FEDERAL BRIEFING: IMMIGRATION COMPLIANCE IN THE EXTREME VETTING ERA

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I. Introduction

Prior to President Trump taking office, in-house counsel typically delegated immigration compliance to HR professionals and staff. But now that the new standard for immigration adjudications is "extreme vetting"—with a 400 percent increase in worksite enforcement investigations —the law demands a closer oversight by in-house counsel of immigration matters. Meanwhile, employers must confront the antidiscrimination provision of the Immigration and Nationality Act (INA),[1] during recruiting, hiring, and terminations.

Employers must now also face innumerable barricades to hiring qualified foreign national employees to meet labor needs, including increased government scrutiny, the ending of deference to prior immigration application approvals, work visa denials, changes to the H-1B work visa program, and increased processing times. Here we present practical solutions to address the most common immigration compliance concerns faced by today's employers.

II. ICE Storms Surge

Employers need to protect themselves against persistent U.S. Immigration and Customs Enforcement (ICE) audits. A review of recently revealed statistics[2] from last year show just how aggressive the federal government has become. Audits of employer Form I-9s, criminal investigations, and arrests by ICE surged by 300 to 750 percent in fiscal year 2018. In this past year alone, ICE conducted 6,848 worksite investigations (compared to 1,691 in FY2017), initiated 5,981 I-9 audits (compared to 1,360 from the prior year), and made 779 criminal and 1,525 administrative worksite-related arrests (compared to 139 and 172, respectively). Overall, ICE

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[1] 8 U.S.C. §1324b, 28 C.F.R. Part 44.

[2] *See* Press Release, U.S. Immigration & Customs Enforcement, ICE Worksite Enforcement Investigations in FY2018 Surge (December 11, 2018), https://www.ice.gov/news/releases/ice-worksite-enforcement-investigations-fy18-surge.

indicted 72 managers, convicting 49 of them. Businesses were ordered to pay more than $20.4 million in civil penalties, judicial fines, forfeitures, and restitutions in 2018.

ICE's worksite enforcement strategy focuses on criminal prosecution of employers who knowingly break the law. ICE issued the largest-ever civil settlement agreement of $95 million against one of the largest privately-held companies in the U.S. after a six-year ICE investigation found unlawful employment of foreign nationals who were ineligible to work in the U.S.[3] ICE determined that the highest levels of company management remained willfully blind while lower level managers hired and rehired employees they knew to be ineligible to work in the United States. Given the agency's current aggressive stance, employers face an increased risk of a visit from federal immigration authorities now more than ever.

A. What Employers Can Do To Prepare: 5-Step Plan To Avoid A Similar Fate

By taking concrete steps now, employers can limit their risk and do their best to avoid an invasive ICE raid altogether. Here are five steps employers can take today to ensure extreme vigilance in an era of extreme vetting.

1. Ensure I-9 compliance policies and programs are in place, up-to-date, and followed.
2. Complete I-9 forms if any are lost or missing. All current employees hired after November 6, 1986 must have an I-9 form on file. Use payroll records to ensure that you have all I-9 forms required for current employees and prior employees.

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[3] *See* Press Release, U.S. Immigration & Customs Enforcement, Asplundh Tree Experts, Co. Pays Largest Civil Settlement Agreement Ever Levied By ICE (September 28, 2017), https://www.ice.gov/news/releases/asplundh-tree-experts-co-pays-largest-civil-settlement-agreement-ever-levied-ice.

3. Train staff and managers on how to complete a Form I-9, and what actions they should take when they are made aware that an employee may not be authorized to work in the U.S.
4. Conduct regular internal I-9 audits and remedy identified errors. Employers should have outside counsel conduct periodic I-9 audits as well.
5. Train a rapid response raid team responsible to immediately contact immigration counsel and employment counsel in the event of a raid. They should be trained on what to do in the event of a visit from enforcement officials, as outlined below.

B. What Employers Should Do In The Event Of An ICE Audit

ICE typically inspects employers' premises in one of two ways: through an I-9 audit, or through a raid.

The most common way in which employers might end up interacting with enforcement officials is through an I-9 audit. The agency will initiate an audit through a Notice of Inspection, which asks employers to produce certain I-9s for inspection within three days. In addition to I-9 forms for current and recently terminated employees, employers will most likely be asked to turn over a list of current employees, quarterly wage and hour reports, payroll records, E-Verify confirmations (if the employer uses the system), and related business information, including the business owner's Social Security Number.

