularly heavily on smaller IT consulting companies.

Under President Trump's administration, protecting American workers by tightening employment-based immigration programs is a priority for USCIS. The agency has established an email address that will allow individuals to submit tips, alleged violations and other information about potential H-1B fraud or abuse. The information will be used for USCIS investigations and referrals to law enforcement agencies for potential prosecution.

Additionally, the Department of Homeland Security is "reconsidering" its position on the Obama-era regulation that allows dependent spouses in H-4 status to apply for an employment authorization document (EAD) in limited circumstances.

Protecting U.S. Workers

On April 4, 2017, the DOL announced it will protect U.S. workers from H-1B program discrimination by providing greater transparency and oversight. The DOL plans to:

Rigorously use its existing authority to initiate investigations of H-1B program violators. This effort will also involve greater coordination with other federal agencies, including the departments of Homeland Security and Justice, for additional investigation and, if necessary, prosecution.

Consider updating the Labor Condition Application, which is a required part of the H-1B visa application process.

Continue to engage stakeholders on how the program might be improved to provide greater protections for U.S. workers, under existing authorities or through legislative changes.

What This Means to You

Employer compliance with the rules governing the H-1B program will be critical as the government expands its reporting tools and enforcement mechanisms. Employers should:

Be aware that foreign workers classified as computer programmers may no longer qualify for H-1B status, even those who have previously been approved for H-1B status.

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Expect an increase in H-1B compliance site visits, especially if the employer is H-1B dependent or places H-1B workers off-site, or if the government is unable to verify the employer's business information using commercial sources.

Expect changes to the Labor Condition Application process.

Contact Us

For more information about how changes to the H-1B visa process may impact your organization, contact Toni Blackwood, Kelli Stout or Tiffany Hutchens of Husch Blackwell's Immigration team.

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