

Hiring, Retaining, and Sponsoring Global Talent: Best Practices for Attorneys and In-House Counsel

Providing the Tools and Resources Needed to Successfully Maintain a Compliant Immigration Program in an Era of Heightened Enforcement

Prepared by Dilnaz A. Saleem

Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

Current Trends in Employment-Based Immigration

- The Year in Review
 - “Buy American, Hire American” Executive Order
 - Removal of Deferred Action for Childhood Arrivals (DACA)
 - Heightened scrutiny of employment-based nonimmigrant petitions, including H-1B and L-1
 - Limited premium processing and adjudication delays
 - Travel Ban
- What can we anticipate?
 - Increased site visits and audits
 - Heightened review of all nonimmigrant and immigration petitions
 - Delays in visa issuance and administrative processing
- Implement a plan for compliance and instill best practices!



Practical Implications for U.S. Employers

- Heightened scrutiny of nonimmigrant visa applications such as H-1B and L-1
- Longer visa wait times, consular delays and increased denials
- Potential for additional screening at all land borders, airports and other ports of entry
- Increased enforcement and spike in anti-fraud investigations, raids and site visits
- Employer sanctions even for non-willful violations

Preparing for Increased Enforcement

I-9 Focus

- Develop a solid I-9 compliance program
- Plan for self I-9 audits

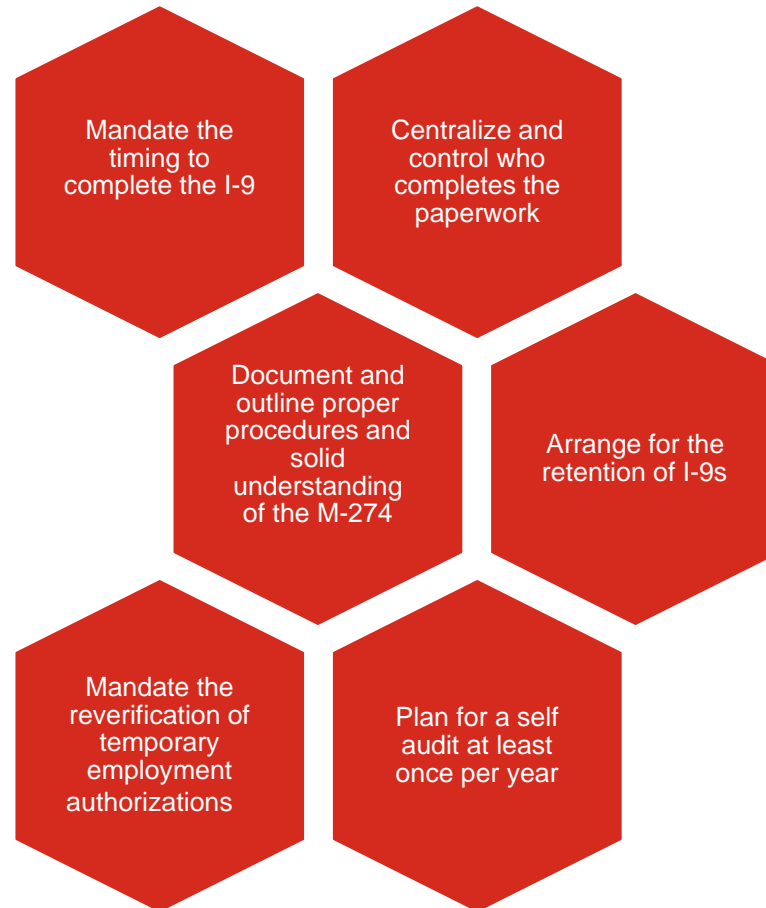
Immigration Program

- Review internal practices for hiring foreign national workers
- Review compliance requirements

Audits/Raids

- Internal prep for possibility of audit or raid
- Provide guidance to foreign national employees

Components of a Solid I-9 Policy



I-9 Self Audits

- Structure your internal audit in a manner consistent with the employer sanctions and anti-discrimination provisions of the INA
- Internal audits should not be conducted on the basis of an employee's citizenship or national origin or in retaliation against any employee for any reason
- Consider if the audit could be perceived to be discriminatory or retaliatory based on its timing, scope or selective nature