If an employer receives such a Notice, employers should immediately contact legal counsel. Employers may be able to receive a short extension for legitimate business reasons depending on the type of extension requested, and counsel might be able to work with the government official to make the process of an inspection more efficient for all involved. Once the audit is underway, a typical compliance review consists of an investigator verifying that the

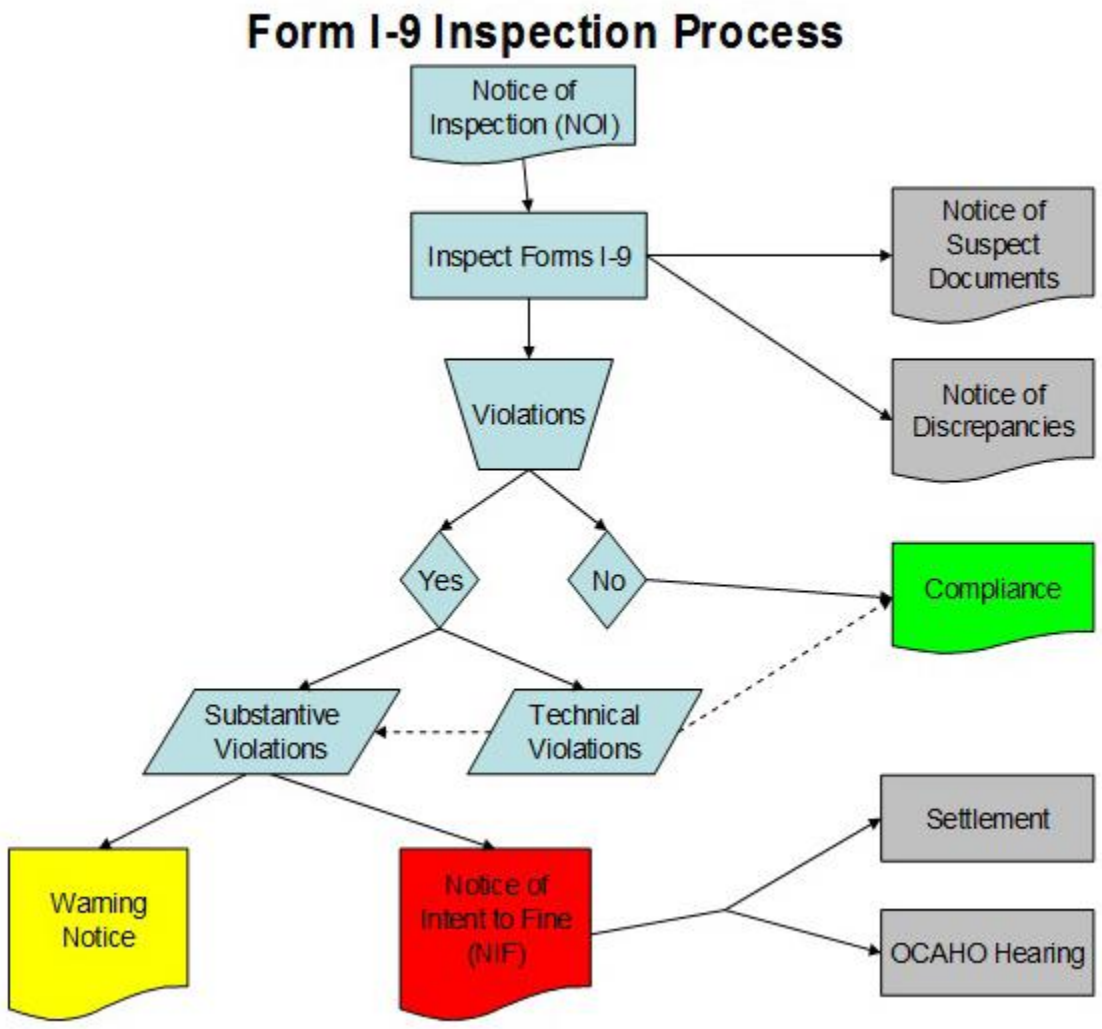
employer's I-9 forms have been properly executed. This typically includes a review of the employer's documents to ensure that they are timely completed, they are correctly and entirely filled out, and that the associated documents establishing identity and employment eligibility are legitimate.

The I-9 form audit process may take as little as two weeks or as long as three years. Once the review is complete, ICE will inform the employer of the results. The best news an employer can hope for would be a letter indicating that the company is in full compliance. If only minor violations were found, ICE may issue the employer a notice of technical or procedural failure indicating certain mistakes on forms, and the employer will have 10 business days to correct them.

If no substantive violations were found, ICE may issue an employer a warning notice without assessing a monetary penalty. However, if the agency determines that the employer has substantive violations or knowingly hired individuals not authorized to work in the United States, it may issue a Notice of Intent to Fine. If this occurs, the employer's immigration attorney may be able to negotiate a reduction of the fine, payment plan, or request a hearing before a federal administrative law judge within 30 days.

ICE may also issue an employer a notice of suspect documents regarding an employee's authorization to work, advising the employer of potential penalties if the company continues to employ the individuals listed on the Notice. In such a case, the employer will be given an opportunity to provide additional documentation to show the employee's authorization to work. Similarly, the agency may issue a notice of discrepancy indicating that work eligibility cannot be determined for a certain employee, with an opportunity for that worker to provide

documentation showing employment eligibility or face termination from employment. Here is overview of the I-9 inspection process.[4]



C. What Employers Should Do In The Event Of An ICE Raid

Alternatively, ICE may conduct an actual raid, which is significantly more disruptive. To conduct a raid, ICE would first obtain a search warrant. In order to obtain the warrant, the agency has demonstrated to a judicial official that it has probable cause to effectuate an unplanned raid. If ICE officials have a search warrant when they come knocking on an employer's door,

[4] U.S. Immigration & Customs Enforcement, Worksite Enforcement, *Form I-9 Inspection Overview Fact Sheet*, https://www.ice.gov/factsheets/i9-inspection.

understand that they will take the position that they are entitled to immediate access to the employer's premises, employees and records. There is no three-day notice period to gather documents, and ICE agents will not wait for the employer's attorney to arrive before conducting a search.

