



## BALCA EN BANC SPEAKS ON RECRUITMENT AND THE PREVAILING WAGE VALIDITY PERIOD

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U.S. companies employing foreign workers in H or L nonimmigrant status are increasingly subjected to random, surprise site visits by the USCIS. This article provides an overview of such visits.

The site visits occur under the Administrative Site Visit and Verification Program (ASVVP) conducted by the Fraud Detection and National Security ([FDNS](#)) Directorate. The purpose of the visits, [according to USCIS](#), is to “verify information contained in certain visa petitions.” Visits are conducted pre- and post-adjudication on randomly selected applications and petitions. Interestingly, ASVVP site inspections are *not* performed in cases where fraud is suspected, although they are part of the fraud detection process, geared toward enhancing the “integrity of the immigration benefit process.”

Many of those who have experienced such site visits are thrown into a state of worry and sometimes panic, convinced that there must be a huge problem with their petition and ability to employ foreigners in H-1B or L status. Beneficiaries get worried because they see their H-1B status (and perhaps the green card process they have been waiting so long to come to completion) flash before their eyes, as if it might disappear. There is a great deal riding on these site visits: if an officer is unable to find a beneficiary or verify the information in a petition, the petitioner may receive a denial on a pending case or a notice of intent to revoke an approved petition. If derogatory information is discovered during a site visit, this may lead to further investigation or even civil or criminal penalties.

Our advice? Nothing earth shattering: Be prepared. If you employ foreign nationals in H or L status, be sure that if an officer from FDNS comes to conduct a site visit, your employees (such as the receptionist, HR team, etc.) know to

contact a specific person (such as the signatory on the petition) who can accompany the officer throughout the visit and answer his or her specific questions about the petitioner, the details of the petition, and the beneficiary. The officer will usually want to speak with the signatory and the beneficiary. If those individuals are not available, the officer should be asked to provide contact information for a follow up discussion. The officers may also want to verify details with the signatory or beneficiary by phone or via email after conducting the site visit, if they are not available at the time of the visit. If the beneficiary is not available at the worksite, for example because he or she is out sick or tending to a family member, the company should have clear proof that the individual has taken a sick day, otherwise revocation could result. If the beneficiary is employed at a third-party worksite, it is important that the receptionist or other first-contact employees are aware of the person's placement and can direct the officer to the beneficiary.

What kinds of information are FDNS officers looking for? Some typical areas of inquiry include: To the petitioner, about the petitioner

- Verify the signatory of the petition, his or her position within the organization
- Whether the signatory is aware that an H-1B petition was filed for the beneficiary
- Check the ID of the petitioner's signatory
- Total number of employees at the petitioner's company
- Number of employees on H-1B status
- Number of employees with LPR status
- Gross annual income
- Net annual income

To the petitioner, about the beneficiary:

- Start date with the organization
- Current salary
- Whether the petition signatory is aware that the beneficiary is on H-1B status

To the beneficiary:

- Name of the employer/petitioner
- Offer letter for the position with the petitioner

- W2 for the most recent year
- Most recent paystubs
- Description of job duties
- Photocopies of qualifying degrees
- Who paid petition filing fees and attorney fees?

To a third-party/end-client worksite representative:

- Describe the relationship between end client and the petitioner
- Does the end client anticipate receiving the services of the beneficiary?
- If the answer is yes, the end client may be asked to provide
  - beginning and ending dates of beneficiary's employment;
  - job description/duties;
  - beneficiary's physical work location
  - project description of the task to which beneficiary has been assigned; and
  - name and title of the beneficiary's supervisor
- Is end client aware that the beneficiary is an employee of petitioner?
- Who assigns work to the beneficiary?
- Who does the end client contact about employee related issues for the beneficiary?

You may recognize that these questions go to the issues not only of verifying details in a petition but also of verifying the existence of an employer-employee relationship and whether the employer controls the employment of the beneficiary. We discussed this issue in former articles about guidance issued by USCIS in January 2010, providing a [general overview of the guidance](#), and [advice on using the guidance](#)

Once this information is provided, the parties are often greeted with silence, in large part because the officers conducting the site visits report their results to FDNS for review, but do not themselves make decisions regarding the validity of an application or petition. After the site visit is over, FDNS reviews the information and determines whether further inquiry is necessary. As [USCIS summarizes](#): "If FDNS cannot verify the information on the petition or finds the information to be inconsistent with the facts recorded during the site visit, the ISO may request additional evidence from the petitioner or initiate denial or revocation proceedings. When indicators of fraud are identified, the FDNS Officer may conduct additional administrative inquiries or refer the case to ICE

for criminal investigation.”

Most petitioners have an attorney prepare their immigration filings for them. Where is the attorney in this process? Unless the petitioner or the beneficiary gets the attorney on speakerphone in a conference room during a site visit, or asks the attorney to take the lead on following up with the officer, the attorney will be absent from the process. Site visits are surprise visits of the petitioner’s offices or the beneficiary’s worksite (if not at the beneficiary’s offices).

Attorneys are not informed of the visit, and a petitioner’s (and beneficiary’s) right to counsel in this context is basically ignored. USCIS takes the position that petitioners have consented to the visits by signing the Form I-129, Petitioner for Nonimmigrant Worker, which in Part 7 includes the following statement: “I also recognize that supporting evidence submitted may be verified by USCIS through any means determined appropriate by USCIS, including but not limited to, on-site compliance reviews.” Thus, the burden is on the petitioner and/or beneficiary in a particular case to get counsel involved in the on-going process.