

AILA Practice Advisory  
Checking Every Closet for Skeletons  
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The Fraud Detection and National Security (FDNS) Directorate

In 2004, the Department of Homeland Security established the Fraud Detection and National Security (FDNS) Directorate, as part of its anti-fraud initiative to protect the sanctity of the legal immigration system. FDNS was charged not only with combating fraud in the visa process, but determining whether individuals or organizations filing for immigration benefits pose a threat to national security, public safety, or the immigration system's integrity.<sup>1</sup>

Several years thereafter, following the release of the USCIS H-1B Benefit Fraud Analysis report in September 2008, FDNS instituted a site-visit program (Administrative Site Visit and Verification Program ASVVP). Under ASVVP, contracted investigators would personally inspect and verify the information submitted in a visa petition, using a pre-prepared USCIS checklist. The inspectors may verify the existence of the petitioning entity, take digital photographs, review documents and speak with representatives of the petitioner to confirm any details set forth in the petition.<sup>2</sup>

Site inspectors make no decisions on immigration benefits, but will report the results of their site inspections to FDNS, which will either "verify" or "not verify" a petition. If a petition is "not verified," that does not necessarily constitute a finding of fraud. A follow-up either by e-mail, telephone or a visit from an FDNS officer is likely followed by either a "verification and revalidation," or the issuance of a Notice of Intent to Revoke or Notice of Intent to Deny (depending on whether the site visit occurred during the adjudication process or post-adjudication.)

Although site visits are randomly selected among filed applications and petitions, there has been a growing trend of post-adjudication site visits (especially in the context of the R-1 site visit), and the past several years have seen a vast increase in site visits.

In fact, since its inception (over the course of 9 years) FDNS expanded from 4 employees to over 800 positions in FY 2012. AILA Verification and Documentation Liaison Committee – USCIS – FDNS Meeting, March 28, 2012, released the following additional data:

- 23,204 H-1Bs and R-1s were identified as candidates for site visits in 2011
- 17,307 site visits were completed.
- 13,484 of those site visits were verified
- 1,592 were not verified.
- 15,648 of those site visits were for H-1Bs.
- 12,038 were verified.
- 1,456 were not verified.<sup>3</sup>

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<sup>1</sup><http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=66965ddca7977210VgnVCM100000082ca60aRCRD&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD>

<sup>2</sup><http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=836d7b8a96aa7210VgnVCM100000082ca60aRCRD&vgnnextchannel=66965ddca7977210VgnVCM100000082ca60aRCRD>

<sup>3</sup> AILA InfoNet Doc. No. 12060144 (USCIS FDNS Meeting March 28, 2012)

## FDNS - Site Visits for R-1s

As intimated in the statistics above, H-1B visa petitions are not the only subject of site visits. R-1 visa petitions are also subject to mandatory site visits due to past abuses of the program.

In 2005, the FDNS conducted a Benefit Fraud Assessment (BFA) of religious worker immigrant petitions, after which FDNS reported a 33% fraud rate on filed applications. A large number of petitions were based on organizations which did not exist, others contained material misrepresentations to establish eligibility<sup>4</sup>. An overhaul of the R-1 visa process ensued in 2008, which included mandatory site visits. It is imperative when preparing a petition for an H-1B or a religious worker, for practitioners to fully discuss the work location with the petitioner in order to preemptively avoid determinations of fraud where no fraud exists.

Examples of this might include the overzealous building security guard who denies an agent entry to a facility (FDNS agents are not always forthcoming about their identity or the purpose of their visit). Another example might be a kosher matzo bakery which has its windows boarded up so that the sunlight does not contaminate the *koshrut* process. The boarded up windows may cause a determination that the facility is abandoned. Or imagine a school teacher whose work location is correctly listed, but whose administrators are located on a different floor, and cannot be easily found. These issues can be avoided by a full discussion of what an officer will encounter upon the site visit.

## Other Anti-Fraud Initiatives (Department of Labor, ICE and Department of State)

Anti-fraud efforts span the course of not only visa categories but also reach across many government agencies.

The Department of Labor conducts audits of Public Access Files based on Labor Condition Application filings, and ICE conducts audits of I-9 records for employer compliance with Section 274b.

When preparing any visa application, it is important to prepare the petitioner for the possibility of these site inspections as well, which carry very significant penalties ranging from monetary fines, to debarment from the H-1B program and in severe cases criminal charges.

The Department of State joined in on the anti-fraud efforts as well, and mandated a J-1 sponsoring organization (which is granted its authority by Department of State) to conduct site visits on all host companies with less than 25 employees or less than \$3 million in annual revenue.<sup>5</sup>

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<sup>4</sup> “Special Immigrant and Nonimmigrant Religious Workers (Proposed Rule).” 72 Fed. Reg. 20,442 (Apr. 25, 2007). See Richard L. Skinner, Memorandum, Letter Report: The Special Immigrant Nonminister Religious Worker Program, (June 11, 2009) (AILA InfoNet Doc. No. 09062364.)

