The Surge of Immigration Restrictions Engulfing Employers

Shanon R. Stevenson
Fisher Phillips LLP

Introduction

Gone are the days when immigration issues rarely made a splash on in-house counsel's desk. Now in-house counsel must stay abreast of complex immigration issues, such as:

- employee identity theft and undocumented workers uncovered through the resurrection of Social Security No-Match letters, medical insurance companies refusing to cover an employee because the employee's SSN belongs to another covered individual, and/or ACA electronic filings kicking out SSNs that do not match IRS records;
- how to handle an acquisition deal when a large percentage of the acquired workforce is unauthorized to work in the U.S.;
- monitoring compliance issues associated with unknown foreign national contractors on U.S. visas working onsite; and
- unpredictable adjudications of work visas.

We will explore the best practices for employers to address the surge of immigration restrictions, which often intersect with benefits law and employment law issues.

I. Employee Identity Theft & Uncovering Undocumented Workers

Employers may receive evidence of an employee's undocumented status and possible identity theft from many different sources, including the Internal Revenue Service, local law enforcement, the Social Security Administration, medical insurance providers, and 401k plan administrators. In addition to the employment and benefits law issues that such evidence implicates, the immigration issues are paramount due to the potential for criminal liability and monetary civil penalties.

U.S. Citizenship and Immigration Service (“USCIS”) interprets constructive knowledge in the context of an employer's obligation to satisfy the employment eligibility verification requirements of INA §274A and the Form I-9 regulations. Employers are required to (a) verify employment eligibility in the United States, and (b) refrain from employing, or continuing to employ, an individual, or recruiting an individual for a fee, whom the employer knows is an unauthorized alien. USCIS defines constructive knowledge as "knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition."[1] Constructive knowledge may include, but is not limited to, situations where an employer:

> A. Fails to complete or improperly completes the Employment Eligibility Verification Form, I-9;
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> B. **Has information available to it that would indicate that the alien is not authorized to work**, such as Labor Certification and/or an Application for Prospective Employer; or
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> C. **Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force** or to act on its behalf. (*Emphasis added*.)

8 CFR § 274a(1)(l)(2), however, limits the application of constructive knowledge to conduct that would constitute immigration-related employment discrimination:

> Knowledge that an employee is unauthorized may not be inferred from an employee's foreign appearance or accent. Nothing in this definition should be interpreted as permitting an employer to request more or different documents than are required under section 274(b) of the [INA] or to refuse to honor documents tendered that on their face reasonably appear to be genuine and to relate to the individual. The agency would impute knowledge by an employer's mere failing to notice "information available" or by "recklessly and wantonly disregarding the legal consequences" of permitting a prohibited action.

Aramark Facility v. Service Employees, Local 1877, 530 F. 3d 817 (9th Cir., 2008) is the leading case applying this definition of constructive knowledge. *Aramark* distinguished earlier cases which involved a finding of constructive knowledge based on notice from the Immigration and Naturalization Service (now known as USCIS) that certain employees had engaged in unauthorized employment.[2] Recognizing that the employment verification requirements of INA § 274A must be balanced against

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[1] 8 CFR § 274a(1)(l)(1).

[2] See *Mester Mfg. Co. v. INS,* 879 F. 2d 561 (9th Cir., 1989), and *New El Rey Sausage Co. v. INS,* 925 F. 2d 1153 (9the Cir., 1991). *Cf., Collins Foods Intern., Inc. v. INS,* 948 F. 2d 549 (9th Circ., 1991) (no constructive-knowledge finding where no law or regulation required an employer to "compare the back of a Social Security card with the example in the INS handbook . . . falls far short of the "willful blindness" found in *Mester* and *New El Rey Sausage*).

the protections of individuals from unlawful, immigration-related employment discrimination found in INA § 274B,[3] the *Aramark* court limited the application of the constructive-knowledge principle, stating:

> IRCA . . . is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens. The doctrine of constructive knowledge has great potential to upset that balance, and it should not be expansively applied. The statute prohibits the hiring of an alien "knowing the alien is an unauthorized alien . . . with respect to such employment." 8 USC §1324a(a)(1)(A) . . . When the scope of liability is expanded by the doctrine of constructive knowledge, the employer is subject to penalties for a range of undefined acts that may result in knowledge being imputed to him . . . To preserve Congress' intent in passing the employer sanctions provisions of IRCA, then, the doctrine of constructive knowledge must be sparingly applied.

This led the court in *Aramark* to conclude that an employer lacked constructive knowledge of unauthorized employment where the Social Security Administration (SSA) issued a "no-match" letter covering several employees. The Ninth Circuit made this finding, however, in a situation in which the employer gave the employees less than a week to provide acceptable evidence of identity and employment authorization.

It remains to be seen, however, whether constructive knowledge would be found if the employer accorded its employees an unlimited amount of time but took no follow-up action. Even though there may be legitimate reasons for a discrepancy between the employer's records and those of SSA, a failure by the employer to bring the inquiry to a conclusion might very well be viewed as "'a mental state in which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment,' or 'the defendant evidenced willful blindness.'"[4]

The Social Security Administration recently resurrected its practice of issuing Employer Correction Request notices – also known as “no-match letters” – when it receives employee information from an employer that does not match its records. The letter notifies employers that the Administration received one or more W-2s from the employer on which the employee’s name did not match the Social Security Number in the Administration’s database. The letter explains that the Administration considers this is to be important, as it wants employees to get the benefits they are entitled to receive. As the letter notes, there are many possible reasons for SSN/name mismatches, including typographical errors (e.g., the name is spelled wrong on the W-4, or a number is transposed in the SSN), name changes that have not yet been reported (due to marriage, divorce, or other reason), or

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[3] INA §§ 274A and 274B came into law simultaneously with the enactment of the Immigration Reform and Control Act (IRCA), Pub.L. 99-603, 100 Stat. 3445, enacted November 6, 1986.

[4] *United States v. Jewell*, 532 F. 2d 697, 698 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

inaccurate input of the SSN on the W-2. There are other possible reasons for a mismatch, including identity theft, domestic violence, and witness protection status. Sometimes no-matches can be generated by a simple missing middle initial or a missing hyphen in an employee's hyphenated last name. The no-match letter asks the employer to log onto a website called the Business Services Online (BSO) to learn the names of those who have been identified as no-matches and to provide the Administration with "necessary corrections to the Form W-2C within 60 days of receipt of this letter so we can maintain an accurate earnings record for each employee and make sure your employees get the benefits they are due."