If ICE raids your company, there are certain things to keep in mind. First, stay calm and ask for a copy of the warrant. The employer should examine the warrant to ensure things are in order (e.g., that the warrant is signed by a judge). From there, the employer should immediately provide a copy to immigration counsel. Second, monitor the search to ensure the ICE agents stay within the scope of the warrant, but stay out of their way to the extent possible. Employers should assign a company representative to follow the agents around the premises to record their actions and make a list of company property seized, but the employer representative should not interfere with ICE's investigation or engage in any hostilities toward them.

Third, an employer should be mindful of how its actions could harm the company. No company employee should do anything that might constitute harboring undocumented workers, such as hiding employees, aiding in their escape from the premises, shredding documents, or providing false or misleading information. At the same time, company representatives should not give any statements to ICE agents without first speaking with legal counsel. However, be aware that employers cannot instruct employees to refrain from speaking to agents if questioned, so employers should let that process carry out without interference. Also, if agents want access to locked facilities, employers should unlock them and cooperate as much as possible.

Fourth, employers should track what and who is seized by ICE, providing the list to its legal counsel once the enforcement action has ended. Finally, the employer should prepare to address the media during and after a raid. Employers should work with legal counsel and perhaps

a Public Relations firm to determine the best way to accomplish this task and whether it is necessary to do so.

D. Penalties For Knowingly Hiring/Continuing To Employ Violations

Employers assessed violations of knowingly hiring or continuing to employ unauthorized workers will be required to cease the unlawful activity and fined. ICE will divide the number of knowing hire and continuing to employ violations by the number of employees for which a Form I-9 should have been prepared to obtain a violation percentage. This percentage provides a base fine amount depending on whether this is a First Tier (1st-time violator), Second Tier (2nd-time violator), or Third Tier (3rd- or subsequent-time violator) case. **The standard fine amount listed in the table relates to *each* knowing hire and continuing to employ violation.** The range of the three tiers of penalty amounts are as follows:

	Standard Fine Amount		
Knowing Hire and Continuing to Employ Violations	**First Tier $548 - $4,384**	**Second Tier $4,384 - $10,957**	**Third Tier $6,575 - $21,916**
0% – 9%	$548	$4,384	$6,575
10% – 19%	$1,140	$6,322	$8,547
20% – 29%	$1,754	$7,232	$11,177
30% – 39%	$2,411	$8,174	$13,807
40% – 49%	$3,069	$9,094	$16,568
50% or more	$3,726	$10,026	$19,242

E. Penalties For Substantive And Uncorrected Technical Violations Knowingly Hiring/Continuing To Employ Violations

The agent or auditor will divide the number of violations by the number of employees for which a Form I-9 should have been prepared to obtain a violation percentage. This percentage

provides a base fine amount depending on whether this is a first offense, second offense, or a third or more offense. **The standard fine amount listed in the table relates to *each* Form I-9 with violations.** The range of the three tiers penalty amounts are as follows:

	Standard Fine Amount		
Substantive Verification Violations	**1st Offense $220 - $2,191**	**2nd Offense $220 - $2,191**	**3rd Offense + $220 - $2,191**
0% – 9%	$220	$1,096	$2,191
10% – 19%	$548	$1,315	$2,191
20% – 29%	$876	$1,534	$2,191
30% – 39%	$1,205	$1,753	$2,191
40% – 49%	$1,534	$1,972	$2,191
50% or more	$1,862	$2,191	$2,191

F. Enhancement Matrix For Penalties

The following matrix will be used to enhance or mitigate the recommended fine contained on the Notice of Intent to Fine.

Factor	Aggravating	Mitigating	Neutral
Business size	+ 5%	- 5%	+/- 0%
Good faith	+ 5%	- 5%	+/- 0%
Seriousness	+ 5%	- 5%	+/- 0%
Unauthorized Aliens	+ 5%	- 5%	+/- 0%
History	+ 5%	- 5%	+/- 0%
Cumulative Adjustment	+ 25%	- 25%	+/- 0%

III. Confronting Antidiscrimination Provision Of INA During Recruiting, Hiring, And Terminations

The U.S. Department of Justice's Immigrant and Employee Rights Section (IER) enforces the anti-discrimination provision of the Immigration and Nationality Act (INA).[5] This federal law prohibits: 1) citizenship status discrimination in hiring, firing, or recruitment or referral for a fee, 2) unfair documentary practices during the employment eligibility verification process, Form I-9 and E-Verify, 3) national origin discrimination in hiring, firing, or recruitment or referral for a fee, and 4) retaliation or intimidation.

