



Kudos to Senator Grassley ! What Seriously ?

Although we have used this forum in the past to criticize Senator Grassley for his attacks on the H-1b visa program, we must commend him, at least in part, for his Sept 29, 2009 letter to USCIS Director Mayorkas. A copy of his complete letter can be found at http://grassley.senate.gov/news/Article.cfm?customel_dataPageID_1502=23410 Essentially, Senator Grassley's letter is a simple "Hey, Mr. Director, What have you done about all of the fraud that the 2008 H-1b Benefit Fraud and Compliance Assessment uncovered ?" Fair question and one that I would surmise Mr. Grassley does not truly want answered. A full description of the inadequacies and downright misleading conclusions contained in the 2008 Fraud report was published in our November 2008 BIM, a copy of which can be found archived on our website but, suffice it to say that the so-called extensive fraud and abuse that Mr. Grassley so desperately wants to find, does not exist.

Certainly, there are instances of fraud and abuse in the H-1b program. A recent BusinessWeek article http://www.businessweek.com/magazine/content/09_41/b4150034732629.htm painted quite the picture of abuses of H-1b workers by certain U.S. companies branded as "High-Tech Sweatshops" however, the reality is that the abuses are minimal. The small number of DOL audits each year which actually find violations is but, one indication of a program that, though not perfect, is not rampant with abuse and fraud. Since 2004, the DOL has only declared 56 companies willful violators of the LCA rules.

In spite of a complete lack of any extensive fraud, several initiatives to prevent fraud have pushed forward. One of Senator Grassley's directives to the USCIS was to require extensive documentation from an H-1b sponsor when an H-1b worker is to be placed at a 3rd party client site. The USCIS obviously took Senator Grassley's orders to heart as they have instituted a policy requiring a myriad of extensive documentation from staffing companies including copies of contracts, work orders, and end client letters confirming placements. Forgetting for a minute that this implementation of Grassley/USCIS policy is not found in any regulation thereby violating the Administrative Procedures Act as rulemaking without proper notice and comment, it also disregards a series of court cases both from the USCIS' own Administrative Appeals Unit and Federal District Courts. This new policy also ignores the realities of corporate to corporate relationships and the need of corporations to protect the content of its contracts and relationships. Although well-intentioned, a change in policy which so significantly impacts staffing companies should be approached with more careful and reasoned consideration. Though I'm no expert in the Administrative Procedures Act, it is quite possible that the very basis for the requirement of a notice and comment period was to get input from various stakeholders before issuing rules.

Unfortunately, a consequence of Senator Grassley's sabre rattling is the over-reaction of the USCIS who now meets every filing, especially those from staffing companies, with outright contempt and disbelief. In our office, each week we see overly broad and simply put, outrageous requests for additional evidence from the USCIS., many of them nothing more than cookie cutter requests so filled with obvious factual and legal errors that a 1st grader would be embarrassed at the quality. For example, can anyone think of a reason why the question of "Please identify all of the computer technologies to be used on this project would be relevant in the case of an Physical Therapist? We also see the USCIS routinely ignore evidence submitted. It is as if some USCIS examiners believe that he or she is doing their part to rid the world of fraud, because if the fraud is extensive as Senator Grassley and others argue, the odds are that

by denying this H-1b petition, regardless of its merits, he or she has helped to solve the problem. Instead the USCIS examiners are overstepping their legal authority and creating ghosts in the night hiding under every bed.

However, I digress, my kudos to Senator Grassley for trying to seek clarification from the USCIS on such key issues as: What evidence is required by law when a worker is being placed at a 3rd party work-site? When must a petitioner file an amended petition?, and What has happened to all of the companies and employees found to have committed fraud ?

Let's analyze one of the questions raised by Senator Grassley, specifically, when must an employer file an amended petition based upon a material change? In the aforementioned 2008 fraud report, of the 51 identified instances of fraud and abuse (yes you read that correctly. Of the >100,000 H-1b petitions filed annually, the extensive fraud report reviewed only 246 cases) by far the largest allegation was that in 28 cases it was found that the worker was working at a different worksite than was included on the original petition and no amended H-1b petition was filed. Sounds like fraud to me, listing a worksite of Iowa and using an Iowa wage while placing the worker in Chicago, and, if those are the facts, then who could argue that both the system and the worker are not being abused. But, what if the employer had filed an LCA with the DOL listing the proper Chicago wage and was, in fact, paying the worker the Chicago wage but, had chosen not to file an amended petition, are you still concerned that fraud and abuse has occurred?

What is legally required of an employer when moving an H-1b worker is murky at best with various policy memorandums being issued by the USCIS and the DOL with no clear answer. With today's more mobile workforce and with technology allowing work to be done from remote locations, a change in worksite is not unusual. In the staffing and contingent workforce industry, it is common for workers to move locations based upon the needs of customers. In the healthcare travel industry, 13 week assignments are the norm. Does the USCIS really want an amended petition every time an H-1b worker changes worksites? What purpose does that serve other than to unduly burden an already over-worked agency and over-regulated U.S. employers. A policy that balances the needs of employers to freely move its employees throughout the U.S. with the need to prevent the underpayment of wages and other abuses is needed. With a well-thought out policy that addresses but, this one issue, the extensive fraud and abuse could be cut by over 50%.

U.S. employers who are trying to follow the rules would love clear answers to the questions that Senator Grassley raises. U.S. employers and organizations that represent their interests including those such as the Staffing Industry Analysts, TechServe Alliance, American Staffing Association, and yes, even the American Immigration Lawyers Association, among others should have their input considered. Senator Grassley should demand that the USCIS promulgate regulations to address these issues rather than adjudicate by the flavor of the month method now being used.

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