



## Immigration Enforcement and Visa Processing: **Critical Developments**

By Helen L. Konrad, Esq.

In this scenario, a staffing company is faced with an **ICE investigation**. **What documentation** is it required to produce, and **what brought about the investigation?**

**L**KJ Staffing, based in Santa Fe, NM, has recently been required by Immigration and Customs Enforcement to produce 80 Forms I-9 for employees that the staffing firm placed over the past year at an industrial manufacturing client site, Industrial Works. The staffing company has only three days to produce the 80 documents, so Joshua Josephson, a recruiting manager at LKJ Staffing, has been tasked with reviewing the documentation and seeing the investigation through to closure. Josephson has heard that ICE (as well as many other government agencies) has been increasing its enforcement efforts, but he wonders

where it is stemming from, and how far-reaching the effects are for staffing companies. He turns to the ASA website, *americanstaffing.net*, to find his answers—and quickly finds the article “The Effects of Increased Immigration Enforcement and Stricter Visa Processing.” Here’s what he learns.

In April 2017, President Donald Trump issued the “Buy American, Hire American” executive order. All executive agencies were then charged with finding ways to implement the message of the executive order. Therefore, we are seeing a focus on enforcement across all agencies—not just the U.S. Citizenship and Immigration Services.

Early in the president’s term, Congress agreed to fund thousands more enforce-



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ment officers to investigate employers who hire unauthorized workers, underpay foreign workers to depress U.S. wages, or show a “preference” for foreign workers over U.S. workers. The message to the agencies was to aggressively investigate all of these options and assess significant fines. We are seeing the impact of this increase in resources in a parallel spike in the initiation of investigations.

### ICE I-9 Investigations

ICE is charged with investigating whether employers have properly completed Forms I-9 at time of hire as a means of ensuring that employers only hire those who are legally authorized to work in the U.S. I-9 investigations are initiated by serving a Notice of Inspection on employers and providing them with only three days to produce required I-9s and supporting documents (as is the case with LKJ Staffing). Supporting documents would include copies of documents presented in support of identity and authorization to work (if maintained), E-Verify documentation (if enrolled), and audit trails, if the employer relies on an electronic I-9 vendor (which LKJ does).

ICE recently announced that in 2018 alone, it has issued more than 5,200 I-9 notices to U.S. businesses; 2,540 were issued between January and March 2018, and an additional 2,738 were issued between July 16 and July 20, 2018.

There are two kinds of investigations: (1) direct investigation of an employer, which usually has a look-back period of a few months to a few years of I-9s; and (2) a derivative investigation of a staffing firm, merely because it was identified as a subcontractor for an end client, that itself was previously served with a Notice of Inspection.

#### Tips:

- Run payroll and ensure that you have a valid and complete I-9 for all employed personnel.
- If you have remote hires, ensure that I-9s are completed and signed only by the employer’s agent or representative who physically saw original supporting documents while in the presence of the employer and did not rely on copies of supporting documents to complete Section 2.
- If you rely on an electronic I-9 vendor, request immediately a copy of its business practices and processes that outline the indexing system, security, and features of electronic signatures.
- Ensure that electronic I-9 vendors can produce an I-9 audit trail for each and every I-9 required to be retained in the system.
- Client contracts should include a provision that Client will notify staffing firm within 24 hours if it is named in response to a Notice of Inspection and/or Immigration Enforcement Subpoena.

The staffing firm should expect to receive its own Notice of Inspection within six months but would have time to prepare.

- Once audited, produce *all* I-9s and supporting documents within the required period. Piecemeal production is not compliant.
- If making corrections, always initial a change with the date the correction is made. No back dating.

### Department of Justice, Immigrant, and Employee Rights Investigations

These investigations have historically focused on the process of applicant hiring and onboarding to ensure that there are not barriers in place to hiring U.S. workers.

On July 31, the U.S. Department of Justice announced that it was forming a partnership with the U.S. Department of Labor “to better protect U.S. workers from discrimination by employers that prefer to hire temporary visa workers over qualified U.S. workers.” As a result, IER opens investigations of employers that have a record of hiring many non-U.S. citizens to determine if they are preventing U.S. workers from being hired and preferring to hire foreign workers. DOL would determine if the employer was also paying foreign labor less than would be required to pay U.S. workers.

Staffing firms in all market segments could be impacted by this focus. Industrial, hospitality, and clerical firms may have a heavily immigrant base because of the unskilled nature of the work. Professional staffing firms may have a heavily immigrant base because of the focus on certain health care workers that are in very short supply in the U.S. (e.g., nurses, physical therapists), or because of the need for IT services.

### Department of Labor Investigations

DOL has traditionally investigated employers to ensure that they are properly classifying workers as employees or independent contractors. It has also focused on per diem reimbursement and payment for overtime. DOL is still doing all of these things,

but while the Obama administration may have focused more on classification issues, the Trump administration is focused on whether employers are hiring “cheap foreign labor” at the expense of U.S. workers.

### Agency Interpretations

Investigations and enforcement are one way to discourage employers from hiring unauthorized workers. A separate avenue is to create additional barriers to the hiring of non-U.S. workers as an incentive to hire Americans. We are seeing this happening in all market segments in different ways, but there is a definite impact on staffing firms that assign workers to third-party sites.

Historically, U.S. immigration policy included a category called temporary protected status (TPS) provided to citizens of certain countries who were in the U.S. when either a natural disaster, like an earthquake or hurricane, or civil unrest made returning to the country untenable. They were given a work authorization card during this temporary period.

This administration has announced elimination of TPS for many countries (e.g., Haiti, El Salvador, Honduras, Nepal). This includes hundreds of thousands of workers who had legal work authorization, and in a year or less will not have legal authorization to work or remain in the U.S. The same is true of the 700,000+ Dreamers who have limited work authorization through the Deferred Action for Childhood Arrivals, which may be expiring soon and not renewed. The impact on staffing firms in these sectors will be quite significant, given that there is not a ready U.S. labor pool to step in and replace these workers.

Foreign students that completed degrees in a STEM field (science, technology, engineering, or math) are entitled to an additional two-year period of work authorization in the U.S. ICE has jurisdiction over the STEM program and has posted extensive frequently asked questions (FAQs) on its website advising employers how to comply with this program to hire student workers.

Recently, many end clients have raised concerns with staffing firms about placement of these STEM workers at client sites based on a posting on the U.S. Citizenship and Immigration Service website that says third-party placement is not appropriate. However, as of Aug. 17, 2018, USCIS removed this posting and changed it back to make it clear that third-party placement is permissible.

H-1B petitions have also been affected, as there is now a much higher standard of review to get an approval. ■

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