The no-match letter is not a notification that the Administration believes that the employer or the named employee intentionally submitted the wrong name or SSN. Nor does the letter call into question any employees' immigration status or work authorization. Indeed, the letter includes an unambiguous warning that employers are not to take any adverse employment action against any employee because of the letter "such as laying off, suspending, firing, or discriminating against any individual, just because his or her SSN or name does not match our records." Such action, according to the letter, could be a violation of "State or Federal Law and [could] subject you to legal consequences."

If, on one hand, the letter indicates that a small number of employees have been identified as no-matches, the potential impact of an internal review of the no-matches on your business is likely to be small. On the other hand, if the number is large, operations could be significantly affected by an internal review of SSN no-matches and by interviews with identified employees. Keep in mind that, once word gets out that the company is asking employees about their Social Security Numbers, employees may quit even if they are not in the identified group.

Next, employers should take the time to review their records. Specifically, employers should make sure to examine the names provided to the company by its employees and the SSNs provided by the employees on their W-4 Forms, and then compare them to the information provided to the SSA for the year in question. Employers should look for typos, name changes, transposed digits, missing middle initials, or other innocent mistakes. Doing so will help employers determine whether the issues are truly clerical or potentially problematic.

While some no-matches may turn out to be due to clerical errors or other innocuous reasons mentioned above, some may not. Again, a no-match does not mean that the employee is not authorized to work legally in the United States. What it does mean, however, is that the employee – willfully or not – may have provided the employer with false information. Accordingly, it is important to identify the policies in place that may apply to this situation. Employers should check the policies that address candor in the workplace and address the consequences of employees providing the employer with false information. It is also important to know how those policies have been enforced in

recent years. If, for example, an employee provided false information about their prior job experience, degree, date of birth, or any other similar information, what discipline, if any, did the employer issue? The key here is consistency and determining before beginning any inquiry what the likely penalty will be in the event it is determined that an employee provided a false SSN at the time of hire. As with all workplace policies, inconsistent enforcement can lead to claims of discrimination. Moreover, if the employer has employees covered by a collective bargaining agreement or otherwise represented by a labor union, and if there is a possibility of discipline or termination of employment if the mismatch cannot be resolved, the union may get involved. Some courts have held that simply receiving notice of an SSN mismatch does not provide you with sufficient "just cause" to terminate employment under typical labor law analysis, even where the employee is given a chance to resolve the mismatch and fails to do so. Also, employees may invoke Weingarten rights if and when they are called in to meet with HR about the mismatch.

If an employer has company has received one or more no-match letters and has done nothing about them, Immigration and Customs Enforcement (ICE) could, permissibly or impermissibly, view its failure to act as proof that the employer had constructive knowledge of potential immigration issues. Also, if it turns out that the no-match at issue was due to identity theft, an employee could claim that the employer's failure to log onto the site ended up causing economic damage to the employee. We recommend that most employers will choose to log onto the BSO website and begin the formal process of addressing the no-match letter.

Statistically, some 70 percent of no-match letters issued by the Administration involve employees who were not born in the United States. Requiring employees who were identified in the letter to fill out new I-9s runs the risk of claims of discrimination claims and lawsuits. Once the employer has addressed these initial issues, begin notifying the identified employees about the letter. Employers should continue paying payroll taxes for all identified employees, regardless of the no-match notice.

Here are some suggested protocols for notifying employees:

- **Meet Individually with Each Employee in A Private Meeting Space.** Two representatives of HR/management should be present (but not the employee's supervisor or anyone in the direct chain of command). Tell the employee that the company has been notified that the SSN on file does not match the employee's name. Instruct the employee to resolve the issue with the Social Security Administration and to report back as to their progress within 30 days. As a courtesy, employers may provide the employee with the telephone number and address of the nearest Social Security Administration office.
- **Confirm Instructions in Writing.** At the meeting, hand the employee a letter (a copy of which you retain) recapping the points covered in the meeting. The letter should include a maximum timeframe by which the employer expects to hear back from the employee to resolve the issue.

The best practice is to ask the employee to try to resolve the issue within 30 days (remember, the SSA requests that employers address the issue within 60 days). Consider the individual's circumstances and be reasonably flexible if they need to take more than 30 days. Attach to the letter a copy of applicable policies and refer to them in the letter. Have the employee sign and date receipt of the letter and keep that copy in the employee's personnel file.

- **Document and Be Prepared to Act.** Take good notes of this meeting, especially of the employee's response to the notification. In the event an employee admits during the meeting (or at any time) that they are undocumented or otherwise admits that they may not lawfully work in the United States, be prepared to terminate their employment immediately. The penalties for knowingly employing a person who is not lawfully permitted to work in the U.S. can include monetary penalties (ranging from $573 to $22,927 per undocumented employee depending on whether it is an employer's first, second, or third offense, loss of government contracts, loss of a business license, and even potential jail time of six months to ten years.
- **Keep A Chart Regarding Notice and Timing.** Track the dates of the meeting and when the employees were provided with notice about the no-match letter and follow up with those who have not reported back at the 30-day mark. Keep good records as to what each employee reports about their efforts to resolve the issue.

If the employee continues to delay reporting progress towards a resolution or seems to be taking an inordinately long time to resolve the matter, consider sending reminders to the employee's home address. The reminder should inform the employee of the date the notification was provided to them (include a copy of the original notice), and any subsequent communications the employer had with them about the issue. If the issue has not been resolved after a reasonable time has passed, and the employee does not appear to be making efforts to resolve the issue, meet with management and legal counsel to discuss next steps. If the employer has received additional information from any other source that the individual may not be authorized to work in the U.S., this information should be provided to legal counsel so that the employer can review the employee's I-9 and the new information with counsel to determine if further action is required, including possible termination.

After the employer has reviewed the no-matches on the BSO website and taken action to address the no-matches, the Administration asks that employers file Forms W-2C informing the Administration of corrections to employees' names and Social Security Numbers. Be sure to carefully follow the instructions for filing these forms. In addition to filing forms W-2C for those employees for whom the no-match can be identified and rectified, we suggest sending a letter to the SSA office that issued the no-match letter, advising it of the status of the remaining identified employees – for example, the employee is not currently employed at the company, the employee notified the employer and

indicated that their SSN is correct, the employee notified the employer that they are consulting with the SSA to address issue, etc.

