

News & Types: Immigration Update

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Practices: Immigration

USCIS NOT CONSIDERING CHANGES TO H-1B EXTENSION RULES

In late December 2017, news service McClatchy DC reported that the U.S. Department of Homeland Security (DHS) was considering new regulations that would limit the ability of H-1B workers who are in the green card process to obtain an extension of their H-1B status beyond the usual six-year limit. However, on January 8, 2018, McClatchy DC once again reported that after facing backlash from the business community, the U.S. Citizenship and Immigration Services (USCIS) backtracked on the proposed policy. Jonathan Withington, Chief of Media Relations for USCIS, said that “any suggestion that USCIS changed its position because of pressure is absolutely false.”

USCIS stated that it was not considering changing its interpretation of Section 104(c) of the American Competitiveness in the Twenty-First Century Act (AC21) which provides for H-1B extensions beyond the six-year limit for those H-1B workers who have received approved I-140s. However, Mr. Withington added the following: “Even if it were, such a change would not likely result in these H-1B visa holders having to leave the United States because employers could request extensions in one-year increments under section 106(a)-(b) of AC21 instead.”

The article pointed out that DHS is nevertheless considering policy and regulatory changes to carry out the President’s “Buy American, Hire American” Executive Order.

ICE WORKSITE ENFORCEMENT AGAINST 7-ELEVEN

On January 10, 2018, the U.S. Immigration and Customs Enforcement (ICE) raided nearly 100 7-Eleven stores in 17 states initiating worksite enforcement action against the targeted stores. ICE issued I-9 audit notices to the business owners inquiring about hiring practices and whether the store management knowingly employed undocumented immigrants. ICE agents also arrested 21 undocumented immigrants who were employed at the targeted 7-Eleven stores.

In a statement issued by Thomas D. Hogan, ICE Deputy Director, the agency sent a strong message to the business community stating that it would hold all employers who hired and employed an illegal workforce accountable. Derek Benner, who is the Acting Head of ICE’s Homeland Security Investigations (HSI), stated that the Agency would be pursuing more large-scale compliance inspections and criminal investigations which would not be limited solely to large companies or any particular industry.

ICE's has developed a comprehensive worksite enforcement strategy to target employers who violate employment laws, in particular, federal employment eligibility requirements. ICE believes that an effective worksite enforcement strategy must address both employers who knowingly hire undocumented workers, as well as the workers themselves.

ICE's three-prong approach to worksite enforcement actions includes:

1. Compliance – I-9 inspections, civil fines and referrals for debarment;
2. Enforcement – Arrest employers who knowingly employ undocumented workers, and arrest unauthorized workers for violating laws associated with working without authorization; and
3. Outreach –ICE Mutual Agreement between Government and Employers (IMAGE) program, to instill a culture of compliance and accountability.

Various factors are weighed in worksite enforcement actions, including how cooperative an employer is with ICE investigators and the culpability level of the employer. If the investigation reveals employee abuse, apart from immigration violations, ICE will also investigate violations of federal criminal statutes including, mistreatment of workers, trafficking, smuggling, harboring, visa fraud, identification document fraud, money laundering, worker exploitation, and other criminal conduct by the employer. In addition, HSI investigates employers using force, threats, or coercion (i.e., threats of deportation) to keep undocumented workers from reporting substandard wages or unsafe working conditions.

The threat of civil and/or criminal penalties is meant to serve as a strong deterrent to all employers. One recent example of this is the six-year investigation of Asplundh Tree Experts, Co. (Asplundh), one of the largest privately-held companies in the United States, which resulted in the largest civil settlement agreement ever assessed by ICE against an employer.

ICE's investigation revealed that Asplundh engaged in a scheme to unlawfully employ undocumented workers, where senior level management willfully ignored the hiring practices of lower level managers who hired workers knowing that they did not have work authorization. The company was ordered to pay an \$80 million monetary forfeiture judgment along with an additional \$15 million to satisfy a separate civil settlement agreement, based on immigration law violations. The \$95 million dollar recovery represents the largest payment ever levied in an immigration case.

USCIS CLARIFIES PROXY VOTE USE FOR CERTAIN L-1 PETITIONS

On January 3, 2018, U.S. Citizenship and Immigration Services (USCIS), in an updated policy guidance, clarified that a proxy vote must be irrevocable to establish the requisite control of a company in an L-1 petition. The L-1 category requires that the petitioning U.S. employer prove that a qualifying relationship exists between the foreign employer and the U.S. company. USCIS examines ownership and control of the entities to determine the existence of a qualifying relationship. One way a petitioner may establish control is based on the use of proxy votes. Proxy votes are obtained when one or more equity holders irrevocably grant the voting ability of their equity to another equity holder. This would effectively and legally give the other equity holder "control" over the company or companies. The new policy memorandum clarifies that when proxy votes are a determining factor in establishing control, the petitioner must now show the proxy votes are irrevocable

from the time of filing through the time USCIS adjudicates the petition. In addition, the petitioner must show evidence the relationship will continue during the requested approval period.