A. Citizenship Status Discrimination In Hiring, Firing, Or Recruitment

On February 1, 2019, the USDOJ reached a settlement agreement with Honda Aircraft Company LLC (Honda Aircraft), a manufacturer and seller of business jet aircrafts, to resolve a claim that Honda Aircraft refused to consider or hire certain work-authorized non-U.S. citizens because of their citizenship status.[6]

Under the settlement agreement, Honda Aircraft will pay a civil penalty of $44,626, and remove all specific citizenship requirements from current and future job postings unless they are authorized by law. The agreement also requires certain employees to attend training on the INA's anti-discrimination provision and ensure that trained personnel review future job advertisements.

The USDOJ's investigation determined that Honda Aircraft published at least 25 job postings that unlawfully required applicants to have a specific citizenship status. The USDOJ concluded that the company's unlawful practice of restricting job vacancies to U.S. citizens and in

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[5] 8 U.S.C. § 1324b, 28 C.F.R. Part 44.

[6] *See* Press Release, U.S. Dep't of Justice, Justice Department Settles Immigration-Related Discrimination Claim Against Honda Aircraft Company LLC (February 1, 2019), https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-discrimination-claim-against-honda-aircraft.

some cases, to U.S. citizens and lawful permanent residents (LPRs), was based on a misunderstanding of the requirements under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR).

The ITAR regulates specific exports of defense articles and services, and – absent State Department authorization – limits access to certain sensitive information to "U.S. persons," which are defined as U.S. citizens, U.S. nationals, lawful permanent residents, asylees, and refugees. The EAR similarly regulates commercial goods and technology that could have military applications. The EAR limits access to export-controlled technology and information to "U.S. persons" absent authorization from the Department of Commerce. Neither the ITAR nor the EAR requires or authorizes employers to hire only U.S. citizens and LPRs. Employers that limit their hiring to U.S. citizens and/or LPRs without legal justification may violate the INA's anti-discrimination provision.

In the absence of a law, regulation, or government contract that requires U.S. citizenship restrictions, employers may not limit job opportunities or otherwise impose barriers to employment based on an individual's citizenship or immigration status. By requiring a specific citizenship status as a condition of employment, Honda Aircraft's job postings created discriminatory barriers for work-authorized individuals and unlawfully excluded U.S. nationals, asylees, refugees, and LPRs.

B. Unfair Documentary Practices During The Employment Eligibility Verification Process

On December 11, 2018, the USDOJ announced[7] that it has received a court order awarding the United States $857,868 in civil penalties, along with other relief, in the USDOJ's

[7] *See* Press Release, U.S. Dep't of Justice, Court Orders $857,868 in Penalties Against Technical Marine Maintenance Texas and Gulf Coast Workforce in Immigration-Related Discrimination Lawsuit

immigration-related employment discrimination lawsuit against Louisiana-based Technical Marine Maintenance Texas LLC (TMMTX), which provides contract shipyard labor, and Gulf Coast Workforce LLC (GCW), a related company. The court previously found that the companies violated the INA by discriminating against workers based on their citizenship status during the employment eligibility verification process.

TMMTX limited the types of documentation different groups of workers could provide to establish their work authorization based on the workers' citizenship status. The United States' complaint against the company alleged that the company asked U.S. citizens to produce "IDs" and Social Security cards, while requesting immigration documents from non-U.S. citizens. After the companies refused to comply with court procedures and orders during the litigation, the court sanctioned the companies and held both companies liable for discriminatory documentary practices.

In addition to the $857,868 civil penalty, the court's order granted the Department's request that the companies train their staff on the INA and be subject to departmental monitoring and reporting requirements for three years.

C. National Origin Discrimination In Hiring For Employers With Less Than 15 Workers

The INA's anti-discrimination provision also prohibits employers with four to 14 employees from discriminating against individuals because of their national origin. The USDOJ reached a settlement with Food Love 125 Inc., d/b/a Ichiba Ramen, a New York City restaurant, to resolve the USDOJ investigation, which revealed that Ichiba Ramen's former chef discriminated

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(December 11, 2018), https://www.justice.gov/opa/pr/court-orders-857868-penalties-against-technical-marine-maintenance-texas-and-gulf-coast.

against a job applicant when the chef refused to hire him as a server because he is not Korean or Japanese.[8]

The investigation also revealed that prior chefs had not placed such limitations on the restaurant's hiring of servers. Under the settlement agreement, Ichiba Ramen will pay a civil penalty, undergo training on the INA's anti-discrimination provision, and post notices informing workers about their rights under the INA. The restaurant also paid $1,760 in back pay to compensate the affected applicant.