Once the employer has a better handle on the number and nature of SSN no-matches, the employer should conduct an I-9 audit. This can be a particularly tricky step, given that the stated purpose of the SSN's no-match letter is to track benefits, not call into question immigration status of employees. Does every employee hired after November 6, 1986 have an I-9? Who is responsible for processing I-9s and have those employees been trained? Are all the required sections filled out? Were they timely completed? Are I-9s for terminated employees being purged in a timely manner? These are just a few of the questions that should be asked about I-9 records and processes. Consider conducting a compliance review of a random sampling of I-9s to determine whether a full review is warranted. If a full review is warranted, work with your legal counsel to address and correct errors (to the extent they are correctable). While there is no indication that the Administration's issuing of an SSA no-match letter will trigger an automatic ICE I-9 audit, this is a good opportunity to get a handle on potential liability and address any issues in the event one was to occur.

The Social Security Administration's decision to re-start issuing no-match letters places employers in a no-win situation. If employers do not log onto the BSO website, the government could infer that they knew of a potential problem with undocumented employees. On the other hand, if employers log on to the BSO website, they cannot simply ignore the information contained on the website but rather must make a good-faith effort to address the issue. Now that the SSA is back in the business of issuing no-match letters and given that an estimated 11 million undocumented individuals live in the United States, employers can get ahead of this issue by taking proactive steps to make sure names and SSNs of new hires match at the time of hiring. Moving forward, well before getting a SSA no-match letters, employers should review their I-9s to gauge whether there is any potential exposure and revisit policies and procedures for verifying the accuracy of new hires' I-9s, consider using E-Verify for new hires, and use the Social Security Number Verification Service for payroll reporting purposes.

Constructive knowledge could also be imputed to the situation in which the employer receives a report of a no-match discrepancy from a private party, such as a 401k plan administrator, a medical insurance company that already has coverage for an individual with the same Social Security Number, and Affordable Care Act electronic filings kicking out SSNs that do not match IRS records. Prudent employers should investigate the reason for the discrepancy and reach a conclusion one way or the other to avoid the imputation of knowledge of unauthorized employment, assuming that a reasonable investigation would in fact have proven that the employee(s) lacked employment authorization.

After a due diligence investigation, the duty to certify that a fact is true may not seem to encompass the principle of constructive knowledge - but it does. The penalty of failing to conduct a due-diligence

investigation merges with the "you should have known" imputation underlying constructive knowledge which may lead to criminal penalties.

II. Due Diligence in Mergers & Acquisitions

Corporate attorneys often overlook the necessity of assessing immigration consequences of corporate changes during the due diligence process. Employers who have acquired another company or have merged with another company may choose to treat employees who are continuing their employment with the related, successor, or reorganized employer as:

- New hires, in which case employers must complete a new Form I-9, Employment Eligibility Verification; or
- Continuing in employment, in which case employers must obtain and maintain the previously completed Form I-9.

Employers who choose to complete a new Form I-9 may do so before the merger or acquisition takes place as long as the employer has offered the acquired employee a job and the employee has accepted the offer. The employee must complete Section 1 no later than the first day of employment and the employer or the authorized representative must complete Section 2 within 3 business days of the employee's first day of employment. Employers should enter the effective date of the acquisition or merger as the date each of these employees began employment in Section 2 of their new Form I-9.

Employers who choose to keep the previously completed Form I-9 accept responsibility for any errors or omissions on those forms. Thus, the best practice is to complete new I-9s for acquired employees to avoid assuming the liabilities associated with the existing I-9s.

Below are the examples of immigration-related information that employers should gather during the due diligence process:

- Identify impacted personnel who have employer-sponsored work authorization status (both Nonimmigrant and Immigrant visa sponsorship).
- Identify impacted employees' new organizational titles, job descriptions, salaries, work locations.
- Confirm with corporate counsel whether transaction documents will show a "Successor-In-Interest" for immigration purposes.
- Conduct case-by-case legal analysis to confirm work eligibility of all impacted employees and identify actions to be taken and any immigration-related issues that may impact the "transfer" of personnel.

- Determine visa portability and advise immediately should key personnel not be portable (e.g., certain L-1 and E visa holders).
- Confirm H-1B visa "max out" dates and determine whether acquiring company may continuing leveraging "Post-6th Year H-1B Extensions".
- Review original public access files from target company (for H-1B and E-3 visa cases only) and assess compliance level and take actions, if applicable (e.g., file new Labor Condition Applications for all impacted personnel).
- Prepare Corporate Change Memorandum for H-1B/E-3 Public Access Files if public access files were properly maintained by the target company.
- Determine status of employer-sponsored immigrant visa petitions (e.g., EB-1, EB-2 and EB-3 filings), including labor certification approval dates and I-140 and I-485 filing dates.
- Conduct AC21[5] Portability Analysis for all pending I-485 applications that may be pending, if applicable.
- Review all PERM filings and recruitment audit files for all approved and pending PERM applications.
- Determine whether necessary to conduct new PERM/Labor Certification advertisements and recruitment steps for pending PERM cases, and if successful, prepare and file new PERM applications with U.S. Department of Labor.
- Prepare and file, if necessary, Non-Immigrant Visa Amendments with USCIS where there may be a "material change" in the employee's position and/or job duties.
- Prepare I-140 Amendments for impacted employees holding approved I-140 petitions, if applicable.
- Prepare and distribute, as necessary, "successor-in-interest" employment verification letters for impacted employees to serve as a supporting to travel document.
- Review target company's Form I-9s and assess compliance level and take actions, as appropriate.
- Complete new Form I-9s for ALL employees joining the acquiring company unless acquiring organization is assuming the liabilities and obligations of the target company.

[5] American Competitiveness in the Twenty-First Century Act of 2000 (AC21) (Public Law 106-313).

- Verify employment eligibility of all impacted employees through E-Verify, if applicable.
- Has the Company had been subject of any investigations from ICE, IRS, legacy INS, USCIS, the Dept. of Labor, or any similar entity to date? If yes, please describe and provide copies of the government correspondence related thereto.
- Has the Company ever received any Notices of Inspection or Notice of Unauthorized Alien from ICE, USCIS, INS, or any other investigating federal agency? If yes, please provide copies of these notices and describe outcome of each.
- Has ICE, USCIS, legacy INS, DOJ, or DOL visited the physical premises or client worksites? If so, why? Did they take custody of any records, documents, employees or contractors?
- Have the Company's I-9 forms or payroll records ever been audited by ICE, legacy INS, DOL or IRS? Results?
- Has the Company ever been fined or provided a Notice of Intent to Fine for incorrectly reporting social security numbers to the IRS or failing to properly complete and maintain I-9 records?
- How many previous no-match (Code V) letters has the Company received, how many employees were listed on each and what action was taken to notify federal agencies of no match resolutions?
- Does the Company have complete I-9 forms for every employee? Have they ever been audited internally or by a third party? If so, please provide dates of audits and results.
- Does the Company make and keep copies of the supporting documents used to complete the I-9 forms? If so, where and how are they stored?
- How many Company employees are foreign nationals with temporary work authorization?
- Is the Company enrolled in the Department of Homeland Security's E-Verify program for confirming authenticity of social security numbers and immigration documents presented to complete the I-9 forms?
- If so, how many tentative and final "no match" results has the Company received since enrolling in E-Verify?
- Are any key employees (executives, managers, or important technical personnel) working for the company pursuant to temporary work authorization? If so, who, and what is their current nonimmigrant status? Please provides copies of visas, I-94 cards, EAD cards (if applicable) and forms I-797 for each affected employee.

