

## USCIS Steps Up VISA Enforcement Activity

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Employers who file I-129 petitions to sponsor foreign nationals for work visas make a number of representations to the U.S. Citizenship and Immigration Services (USCIS) about the terms of the foreign national's employment, the nature of his duties and responsibilities, and the circumstances of the employer's business. To ensure that employers make accurate statements about these matters, USCIS uses a program called Fraud Detection and National Security Directorate (FDNS) to investigate the circumstances of work visa employment after the visa petition has been approved. FDNS typically uses site visits to "check up" on compliance, and these site visits are rarely announced. Employers may be selected for site visits at random, in response to allegations of wrongdoing, or to satisfy political policy initiatives. Political policy appears to be driving increased scrutiny of employers who use the E-1 and E-2 visa program.

The E-1 and E-2 visa program is available to foreign nationals who possess the nationality of a country with which the United States maintains a bilateral investment treaty or a treaty of friendship, commerce and navigation. Individuals or corporate entities who either conduct substantial trade with the United States or who have made a significant investment to create a business in the United States are permitted to apply for E visas for themselves and for other citizens of the treaty country who are involved in supporting and overseeing the trade or business operations. President Trump announced in 2017, through an Executive Order titled [Buy American and Hire American](#), that the E visa program would be subjected to increased scrutiny to ensure that it is not depriving U.S. workers of jobs. In response, USCIS has been expanding enforcement activities, including FDNS investigations, and more employers are added to the investigations list each day.

### What Happens During a FDNS Site Visit?

FDNS visits usually focus on one petition at a time, which means one foreign national worker will likely be the subject of any site visit. The main purpose of an FDNS site visit is to verify the information contained in the worker's visa petition is accurate and true, so the officer will want to discuss:

- The worker's current job title, job duties, and supervisors/direct reports;
- The worker's salary;
- Other conditions of the worker's employment, such as benefits, bonuses, hours, etc.;
- The worker's U.S. employment and residence history.

In E visa cases, FDNS will also want information about the employer, such as updated information about finances, number of employees in the United States, ownership of the employer's premises, etc. FDNS requests this information to ensure that the employer is operating, owns assets in the United States, and is creating jobs. Expect the FDNS agent to request interviews with management and the foreign national, review business documents, photograph the premises (including the foreign national's work station), and leave lists of additional documents for the employer to produce by mail or email later.

The most important thing for an employer to remember about FDNS site visits is that the employer already consented to the visit by signing and filing the work visa petition in the first place. FDNS is not required to present a warrant or a subpoena, nor is it required to provide notice of the investigation or time to respond. Therefore, it is highly recommended that the employer cooperate with FDNS in all respects. The employer may object to an officer's request to discuss matters that are not relevant to the visa petition, and to photograph parts of the premises or view information that is protected as a trade secret. Legal counsel is permitted to be present, and management is typically allowed to be present during employee interview.

However, note that the foreign national who holds the work visa never signed the work visa petition, and therefore never expressly consented to participate in the investigation. The employer should make reasonable efforts to give FDNS access to the foreign national, but if the foreign national refuses to answer questions, that is his decision. Employers are advised not to attempt to influence the foreign national one way or the other. It is acceptable for a foreign national not to participate in an interview because he is not on site, or because he is engaged in a critical activity that he cannot abandon, or because he simply does not want to. It is not acceptable for a foreign national not to participate in an interview because the employer told him not to.

### **What May Happen After a Site Visit?**

USCIS will review the FDNS officer's Compliance Review Report for any indicators of fraud or noncompliance. Depending on the FDNS findings, USCIS may do nothing, or it may give notice to the employer that:

- It is requiring the employer to file an amended petition for the foreign national's work visa. This may happen if there have been changes to the terms and conditions of the foreign national's employment that USCIS considers significant enough to re-review the visa petition.
- It intends to revoke the foreign national's visa. This may happen if there were very serious deviations from the representations made in the petition, and USCIS has no confidence that those deviations can be rehabilitated through an amendment. Employers receive notice of intent to revoke a visa and usually have 30 days to respond.

It is also possible that USCIS may refer the investigation to Immigration and Customs Enforcement (ICE) if there are suspicions of serious violations, such as multiple instances of visa fraud, presence of unauthorized workers, or concerns about exploitation of foreign workers. ICE investigations do require subpoenas or warrants, and both employers and foreign nationals are entitled to counsel during these investigations.

In most cases, no news is good news – if employers do not receive any notice that concludes the investigation, it likely means that USCIS does not wish to act on the FDNS officer's findings.

### **What Employers Can Do to Prepare for a Site Visit?**

Filing any work visa petition that requires an I-129 form makes an FDNS visit a possibility. It is important for employers and the foreign nationals to know what is being represented to USCIS on their behalf. Employers should carefully read any documents submitted to USCIS and make the foreign national aware of contents of visa petitions that pertain to them.

An FDNS site visit will always be a surprise, but these suggestions may make the visit go more smoothly:

- Keep complete copies of visa petitions for active foreign national workers on site in a safe place.
- Make sure relevant management and the foreign national are aware of the contents of the visa petition. If everyone involved in the petition has input about its contents, then the petition is more likely to accurately reflect the reality at the worksite.
- Know that any material changes in circumstances after visa approval may require an amendment petition. For example, if the employer needs the foreign national to take a different position in a different department, it may be prudent to notify USCIS of the change. Changes in the employer's circumstances, such as company ownership changes, worksite location changes, etc., may also require attention.

Seek legal counsel to address concerns about deviations from visa petitions, particularly to address uncertainty about whether the deviation is serious enough to require attention through amended petitions or other notifications to USCIS.

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