D. Retaliatory Conduct Against Workers Who Raise Concerns About Immigration Compliance is Also Prohibited

The USDOJ reached a settlement with InMotion Software LLC (InMotion), a software developer and recruiter in Texas, determining that the company retaliated against a work-authorized job applicant after she protested InMotion's requirement that she provide a Permanent Resident Card even though she had a valid employment authorization card issued by the U.S. Citizenship and Immigration Services.[9] After the worker complained that InMotion's request constituted discrimination under the INA, InMotion removed her from its pool of candidates available for job placement. The INA's anti-discrimination provision prohibits employers from retaliating against or intimidating workers because they have opposed employer conduct that may violate that provision or have participated in the department's activities to enforce it.

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[8] See Press Release, U.S. Dep't of Justice, Justice Department Settles National Origin Discrimination Claim Against New York Restaurant (February 20, 2018), https://www.justice.gov/opa/pr/justice-department-settles-national-origin-discrimination-claim-against-new-york-restaurant.

[9] See Press Release, U.S. Dep't of Justice, Justice Department Settles Immigration-Related Retaliation Claim Against Texas Company (October 11, 2017), https://www.justice.gov/opa/pr/justice-department-settles-immigration-related-retaliation-claim-against-texas-company.

Under the settlement agreement, InMotion will pay the maximum civil penalty for an instance of retaliation, post notices informing workers about their rights under the INA's anti-discrimination provision, train its staff, and be subject to departmental monitoring and reporting requirements for one year.

"Employees must be able to assert their rights without fear of reprisal," said Acting Assistant Attorney General John M. Gore of the Civil Rights Division. "Employers should familiarize themselves with the law and ensure that they do not engage in retaliatory conduct against workers who raise concerns about compliance."

E. How Employers Can Avoid Or Minimize The Risk Of A USDOJ Discrimination Charge

Employers have a very delicate balancing act to achieve. On one hand, employers want to ensure a lawful workforce; if onboarding staff requests too much information, however, the employer may face a USDOJ discrimination charge. Here are steps the employer can take today to minimize the risk of a USDOJ discrimination charge:

- Do not require specific documents or combination of documents for the Form I-9.
- Do not require more or different documents than are minimally required for the I-9.
- Do not refuse to accept documents that reasonably appear to be genuine.
- Allow the employee to choose which of the acceptable Form I-9 documents to present.
- Do not ask candidates about specific immigration status until an offer is made. However, employers may ask whether an applicant is currently authorized to work in the United States or will require sponsorship for employment. Under the anti-discrimination provision, nonimmigrant visa holders may not claim a violation of the law for failure to hire based on their need for sponsorship.

- Do not refuse to hire an individual solely because that individual's employment authorization document will expire in the future. The existence of a future expiration date does not preclude continuous employment authorization for a worker and does not mean that subsequent employment authorization will not be granted. In addition, consideration of a future employment authorization expiration date in determining whether an individual is qualified for a particular job may constitute an unfair immigration-related employment practice in violation of the anti-discrimination provision of the INA.
- If the employer does not want to sponsor foreign nationals for work visas due to the costs involved, the employer should contact legal counsel to determine the best language to add to the advertisements.

IV. Federal Government Barriers To Hiring Qualified Foreign Nationals To Meet Labor Needs

Following the Buy American, Hire American Executive Order[10] issued on April 18, 2018, employers must now also face innumerable barricades to hiring qualified foreign national employees to meet labor needs, including increased government scrutiny, the ending of deference to prior immigration application approvals, work visa denials, changes to the H-1B work visa program, and increased processing times.

A. DHS Denial Rates And Requests For Additional Evidence Rates Escalate

According to a report issued by the National Foundation for American Policy (NFAP)[11], H-1B denials and Requests for Evidence (RFE) on petitions have increased by more than 44%, from the 3rd quarter to the 4th quarter of fiscal year 2017 (FY 2017). In fact, the 4th quarter

[10] Exec. Order No. 13788, 82 Fed. Reg. 18837 (2017).
[11] National Foundation For American Policy: NFAP Policy Brief, H-1B Denials And Requests For Evidence Increase Under The Trump Administration (2018), https://nfap.com/wp-content/uploads/2018/07/H-1B-Denial-and-RFE-Increase.NFAP-Policy-Brief.July-2018.pdf

RFEs in FY2017 (63,184) were nearly equal to the number of RFEs issued for the first three quarters (63,599) of the same fiscal year.

Additionally, according to the NFAP report, rates of denials for professionals increased by 41% in the same period, rising from a denial rate of 15.9% in the 3rd quarter to 22.4% in the 4th quarter. Further, according to USCIS published statistics, Form I-129 (which includes nonimmigrant categories such as H-1B and L-1, the two most used visa types by U.S. employers) denial rates from Q2 2017 to Q2 2018 have increased by 14%. Additional scrutiny has been on the amount of RFEs and denials for professionals from India compared to those from all other countries. In the 4th quarter of FY 2017, H-1B cases for Indians, received 72% of RFEs, and 42% of denials.

This same trend is seen for those with specialized knowledge, seeking employment through an intracompany transfer (L-1B) from India. Nearly half of the Indian nationals who applied, 48% were denied in the 4th quarter of FY 2017.