A failure to conduct a proper due-diligence can have dire consequences to the remaining entity resulting in the loss of key employees, unnecessary exposure for monetary penalties and criminal penalties, disruption in operations, possible loss of government contracts and possible debarments from filing nonimmigrant and immigrant visa petitions. If the due diligence review reveals a significant number of undocumented workers, it should be factored into the purchase price or an indemnity clause should be added to the contract to account for the loss of workers.

III. Third-Party Contractors

If vendors' employees are properly classified as independent contractors pursuant to employment law, the immigration regulations do not require employers to verify the identity and employment eligibility of its vendors' employees.

H-1B Third-Party Placements

U.S. Citizenship and Immigration Services ("USCIS") does, however, scrutinize third-party placement arrangements and end clients are expected to comply with the immigration regulations. In February 2018, USCIS released a new policy addressing its concerns with third party contractors. See USCIS Memorandums: Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements[6] and Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites (PM-602-0157 Feb. 22, 2018).[7] The updated policy guidance aligns with President Trump's Buy American and Hire American Executive Order.[8] The USCIS policy requires H-1B employers to disclose detailed information about vendor and end-client relationships when petitioning for employees who will be placed at third-party sites. Though USCIS has long asked H-1B petitioners to provide information about third-party assignments, the new guidelines indicate that the agency will scrutinize relationships among petitioners, subcontractors and end-clients even more closely than in the past and will seek direct confirmation of H-1B assignments from end-clients in initial petitions and extensions. More broadly, the new policy gives USCIS the ability to scrutinize an organization's practices and patterns of engagement with subcontractors and end-clients.

USCIS requires corroborating evidence that the work performed by the H-1B employee at a third-party worksite will be in a specialty occupation and examines the end-client's requirements to make that determination. USCIS will also use contracts and related documentation to determine whether

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[6] USCIS Memorandum, Determining Employer-Employee Relationship for Adjudication of H-1B Petitions, Including Third-Party Site Placements" (January 8, 2010), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2010/H1B%20Employer-Employee%20Memo010810.pdf.

[7] USCIS Memorandum, "Contracts and Itineraries Requirements for H-1B Petitions Involving Third-Party Worksites" (February 22, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-02-22-PM-602-0157-Contracts-and-Itineraries-Requirements-for-H-1B.pdf.

[8] Exec. Order No. 13788, 82 Fed. Reg. 18837 (2017).

the petitioner will maintain an employer-employee relationship with the H-1B worker throughout the period of employment. Acceptable corroborating evidence includes:

- Signed contracts with the end-client and all other companies involved in the H-1B employee’s assignment.
- Documents signed by the end-client specifying the specialized duties the H-1B employee will perform, the qualifications required to perform the duties, the duration of the job and the hours to be worked, such as a statement of work, work order or letter signed by an authorized official of the end-client.
- Detailed evidence of work assignments, including technical documents, marketing analyses, and funding documents.

In its 2018 Policy Memorandum, USCIS notes that all petitions requiring services that will be performed in more than one location must be accompanied by an itinerary. The petition may be denied if the employer fails to submit an itinerary either with the initial petition or in response to a Request for Evidence. Employers may provide an itinerary with the additional details listed in the memorandum to help USCIS evaluate whether the position offered to the foreign worker is a specialty occupation. The itinerary of the foreign worker's US services or engagements should include:

- The start and end dates of service.
- The names and addresses of the sponsoring employers.
- The names and addresses of the location where the services will be performed for the requested dates.
- Other documents that may be included in an initial petition for the H-1B worker include:
- A copy of a signed employment agreement between the petitioner and beneficiary detailing the beneficiary's employment terms and conditions.
- A copy of an employment offer letter that clearly describes the nature of the employer-employee relationship and the services the beneficiary will perform.
- A copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered a business agreement for which the petitioner's employees will be used) establishing that the petitioner continues to have the right to control its employees while the employees are placed at the third-party worksite.
    - A copy of the petitioner's position description or other recruiting documents (used to hire the H-1B worker) that describe:

        - the skills required to perform the job offered;
        - the source of instrumentalities and tools needed to perform the job;
        - the product to be developed or the service to be provided;
        - the location where the beneficiary will perform the duties;
        - the duration of the relationship between the petitioner and beneficiary;
        - whether the petitioner has the right to assign additional duties;
        - the extent of the petitioner's discretion over when and how long the beneficiary will work;
        - the method of payment to the beneficiary;
        - the petitioner's role in paying and hiring assistants to be used by the beneficiary;
        - whether the work to be performed is part of the petitioner's regular business;
        - the employee benefits; and
        - the beneficiary's tax treatment in relation to the petitioner.
        - A description of the performance review process.
        - A copy of the petitioner's organizational chart, demonstrating the beneficiary's supervisor chain and placement in the petitioner's organization.

When filing a petition to extend a worker's H-1B status, the petitioner must show the beneficiary's ongoing eligibility, including the continuing existence of the employer-employee relationship. This includes showing that the H-1B requirements were met during the initial duration of the H-1B period, including that the foreign worker worked in the specialty occupation, that the worker received the required wage, and that the employer maintained the right to control the beneficiary. Some documents from the period of previously approved H-1B status that may be used to show the on-going maintenance of the relationship include copies of:

- The beneficiary's pay records, such as:
    - leave and earnings statements;
    - pay stubs; or
    - any other relevant documents.

- The beneficiary's payroll summaries, Forms W-2, or both, evidencing wages paid to the beneficiary.
- The beneficiary's times sheets.
- Prior years' work schedules.
- Documentary examples of work product created or produced by the beneficiary, such as copies of:
    - business plans;
    - reports;
    - presentations;
    - evaluations;
    - recommendations;
    - critical reviews;
    - promotional materials;
    - designs;
    - blueprints;
    - newspaper articles;
    - website text;
    - news copy;
    - photographs of prototypes; or
    - any other relevant documents.
- Dated performance reviews.
- Any employment history records, including among other documents showing:
    - date of hire;
    - dates of job changes such as promotions, demotions, transfers, or layoffs; or
    - pay changes with effective dates.