Scrutiny of Visa Programs

- Spike in anti-fraud investigations and worksite visits to determine if nonimmigrant workers are in compliance
- Most likely to impact H-1B and L-1 programs
- USCIS will focus on H-1B cases where:
 - agency cannot validate employer’s basic business information
 - the employer is H-1B dependent
 - the employer petitions for H-1B workers who are offsite
- USCIS announced dedicated email address for reporting tips and alleged violations or other relevant information relating to H-1B potential fraud or abuse
- Routine audit of H-1B Public Access Files

Surprise Visits

- Study conducted by USCIS found that one in five H-1B petitions were affected either by fraud or “technical violations” of the H-1B program
- Surprise visits by FDNS – primary mission is to detect, deter and combat immigration benefit fraud
- USCIS randomly conducts unannounced on-site visits/inspections as part of the Administrative Site Visit and Verification Program for both H-1B and L-1 workers
- FDNS officers will visit employers’ sites to interview an H-1B or L-1 employee’s manager or HR representative, and to meet and directly question the foreign national employee

Preparing for FDNS Site Visit

- H-1B Specialty Occupation
 - The Inspector will ask both parties questions about the position held by the H-1B worker including the title of the job and the duties, the salary being paid, the hours being worked, and the actual location of the work.
 - The Inspector may also request to examine the public access files. Although the U.S. Department of Labor (DOL) has jurisdiction over ensuring these files are properly maintained, the USCIS does have the right to inspect them as these files are required to be available to members of the public.
 - Inspector will make a report as to whether further inquiry is appropriate.
- L-1 Intracompany Transferee
 - Goal is to verify the information in the underlying petition including job title and job duties to ensure the foreign national is either in a specialized knowledge or managerial position.
 - HR/manager and employee should be ready to verify that managerial employees are working at least at the level as outlined in the petition.
 - New office L-1s: USCIS will verify that operations are in accordance with business plan. USCIS considers things such as the number of employees, growth in revenues, attainment of significant clientele and other elements indicating that the entity has been actively engaged in business activities.