Thus, a well-crafted RFE response with the assistance of immigration counsel and with robust supporting evidence can still result in an approval. Evidence to prove the position is a specialty occupation should include, but not be limited to, a detailed job description, organizational chart, a spreadsheet showing the names of other employees in the same position, their rates of pay, their education levels, copies of their degrees, and any prior recruitment the employer conducted for the H-1B position listing at least a bachelor's degree as a minimum requirement. By arguing that the duties associated with the position are complex and require at least a bachelor's degree, such RFEs can be successfully addressed.

B. DHS Increases Scrutiny Of Third-Party Placements Of H-1B Workers

A Department of Homeland Security memo[12], dated February 22, 2018, places additional restrictions on employers that place H-1B workers at third-party client sites, including requiring evidence of actual work assignments, proof of which entity controls the H-1B worker, detailed itineraries to cover assignments for an entire three-year period, contracts, and Statements of Work. IT staffing companies filed a complaint to block the enforcement of the DHS memo.

While the memo is an apparent attempt to have a chilling effect on IT consulting companies, it is impacting almost all companies that employ foreign national contractors. H-1B petitioners that are placing workers at client sites are encouraged to submit strong evidence of their control over the H-1B worker, including contracts, performance reviews, benefits elections, W-2s and paystubs, SOWs and end-client contracts covering a full three-year period - which is nearly impossible to do in industries where contracts are usually secured for shorter time frames than 3 years.

C. USCIS Ends Deference To Prior Approvals

USCIS has rescinded its long-standing policy memorandum directing USCIS adjudicators to give deference to a prior approval of an application when adjudicating a work visa extension involving the same employer and the same position. The new guidance, published in a policy memorandum[13] on October 23, 2017, instructs USCIS adjudicators to apply the same scrutiny to

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[12] 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.

[13] 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.

both initial work visa petitions and all subsequent extension petitions. Moreover, the guidance states that USCIS adjudicators "should not feel constrained" in issuing requests for evidence.

D. USCIS Encourages Officers To Deny Work Visa Petitions Without Allowing Employers To Provide Additional Information

USCIS issued a policy memorandum[14] that allows USCIS adjudicators discretion to deny an application, petition, or request without first issuing a Request for Evidence (RFE) or Notice of Intent to Deny (NOID) when required initial evidence was not submitted or the evidence of record fails to establish eligibility. Prior to this new policy, USCIS would only deny an application, without first issuing a RFE or a NOID, if there was "no possibility" that the deficiency could be overcome with the submission of additional evidence. Such as, an applicant had no legal basis for the benefit/request sought, or requested a relief under a program that has been terminated. This is no longer the standard. The new guidance went into effect on September 11, 2018, and applies to applications received after this date.

E. DHS Unveils Details For FY2020 H-1B Lottery

To boost innovation and remain competitive, employers often have no option but to sponsor foreign nationals for H-1B work visas to meet their labor needs, especially when it comes to workers in science, technology, engineering, and math "STEM" fields. While employment in STEM occupations has grown 79 percent since 1990 and outpaced overall U.S. job growth, the number of U.S. students enrolling in STEM studies has not kept up.

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[14] USCIS Memorandum, "Issuance of Certain RFEs and NOIDs; Revisions to Adjudicator Field Manual (AFM) Chapter 10.5(a), Chapter 10.5(b)" (July 13, 2018), https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/AFM_10_Standards_for_RFEs_and_NOIDs_FINAL2.pdf.

USCIS Director L. Francis Cissna further fortified the Trump Administration's extreme vetting policies by sending a letter[15] to Senator Charles Grassley (R-IA) on April 4, 2018, stating that USCIS is "focusing on strengthening the integrity of the H-1B program" through measures such as a "dedicated email address to make it easier for the public to report suspected fraud and abuse" in the H-1B program, narrowing the eligibility for H-1Bs, establishing an electronic registration program for petitions subject to the H-1B cap, and contorting "the definition of employment and employer-employee relationship to better protect U.S. workers and wages." In regards to both the legislative and executive branch of the federal government, there seems to be a consensus on stronger vetting policies, no matter the toll that would take on American business owners.

The federal government just published its final rule[16] amending the regulations that will govern petitions filed under the H-1B work visa lottery. Although the final rule is effective April 1, 2019, the Department of Homeland Security (DHS) has announced it will suspend the electronic registration requirement for employers for this year's H-1B cap. This will allow U.S. Citizenship and Immigration Services (USCIS) sufficient time to complete the necessary user testing and ensure the system and process are fully functional before they are implemented.

Some things remain the same this year as in past years. Higher educational institutions, nonprofit research organizations, and governmental research organizations remain exempt from the H-1B cap. Also, employers filing extensions for their current H-1B employees, changes-of-employer for candidates already in H-1B status, or petitions for candidates who were counted against the cap in the last six years are also not subject to the H-1B cap. There is no change to

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[15] Letter from L. Francis Cissna, *Director, USCIS*, to The Honorable Charles Grassley, *Chairman, U.S. Senate, Committee of the Judiciary* (April 4, 2018).
[16] 8 C.F.R. §214 (2019).

the fact that the H-1B job must be one that requires at least a bachelor's degree or the equivalent in a specific field for entry, and the foreign worker must have the required degree in the field or the equivalent.