Defining the Worksite

A crucial element of the employer's ability to satisfy its LCA obligations (and acquire and maintain the worker's H-1B status) is identifying where the worksite or worksites will be. The worksite or worksites contain the population of workers that hold the same or similar occupation as the H-1B worker requiring notice of the LCA filing. DOL regulations define the worksite as the physical place where the work is performed, except in the following circumstances:

- The employee goes to another location to attend an individual or employer-required developmental activity, such as a:
    - management conference;
    - staff seminar; or
    - formal training.
- The nature of the job requires frequent location changes. A location is not a worksite if:
    - the job is either peripatetic, normally requiring frequent travel from location to location, or the job is mostly performed in one location but requires occasional short-term travel to work at other locations;
    - the H-1B worker's work at remote locations occurs on a short-term basis (up to five consecutive workdays per visit by a peripatetic worker (also known as a roving employee) or ten consecutive workdays per visit by occasional traveling workers); and
    - the H-1B worker is not at the remote location as a strikebreaker.

20 C.F.R. § 655.715.

Each approved LCA applies to any worksite within the specified geographic area of employment, if the employer complies with its obligations regarding:

- The actual wage determination.
- Notice.
- Other worksite-specific obligations.

In addition, if after the H-1B petition approval the employer places the H-1B employee at a new worksite in a geographical area not anticipated at the time the original LCA was filed, the employer may be required to post another LCA with the new geographical data. The placement may also require the employer to obtain approval of an amended H-1B petition with USCIS.

Notice of the Labor Condition Application Filing

The fourth statement required of employers on the Labor Condition Application ("LCA") is notice of the LCA filing to similarly situated workers to the H-1B worker at the worksite (20 C.F.R. § 655.734). Employers must provide information regarding:

- The number of H-1B workers sought.
- The wages to be paid.
- The way that similarly situated workers can make a complaint to the DOL regarding the LCA filing, and presumably, the employment of H-1B workers.

A notice, whether hard copy or electronic, must be posted for 10 consecutive business days at two conspicuous locations, such as an HR bulletin board and breakroom, at the H-1B worker's place of employment, defined generally as the worksite or physical location where the work is performed. If the H-1B worker will be placed at a third-party location, posting must be accomplished at that worksite. Therefore, employers that place H-1B workers on third-party worksites must ensure that notice is made to the appropriate body of similarly situated workers. Rather than only the employer's employees, the similarly situated workers also include the employees of the third-party worksite enterprise who are employed in the same occupational classification as the H-1B worker. When the H-1B worker is not in a union-represented job (for which notice is made to the union representative), it may be more difficult for the employer to reach a third-party's workforce.

DOL regulations permit direct notice to be made either by hard copy or electronic posting. In either case, the notice must be readily available to the similarly situated employees at the worksite. However, it may be difficult for the employer to provide notice of the LCA filing at a third-party worksite where it may be easily seen and read by those employees. The third-party enterprise may not permit the posting if it is reluctant to publicize the use of contract workers or for other reasons.

On March 15, 2019, the DOL posted a Field Assistance Bulletin[9], confirming an employer's obligations when posting the notice electronically. The DOL notes that electronic notice must be as effective as hard copy posting, in that it must be readily available to the affected employees. Therefore, affected employees, whether employees of the H-1B petitioning employer or a third-party host, must:

- Know about the electronic posting location (similar to the notion of posting hard copies in a conspicuous location).

[9] (WHD FAB No. 2019-3 (Mar. 15, 2019)

- Be able to access the electronic posting. For example, notice posted on a password-protected intranet that is not accessible by all affected employees, including employees of a third-party host if the H-1B worker will be placed at a third-party location, is not acceptable.
- Be able to discern which notices apply to their worksite.

As long as the electronic notice meets these criteria, it may be made in any method preferred by the H-1B employer, including:

- Posting to the employer's public website.
- Posting to an intranet site or electronic bulletin board.
- Emailing or otherwise circulating electronic messages.

The L-1 Visa Reform Act of 2004

Congress passed the L-1 Visa Reform Act of 2004 in response to concerns that employers were importing workers in the L-1 nonimmigrant visa classification when the H-1B nonimmigrant classification was unavailable to provide general skills (rather than the workers' specialized knowledge) to secondary employers (Pub. L. 108-447, Div. J, Title IV, 118 Stat. 2809 (2004)). The L-1 Visa Reform Act added a bar to job-shopping of L-1B employees (8 U.S.C. § 1184(c)(2)(F)). USCIS distinguishes between a petitioner whose business is to place employees with secondary employers, a situation clearly barred, and a petitioner that controls and supervises the work of the employee as they provide a specialized product or service on the premises of an unaffiliated company. Generally, an L-1B petition may be denied if the third-party controls:

- Work product.
- Work time.
- Workplace.
- Content of the employee's assignment.

The Job Shop Bar

A specialized knowledge worker is ineligible for L-1B classification if they will be stationed primarily at the worksite of an employer other than the petitioner, or its subsidiary or affiliate, and either:

- The worker will principally be under the control and supervision of the unaffiliated employer.
- The placement is essentially an arrangement to provide labor for hire for the unaffiliated employer rather than a placement for providing a product or service for which specialized knowledge specific to the petitioner is necessary.

8 U.S.C. § 1184(c)(2)(F).

The provision applies only to specialized knowledge employees who would be stationed primarily outside the L-1B petitioner's corporate family. The restriction does not apply unless a majority of the L-1B worker's work-related activities occur at a location other than that of the petitioner or its affiliates. That is, an employee might be subject to the bar if most of her work is done off premises, even if she spends most of her time on the petitioner's premises, if the latter time is "down time" rather than time actually spent performing the services described in the petition. The number of non-affiliated worksites where the L-1B worker might be stationed, by itself, is not relevant. Instead, the location where the worker will be engaged in the employment described in the underlying L-1B petition is relevant. (See USCIS Memorandum: Changes to the L Nonimmigrant Classification Made by the L-1 Reform Act of 2004 (July 28, 2005).)

Control of and Supervision Over the L-1B Worker

Even in the event of off-site work, the employee will not be barred unless either:

- The employee will be principally under the control and supervision of the unaffiliated employer.
- The assignment is essentially an arrangement to provide labor for hire for the unaffiliated employer.