<sup>5</sup> See 22 CFR § 62.22. These site visits may also occur post-adjudication as noted by the “training-site agreements” signed by both the J-1 host company and sponsor, which allows the sponsor to conduct a site visit at any time during the course of training.

## VIBE

The Validation Instrument for Business Enterprises (VIBE) is another component of USCIS' mission for verification and fraud deterrence. VIBE is currently used to verify basic information of the petitioning organizations of all I-129 petitions, with the exception of Os and Ps.<sup>6</sup> On April 14, 2009 USCIS issued an RFP, based on its assessment that the next anti-fraud initiative required access of a web-service interface to a contractor's system. The RFP stated:

The USCIS Office of Service Center Operations (SCOPS) processes employment-based immigrant and non-immigrant petitions. SCOPS needs to determine the financial viability of a petitioning company. Currently, the information used to determine financial viability comes directly from the company itself. However, USCIS would like to verify the financial viability through a contract vehicle with an Independent Information Provider (IIP) to support the VIBE initiative.

Following the RFP process, Dunn and Bradstreet ("D&B") became the vehicle by which immigration would verify information. Many petitioners are wary of entering corporate information onto D&B, either because of the additional cost, or because they do not wish to divulge sensitive data which might be sold or otherwise misused.

Certainly, one legal strategy is to advise the client to comply with the VIBE system in the traditional way, and obtain a Dunn and Bradstreet number and profile. However, regardless of the CIS's determination that a web based service was necessary to verify the viability of a petitioning company, there are other valid methods of verifying information. Many companies have successfully responded to so-called "VIBE RFEs" without ever registering in D&B. The AILA A/VSC Practice Pointer does specify that the evidence submitted with the petition is given deference, and that the VIBE information is not reviewed independently. Therefore, in response to an RFE that asks for VIBE compliance, a petitioner may provide other evidence of viability, including copies of: articles of incorporation, FEIN verification, tax returns, payroll information, photos, invoices, bank account information, website and promotional material, print-outs of a Google search, and print-outs of searches from Google Maps.

## PERM

Turning to the "immigrant side" of the anti-fraud effort, the Departments of Labor and Homeland Security will sharply review the bona fides of the job opportunity.

The most common challenge to job opportunity bona fides appears when the beneficiary has an ownership interest in the petitioner's business entity.

The landmark case setting the standard for a bona fide job offer where there is an ownership interest is *Modular Container Systems* (89-INA-228, July 16, 1991). This BALCA decision requires the Certifying Officer to review the totality of the circumstances and requires the following types of documentation to demonstrate that a valid job offer exists and is available to the U.S. labor pool:

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<sup>6</sup> AILA/VSC Liaison Practice Pointer: Dealing with VIBE. (AILA InfoNet Doc. No. 11091469).

- A copy of the articles of incorporation, partnership agreement, business license or similar documents that establish the business entity.
- A list of all of the company's officers and owners, their titles and positions and a description of the relationships to each other and to the worker;
- The financial history of the company including the total investment by each officer, owner and the worker.
- The name of the company official with primary responsibility for interviewing and hiring applicants and the names of company officials with influence over hiring for positions for which labor certification is sought.
- If the worker is one of ten or fewer employees, the employer must document any family relationship between the employees and the alien.

*Modular Container* sets out a test to help illustrate how a beneficiary can satisfy 20 CFR § 656.3. It states that an ownership interest in the company does not necessarily mean the job opening is not bona fide and unavailable to a U.S. worker, *unless* the investment is *so* great that it is tantamount to self-employment.

Familial relationship between employers and employees is another red flag for an examination of bona fides of a job offer. For example BALCA has held that a close family relationship between the alien and the hiring manager is not fatal to an application, but does require that the bona fides of the application be given greater attention, even though the familial relationship “is only one factor to be considered.”<sup>7</sup> The Board added: “Assuming that there is still a genuine need for an employee with the alien’s qualifications, the job has not been specifically tailored for the alien, the Employer has undertaken recruitment in good faith and the same has not produced applicants who are qualified, the relationship, per se, does not require denial of certification.”

As practitioners, we would be quite skeptical that a fraternal relationship would pass the totality of the circumstances test regardless of this decision, but know that binding precedent is available to help if your clients are willing to accept the risk of denial.

### Summary

In summary, it important to note that many government agencies have taken part in the effort to combat fraud, and practitioners must prepare their clients and their petitions with these efforts in mind. Many misunderstandings occur during governmental anti-fraud investigations that lead to erroneous denials and revocations of petitions, but in many cases these misunderstandings can be avoided with the proper preparation and forethought.

Another issue to be aware of in the current political climate is the increased levels of fraud detection and enforcement we can expect with the arrival of immigration reform. We are all aware that with the bi-partisan effort to reform our immigration system, will come a much more heavy-handed layer of enforcement. Petitioners should be aware that we may see an increase in the number of audits and site visits to go along with any legalization measures that come to pass.

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<sup>7</sup> *Paris Bakery Corp.*, 1988-INA-337 (Jan. 4, 1990).