Further, as always, in order to be eligible for selection in the visa lottery, employers will need to file H-1B cap-subject petitions using the same process as in prior years by submitting a complete H-1B petition to USCIS. The final rule makes two major changes to the standard process, however:

- It adds an electronic registration requirement for petitioners seeking to file H-1B cap-subject petitions. DHS anticipates that the registration requirement will be implemented next year.
- It reverses the order by which USCIS will select petitions under the H-1B cap and the advanced degree exemption. Under the final rule, USCIS will count all applicants towards the 65,000 regular cap first, then select applicants towards the 20,000 advanced degree exemption second. USCIS anticipates that this change will result in an increase of up to 16 percent—or 5,340 workers—in the number of selected petitions for those with a master's degree or higher from a U.S. institution of higher education. The reversal of the order by which USCIS selects petitions under the H-1B cap and the advanced degree exemption will take place this year.

Employers should continue to work with immigration counsel to have H-1B cap cases ready before April 1, 2019 so that they can be timely filed. Employers should take the following five steps now to ensure timely filing:

1. Assess employment needs from now until at least October 1, 2020. Does the company have new contracts or projects, but not enough workers to help fulfill the terms? Does

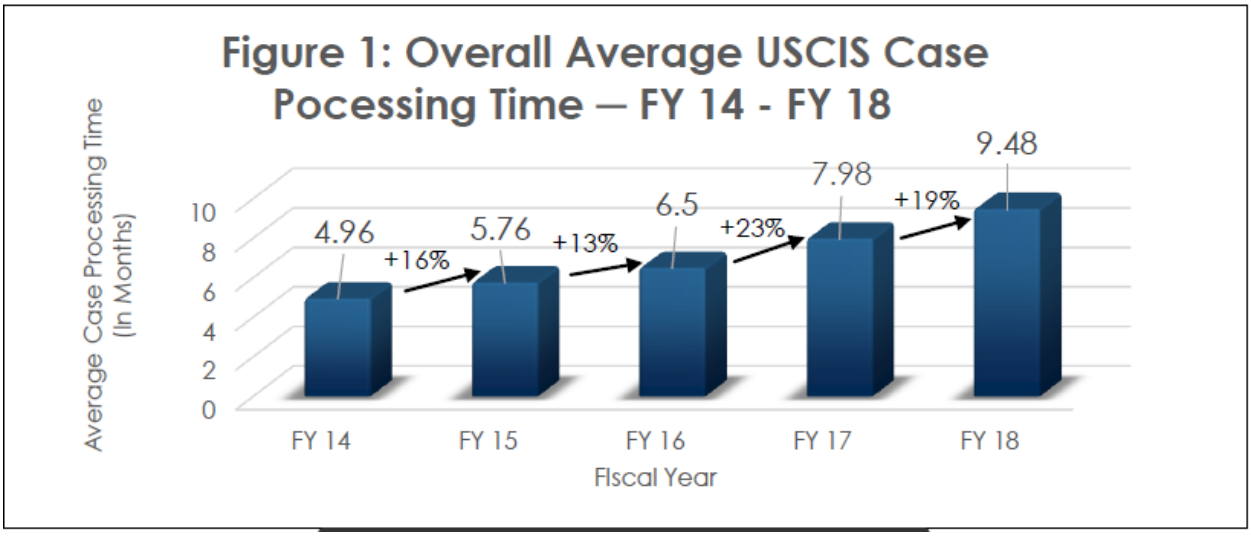
the company employ F-1 students who are working on OPT or STEM OPT Employment Authorization cards? Does the company employ H-4 visa holders who are working on Employment Authorization Card that may be eliminated by the Trump administration soon? Does the company employ TN or E-3 work visa holders who you are planning to sponsor for permanent residence? If so, they are all candidates for the H-1B lottery.

2. Start the process immediately. It generally takes at least 14 days to get the H-1B petition package ready to submit to USCIS. H-1B candidates will need to provide critical documents, such as academic transcripts, degrees, and other evidence, and that takes time to assemble.
3. Get any Labor Condition Applications (LCA) filed early with USDOL to avoid processing delays later in the H-1B season. The USDOL website tends to crash when the volume of submissions increases. A certified LCA is a prerequisite to filing the H-1B with USCIS and takes 7 to 10 days to process.
4. If foreign workers earned their degrees outside of the U.S., the company's immigration attorney will need to obtain a credentials evaluation showing that the foreign degree is the equivalent of one awarded by an accredited U.S. institution. Credentials evaluations often take 3-5 business days to process.
5. Anticipate a Request for Evidence (RFE) from USCIS. USCIS issued RFEs in approximately 70 percent of H-1B cap cases filed. Employers should work with immigration counsel to ensure the submission of a detailed job description, explanations of how the foreign national's degree relates to the position, and evidence that a degree or the equivalent in a specific field is required for the position.

An H-1B worker may be the perfect fit for a business. Missing the H-1B application window could mean you are not able to continue employing that right employee.