What constitutes "essentially" in such an arrangement is a question of fact. Adjudicators will consider all aspects of the activities in which the L-1B worker will be engaged away from the petitioner's worksite. (See USCIS Memorandum: Changes to the L Nonimmigrant Classification Made by the L-1 Reform Act of 2004 (July 28, 2005).)

Considering the current Administration’s extreme vetting policies, below are our recommended best practices for utilizing foreign national contractors:

- The employer should have procedures in place to accurately track visa types and expiration dates, but not to take any adverse actions against any contractor without the advice of counsel due to the complexities involved with automatic extensions of some Employment Authorization Cards and 240-day extensions of some timely filed work visa extensions.
- The employer should only track the following visa types: E-3, H-1B, H-4, L-1A, L-1B, L-2, O-1, TN-1, TN-2, and Employment Authorization Cards (“EAD”).
- The employer should not track expiration dates for Lawful Permanent Resident Cards (green cards) because this could result in a discrimination charge with the U.S. Department of Justice.

- The employer should coordinate with its vendor relations team to obtain information on which foreign national contractors need to have LCA notices posted and to manage the posting, removal and retention of the LCA notice copy.
- The employer team should develop a policy of who on the team is authorized to confirm a contractor's assignment details the U.S. Consulate and the Department of State.
- The employer should have copies of the H-1B or L visa petitions filed by vendors on behalf of contractors (or at least know who to contact at the Vendor to obtain a copy quickly) in the event of a government site visit at the employer's worksite.
- The employer should develop a template end-client letter to use for contractors in support of their visa processes and develop a policy that all requests for end-client letters must go through a specific team and only members of that team are authorized to sign on behalf of the employer.
- The employer should develop a template RFE response letter to use in the event USCIS requests additional information.
- The contract terms should clearly indicate the vendor's responsibilities (see below).

Although the employer should not assume the unnecessary administrative burden of keeping up with the work authorization expirations of its vendors' employees and the potential monetary and criminal penalties associated with knowingly employing an undocumented worker, the following are the reasons that the employer needs to be aware of the above-requested information:

- To ensure employer meets the posting requirements associated with some work visas, such as H-1Bs, H-1B1s, and E-3s;
- To ensure that the employer is aware of and can prepare for random site visits from the U.S. Department of Labor, and the Fraud Detection and National Security Directorate associated with H-1B and L-1 visas; and
- To ensure that the employer can respond to requests for verification from U.S. Consulates, and the U.S. Department of State of the terms and conditions of employment of foreign nationals working on-site at the employer.

Employers that sponsor H-1B or L-1B workers for employment that require placement at third-party worksites should consider the arrangement they seek and ensure that it meets regulatory requirements and current USCIS interpretations. Employers should document employment arrangements with employees to provide evidence and support of their work agreements. In addition, employers should ensure that the H-1B or L-1B workers are aware of the questions that may arise

regarding their placement at a third-party worksite and how to address those questions when raised by a US government official.

If the employer chooses to move away from using third-party contractors, the employer may alternatively directly sponsor the foreign national contractors for U.S. work visas, such as H-1Bs.

In the event that the employer does not have the internal resources to handle the posting of Labor Condition Applications, end-client letters in initial visa petition submissions, letters of support in response to Requests for Evidence from U.S. Citizenship and Immigration Services, confirming job details to U.S. Consulates, or responding to government site visits, outside counsel can assist with some or all of the requirements. Employer may pass outside counsel fees onto the Vendor by incorporating them into the contract terms, such as the following:

Vendor certifies that all its employees are legally authorized to work in the U.S. for the Vendor at employer's site. Vendor verifies its compliance with all applicable federal, state or local laws, regulations, or ordinances related to immigration and verification of lawful status and employability of employees working on a contract, including notifying employer of all posting requirements and foreign national employees working on visas that may subject employer to a site visit, audit or request for information from the government. Vendor agrees that upon employer's, vendor will engage a third-party auditor who is an expert in U.S. immigration law and the employee verification process to audit the Vendor's immigration compliance plan, review Form I-9s, review work visa petitions, and provide an immigration certification letter regarding Vendor's immigration compliance levels to employer. Vendor further agrees to reimburse employer for any fees and costs associated with employer posting Labor Condition Applications on behalf of Vendor's employees, responding to government site visits related to vendor's employees, responding to government audits and/or responding to requests for information from the government on behalf of Vendor's employees.

IV. Unpredictable Adjudications of Work Visas

The Trump Administration has adopted "extreme vetting" policies for adjudicating work visas filed by employers. As demonstrated by the tables below, these extreme vetting policies have resulted in a 10.9% increase in the denial rate for H-1B work visas since 2015 and a 17.9% increase in Requests for Additional Evidence ("RFE"). Of those H-1Bs where USCIS issued an RFE, there was an 17.8% increase in the denial rate since 2015. In 2019, USCIS issued RFEs in 40.2% of H-1B work visa petitions filed by employers.

U.S. Citizenship and Immigration Services

I-129 - Petition for a Nonimmigrant Worker Specialty Occupations (H-1B) by Fiscal Year, Quarter, and Case Status: October 1, 2014 - September 30, 2019