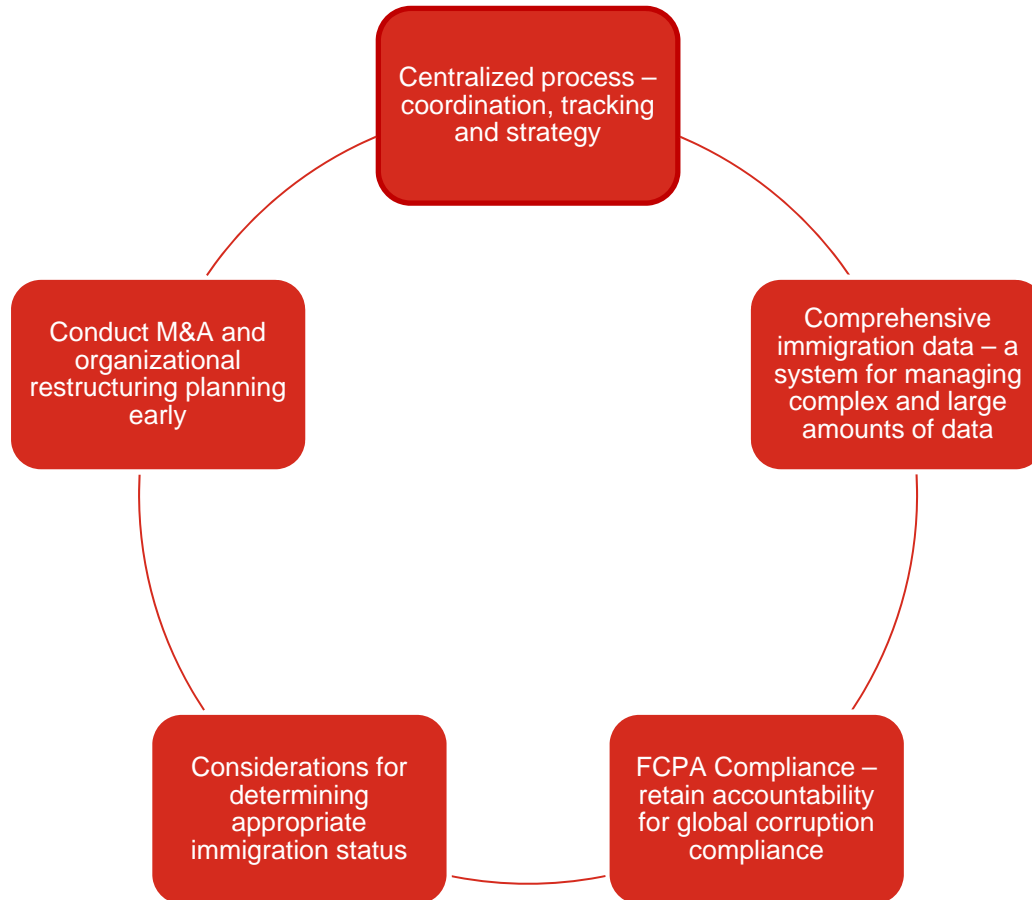
Best Practices for Site Visits

- Employers should prepare for the expected site visits by implementing front-end best practices and procedures for managing inspections
 - Who needs to be involved? In house counsel, immigration counsel, building management, human resources
 - Develop a policy for site visits including who should be alerted immediately in the event of a site visit and alert appropriate front desk or security personnel of an expectation of a visit
 - Prepare managers and HR representatives. Educate both managers and foreign nationals about site visits
 - Be ready to provide foreign national's identity documents, business card, most recent paystub and possibly last Form W-2

Immigration Program Compliance

- Basic Best Practices
 - Create a process for international hiring decisions
 - Streamline the flow of information
 - Establish solid communication procedures
 - Establish internal processes
 - Establish and communicate the company's business case and goals for international hires
 - Build a culture of compliance
 - Create a compliance checklist
 - Complete internal immigration program audits

Creating a Compliant Immigration Program



Creating a Centralized Immigration Program

- Program management:
 - consider moving from a decentralized ad hoc system to one that is centralized and coordinated – immigration that is handled at the local level has the potential for minimal oversight of compliance
 - find the right partners – outsource immigration to a third party to manage processes
 - Dedicate internal stakeholders responsible for various components of the immigration program
 - HR
 - Export Control
 - Recruiters
 - Legal
 - Relocation
 - Tax

Fact Specific Analysis

- Business Travelers – short term activities *may* be pursued without a visa. Consider nature of activities, length of assignment and pay
- Considerations for locally hired foreign nationals
- Compliance considerations for on-site contractors and third party vendors
- Develop special process workflows – ensure quick movement of foreign nationals but with a strict focus on compliance

The Immigration Consequences of Corporate Restructuring

- Significant immigration consequences for employers undergoing any change to their corporate structure – joint venture, acquisition, or merger
- Be sure to understand and analyze the terms of the deal! Does the new entity qualify as a “successor-in-interest”?
- Nonimmigrant Status
 - H-1B: has there been a material change to the position?
 - L-1: does a qualifying corporate relationship continue to exist?
 - E-1/E-2: analysis of the corporate structure to confirm nationality of the employer
 - TN: is the employee still performing services under a NAFTA occupation?
- Green Card Applications – timing is everything

Know the Rules Around Benching, Layoffs, and Terminations

- H-1B Obligation to Pay – The employer’s obligation commences on the date which:
 - The H-1B worker first makes self available for work or otherwise comes under control of the employer and
 - If the H-1B worker does not reside in the U.S., not later than 30 days after that worker is admitted to the U.S.; OR
 - If the H-1B worker already resides in the U.S., not later than 60 days after that worker becomes eligible to work
- The employer must pay the required wage rate for all nonproductive time caused by:
 - conditions related to employment
 - lack of work
 - lack of permit
 - studying for licensing exam
 - employer required training
- Failure to pay will result in the employee’s being “benched.” Benched time must be compensated

H-1B Obligation to Pay

- Obligation to Pay:
 - The employer’s obligation ceases only after a bona fide termination of employment, as indicated by:
 - Notification to the H-1B worker that employment relationship has been terminated
 - Notification to USCIS that the employment relationship is canceled
 - Payment and/or offer to pay transportation home if required by USCIS regulation
- An H-1B worker may not be terminated and then rehired under the same petition
- “Working” without pay is not permissible
- Recommendation: Practice Caution and file H-1B amendments if you anticipate any changes to job/pay details



Conclusion

- Compliance is Critical!
- Avoid the common pitfalls
- Immigration violations are costly
 - Worksite raids and loss of business during the raid
 - Compliance audits
 - Significant fines
 - Criminal sanctions
 - Revocation of state business licenses and government contracts
 - Negative publicity

Stay Tuned

BAKER DONELSON will keep you updated with the latest alerts and additional webinars. Make sure you are on our mailing list!

Dilnaz A. Saleem

dsaleem@bakerdonelson.com

713.210.7435

*Thank
You*