F. USCIS Processing Delays Have Reached Crisis Levels

In addition to having to provide more evidence for work visa petitions, employers are also facing dramatic increases in average case processing times.[17]



Even as the overall volume of USCIS case receipts declined through the first three quarters of FY2018, average case processing times increased.[18]

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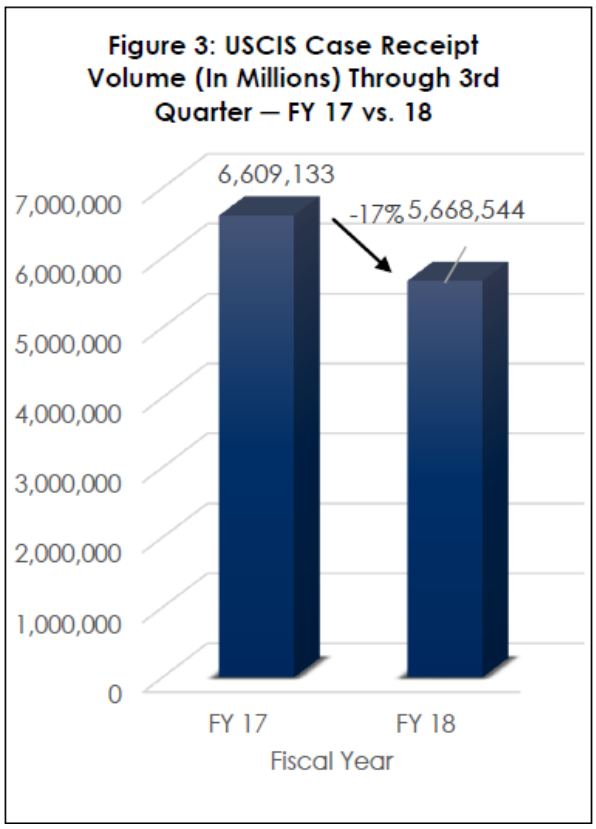
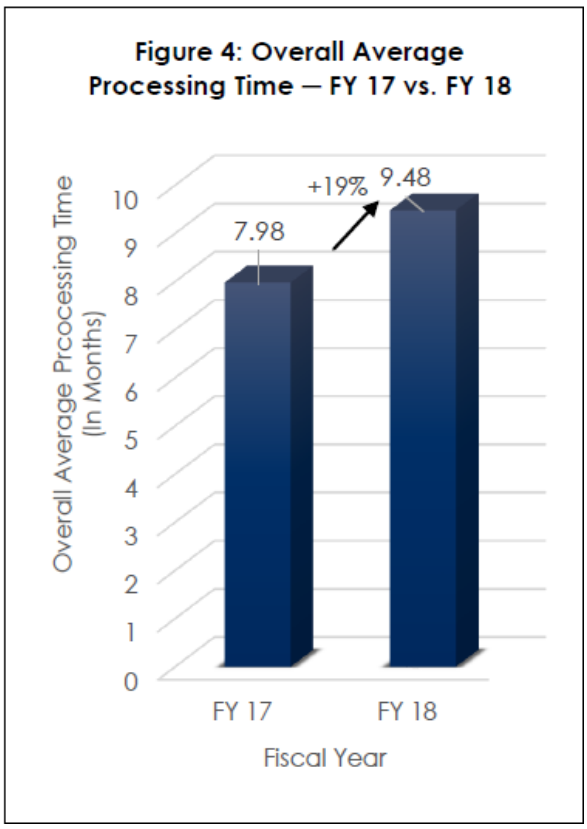
[17] American Immigration Lawyers Association (AILA) analysis of data from USCIS webpage, "Historical National Average Processing Times for All USCIS Offices" (Nov. 29, 2018); https://www.aila.org/infonet/processing-time-reports/historical-average-processing-times/uscis-national-average-processing-times-9-30-18.

[18] AILA analysis of data from USCIS webpages, "All USCIS Application and Petition Form Types (Fiscal Year 2017, 3rd Quarter, April 1-June 30, 2017)" (Sep. 21, 2017); https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY17Q3.pdf; "All USCIS Application and Petition Form Types (Fiscal Year 2018, 3rd Quarter, April 1-June 30, 2018);" https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/Quarterly_All_Forms_FY18Q3.pdf; "Historical National Average Processing Times for All USCIS Offices" (Nov. 29, 2018); https://www.aila.org/infonet/processing-time-reports/historical-average-processing-times/uscis-national-average-processing-times-9-30-18.





USCIS delays in adjudicating employment-based petitions have undercut the ability of employers to hire and retain critical workers, compromising the competiveness of U.S. companies.

V. Employers Urged To Exercise Extreme Vigilance When It Comes To Immigration Compliance

When it comes to immigration compliance, extreme vetting can only be countered with extreme vigilance by employers. Through robust internal training, well-developed internal policies and procedures, internal I-9 audits, and working with immigration counsel to file comprehensive employment-based petitions, employers can protect themselves in an "extreme vetting" era.