Period		Petitions by Case Status								
Fiscal Year	Quarter	Petitions Received [1]	Initially Approved [2]	Initially Denied [3]	Total Completions [4]	Approved (%)[5]	Completions with RFE[6]	Completions with RFE (%)[7]	Approved with RFE[8]	Approved with RFE (%)[9]
2015	Q1. Oct. - Dec.	52,030	68,890	3,977	72,867	94.5%	19,606	26.9%	15,995	81.6%
	Q2. Jan. - Mar.	46,136	45,927	2,214	48,141	95.4%	11,614	24.1%	9,602	82.7%
	Q3. Apr. - Jun.	176,424	85,545	1,945	87,490	97.8%	10,977	12.5%	9,339	85.1%
	Q4. Jul. - Sep.	93,558	88,139	4,937	93,076	94.7%	25,118	27.0%	21,073	83.9%
2015 Total		**368,148**	**288,501**	**13,073**	**301,574**	**95.7%**	**67,315**	**22.3%**	**56,009**	**83.2%**
2016	Q1. Oct. - Dec.	64,730	68,521	6,014	74,535	91.9%	25,281	33.9%	20,546	81.3%
	Q2. Jan. - Mar.	66,734	78,114	6,224	84,338	92.6%	15,217	18.0%	11,163	73.4%
	Q3. Apr. - Jun.	185,705	113,093	4,386	117,479	96.3%	15,777	13.4%	12,828	81.3%
	Q4. Jul. - Sep.	81,491	97,467	6,408	103,875	93.8%	22,703	21.9%	17,807	78.4%
2016 Total		**398,660**	**357,195**	**23,032**	**380,227**	**93.9%**	**78,978**	**20.8%**	**62,344**	**78.9%**
2017	Q1. Oct. - Dec.	64,979	89,938	7,618	97,556	92.2%	26,795	27.5%	21,145	78.9%
	Q2. Jan. - Mar.	97,058	103,404	8,428	111,832	92.5%	20,290	18.1%	13,936	68.7%
	Q3. Apr. - Jun.	169,294	108,741	6,647	115,388	94.2%	19,580	17.0%	14,479	73.9%
	Q4. Jul. - Sep.	71,754	71,259	7,161	78,420	90.9%	19,523	24.9%	13,872	71.1%
2017 Total		**403,085**	**373,342**	**29,854**	**403,196**	**92.6%**	**86,188**	**21.4%**	**63,432**	**73.6%**
2018	Q1. Oct. - Dec.	62,314	80,808	16,517	97,325	83.0%	44,337	45.6%	28,853	65.1%
	Q2. Jan. - Mar.	69,604	72,532	19,287	91,819	79.0%	44,296	48.2%	26,362	59.5%
	Q3. Apr. - Jun.	202,369	92,670	11,312	103,982	89.1%	26,647	25.6%	16,269	61.1%
	Q4. Jul. - Sep.	84,454	88,935	14,231	103,166	86.2%	35,329	34.2%	22,426	63.5%
2018 Total		**418,741**	**334,945**	**61,347**	**396,292**	**84.5%**	**150,609**	**38.0%**	**93,910**	**62.4%**
2019	Q1. Oct. - Dec.	60,296	76,696	25,080	101,776	75.4%	61,126	60.1%	37,578	61.5%
	Q2. Jan. - Mar.	67,295	80,535	15,671	96,206	83.7%	33,942	35.3%	19,952	58.8%
	Q3. Apr. - Jun.	206,739	116,315	11,711	128,026	90.9%	34,126	26.7%	23,419	68.6%
	Q4. Jul. - Sep.	86,287	115,840	17,081	132,921	87.1%	55,141	41.5%	39,641	71.9%
2019 Total		**420,617**	**389,386**	**69,543**	**458,929**	**84.8%**	**184,335**	**40.2%**	**120,590**	**65.4%**
Grand Total		**2,009,251**	**1,743,369**	**196,849**	**1,940,218**	**89.9%**	**567,425**	**29.2%**	**396,285**	**69.8%**

USCIS is not giving deference to prior approvals[10] for the same position or even the same foreign national. USCIS' typical RFE for an H-1B directs the employer to provide more evidence in the following areas: (1) specialty occupation; (2) Employer-Employee Relationship; and (3) In-House Employment.

A. Specialty Occupation

In order to show that an H-1B position is a specialty occupation, the employer should submit the following evidence:

- Proof that the position requires a bachelor's degree in a specific and related field, such as prior job postings;
- Degrees, resumes and pay stubs of other employees in the same role;
- Spreadsheet showing the percentage of time the worker spends on each duty and the specialized knowledge required to perform each duty, and the coursework the worker completed to qualify for each task;

[10] USCIS Memorandum, "Rescission of Guidance Regarding Deference to Prior Determinations of Eligibility in the Adjudication of Petitions For Extension of Nonimmigrant Status" (October 23, 2017), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2017/2017-10-23Rescission-of-Deference-PM6020151.pdf.

- An organizational chart showing hierarchy and staffing levels and include all divisions of the organization. Identify the foreign national's position within the chart as well as the names and job titles of anyone who works under them and indicate their supervisor (including their job title). Employers should also include the employees' corresponding educational and experience requirements for the position;
- Examples of work product created by current or prior employees in similar positions, such as reports, presentations, evaluations, designs, blueprints, etc.;
- Additional information about the employer that highlights the nature, scope, and activity of the business enterprise along with evidence to establish that the foreign national will be employed with the duties presented. Examples include business plans, reports and presentations to describe the business, contractual agreements or work orders from each company that will use the foreign national's services showing that the worker will be performing specialty occupation duties, promotional materials, advertisements, articles, and/or press releases, and patents; and
- Copies of trade publications or other articles within employer's industry which demonstrate and highlight the specific complex or unique functions of the particular position, which can only be performed by an individual with a bachelor's degree or higher in a specific field.

B. Employer-Employee Relationship

USCIS is also demanding that employers to submit more documentary evidence of the employer-employee relationship, including:

- Performance reviews of the foreign national (if any);
- Offer letter;
- Quarterly wage reports
- Tax returns of the employer, including all schedules;
- Foreign national's benefits; and
- Descriptions of projects to show the worker has enough work for three years.

C. In-House Employment

The other area of USCIS' inquiry usually involves proof that the foreign national will perform work at the employer's premises, and that there is enough work available for the requested 3-year period, including:

- Evidence of actual work assignments, which may include technical documentation, milestone tables, marketing analysis, cost-benefit analysis, brochures and funding documents; and

- Evidence of sufficient production space and equipment to support the foreign national's specialty occupation work, such as photographs of workspace, building signage, and building lease.

Similarly, the Trump Administration's extreme vetting policies have resulted in a 11.8% increase in the denial rate for L-1 intracompany transferee work visas since 2015 and a 20% increase in Requests for Additional Evidence ("RFEs"). Of those L-1s where USCIS issued an RFE, there was an 2.7% increase in the denial rate since 2015. In 2019, USCIS issued RFEs in 54.3% of L-1 work visa petitions filed by employers.

U.S. Citizenship and Immigration Services

I-129 - Petition for a Nonimmigrant Worker
Intracompany Transferee Executive or Manager (L-1A)
Intercompany Transferee Specialized Knowledge (L-1B)
by Fiscal Year, Quarter, and Case Status:
October 1, 2014 - September 30, 2019

Period		Petitions by Case Status								
Fiscal Year	Quarter	Petitions Received [1]	Initially Approved [2]	Initially Denied [3]	Total Completions [4]	Approved (%)[5]	Completions with RFE[6]	Completions with RFE (%)[7]	Approved with RFE[8]	Approved with RFE (%)[9]
2015	Q1. Oct. - Dec.	9,501	8,251	1,913	10,164	81.2%	4,136	40.7%	2,248	54.4%
	Q2. Jan. - Mar.	9,517	7,217	1,685	8,902	81.1%	3,411	38.3%	1,754	51.4%
	Q3. Apr. - Jun.	10,730	9,221	1,372	10,593	87.0%	2,935	27.7%	1,608	54.8%
	Q4. Jul. - Sep.	10,447	8,765	1,556	10,321	84.9%	3,223	31.2%	1,726	53.6%
2015 Total		**40,195**	**33,454**	**6,526**	**39,980**	**83.7%**	**13,705**	**34.3%**	**7,336**	**53.5%**
2016	Q1. Oct. - Dec.	10,142	7,483	1,376	8,859	84.5%	3,030	34.2%	1,710	56.4%
	Q2. Jan. - Mar.	10,622	9,086	1,513	10,599	85.7%	3,226	30.4%	1,789	55.5%
	Q3. Apr. - Jun.	10,669	8,913	1,552	10,465	85.2%	3,332	31.8%	1,836	55.1%
	Q4. Jul. - Sep.	10,321	8,576	1,549	10,125	84.7%	3,279	32.4%	1,822	55.6%
2016 Total		**41,754**	**34,058**	**5,990**	**40,048**	**85.0%**	**12,867**	**32.1%**	**7,157**	**55.6%**
2017	Q1. Oct. - Dec.	10,367	8,603	1,391	9,994	86.1%	2,982	29.8%	1,700	57.0%
	Q2. Jan. - Mar.	10,902	8,881	2,062	10,943	81.2%	3,784	34.6%	1,876	49.6%
	Q3. Apr. - Jun.	11,625	9,488	2,569	12,057	78.7%	4,800	39.8%	2,296	47.8%
	Q4. Jul. - Sep.	9,910	8,709	2,451	11,160	78.0%	4,431	39.7%	2,038	46.0%
2017 Total		**42,804**	**35,681**	**8,473**	**44,154**	**80.8%**	**15,997**	**36.2%**	**7,910**	**49.4%**
2018	Q1. Oct. - Dec.	9,897	7,187	2,048	9,235	77.8%	4,255	46.1%	2,241	52.7%
	Q2. Jan. - Mar.	10,339	7,907	2,097	10,004	79.0%	4,262	42.6%	2,246	52.7%
	Q3. Apr. - Jun.	11,014	7,335	2,035	9,370	78.3%	4,120	44.0%	2,157	52.4%
	Q4. Jul. - Sep.	9,993	7,104	2,245	9,349	76.0%	4,684	50.1%	2,520	53.8%
2018 Total		**41,243**	**29,533**	**8,425**	**37,958**	**77.8%**	**17,321**	**45.6%**	**9,164**	**52.9%**
2019	Q1. Oct. - Dec.	9,867	6,922	2,393	9,315	74.3%	4,841	52.0%	2,548	52.6%
	Q2. Jan. - Mar.	10,076	6,696	2,625	9,321	71.8%	4,959	53.2%	2,534	51.1%
	Q3. Apr. - Jun.	10,919	7,697	3,272	10,969	70.2%	6,101	55.6%	2,985	48.9%
	Q4. Jul. - Sep.	10,077	8,020	3,177	11,197	71.6%	6,251	55.8%	3,177	50.8%
2019 Total		**40,939**	**29,335**	**11,467**	**40,802**	**71.9%**	**22,152**	**54.3%**	**11,244**	**50.8%**
Grand Total		**206,935**	**162,061**	**40,881**	**202,942**	**79.9%**	**82,042**	**40.4%**	**42,811**	**52.2%**

Footnotes

[1]The number of new petitions received and entered into a case-tracking system during the reporting period.
[2]The number of petitions approved during the reporting period. Only initial decisions are considered. Subsequent decisions are excluded (Revocation, Remands, etc.)
[3]The number of petitions denied during the reporting period. Only initial decisions are considered. Subsequent decisions are excluded (Revocation, Remands, etc.)
[4]The number of petitions approved and denied during the reporting period.
[5]The percentage of petitions approved out of total completions.
[6]The number of completions that had a Request for Evidence (RFE).
[7]The percentage of completions with an RFE out of total completions.
[8]The number of petitions with an RFE that were approved.
[9]The percentage of petitions with an RFE that were approved out of all completions with an RFE.

Note:

1) Some petitions approved or denied may have been received in previous reporting periods.
2) Petitions may have been received in a different time period from the one in which a RFE was ordered.
3) Petitions with multiple RFEs are only counted once.
4) The report reflects the most up-to-date data available at the time the database is queried.
5) Counts may differ from those reported in previous quarters due to system updates and post-adjudicative outcomes.

Source: Department of Homeland Security, U.S. Citizenship and Immigration Services, C3 Consolidated via Statistical Analysis System (SAS), queried September 30, 2019

For L-1A intracompany-transferee petitions for managers or executives, USCIS' most common RFE requests evidence that the position abroad and the position in the U.S. are managerial or executive in nature, including the following:

- Copies of performance appraisals or reviews conducted by the foreign national for their direct reports abroad or any other evidence showing that they have managerial authority over the direct reports (i.e. email correspondence with Human Resources discussing hiring or promotions, disciplinary actions, leave authorization, etc.);
- Copies of foreign national's training, pay or personnel records showing that they are in a managerial position abroad.
- Organizational chart or diagram showing the organizational structure and staffing levels of the affiliated company abroad;
- Job descriptions and educational degrees for all of the employees in foreign national's immediate division/department;
- A letter from an authorized representative from the affiliated employer abroad describing foreign national's managerial position;
- An organizational chart or diagram showing the U.S. company's organizational structure and staffing levels. The chart/diagram should include all of the employees in proposed department, by name, job title, summary of duties, education level and salary;
- Educational degrees for all of the U.S. employees the foreign national will manage in the U.S.; and
- Copies of the U.S. company's payroll summary, Forms W-2, W-3 and 1099-MISC showing all wages to be paid to the employees under foreign national's direction.

A well-crafted RFE response with the assistance of immigration counsel and with robust supporting evidence can still result in an approval. The challenge for employers is that even when all the evidence is submitted, USCIS is still inconsistent in its adjudications. For example, one engineering company filed 3 petitions at the same time for engineers in the exact same position with virtually identical qualifications – one was approved, USCIS issued an RFE on the other and the third petition was denied. Unfortunately, this was not an isolated incident.

Even if in-house counsel does not play a role in the initial filings of work visas, they are usually brought into the matter when a Request for Evidence is issued because some of the evidence requested may involve confidential and proprietary information and/or may implication privacy concerns.

When it comes to immigration compliance, extreme vetting can only be countered with extreme vigilance by employers. By working with immigration counsel to file comprehensive work visa petitions, reviewing the placement of foreign contractors on-site, conducting immigration due

diligence before undertaking mergers and acquisitions, and investigating evidence of identity theft or undocumented status of workers, employers can protect themselves in an “extreme vetting” era to minimize exposure.