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Hiring Foreign Contractors: What Every Company Should Know

IT consulting companies are a target-rich environment for immigration enforcement, and the current immigration climate evidences this. Data has shown that H-1B petitions for professionals filed by consulting companies are more heavily scrutinized, with a rate of denial at approximately 40%; as compared to a denial rate of under 10% in 2015.

The additional scrutiny on IT consulting companies has manifested itself in numerous ways, including additional disclosures during the H-1B/Labor Condition Application process, site visits at the end client, and verification requests sent to the end client.

On November 19, 2018, the Department of Labor (DOL) instituted a new disclosure requirement for consultants assigned to third-party worksites based on an H-1B petition. Now, in addition to disclosing the end client site where the consultant will be assigned and physically reports, the DOL requires the name of the end client to be listed on the Labor Condition Application (LCA). With this, there is a posting requirement at the end client site to post the key information regarding the terms of employment.

USCIS has a Fraud Detection and National Security (FDNS) branch, charged with verifying the information submitted in H-1B and L-1 petitions, which often results in an FDNS site visit at the end client's office location. These site visits will involve FDNS requesting to speak to the foreign national assigned, and often, the onsite manager (who is an employee of the end client). This can be a very tricky situation for end clients. End client staff members often are not able to verify the employment details of the consulting foreign national since they do not manage the foreign national's employment. The onsite manager may not even be the appropriate person who has knowledge of the consultation contract or Statement of Work, but simply is overseeing the project on which the foreign national is assigned.

To mitigate any potential issues, it is essential for IT companies that utilize contractors, as described, to train their staff at every level, from the receptionist and security personnel to the onsite managers, with the established protocol for when an Immigration Officer requests to speak to an employee or contractor. Something that seems inconsequential can have very serious consequences — for instance, if an officer asks to speak to Bob

Jones, and the receptionist says, "There is no Bob Jones that works here!" In this situation, the officer may determine Bob Jones wasn't working at the project site he was assigned to and therefore he was not maintaining the terms of his immigration status. In reality he was doing just that, the receptionist just didn't realize Bob Jones is a contractor and he isn't in her system of employees.

Another situation that is ripe for missteps is when the onsite manager is overly communicative with the immigration officer. The onsite manager wants to help and answer the questions asked, but they aren't completely knowledgeable with the terms of employment. This can become a problem when the officer asks the onsite manager for specific details, like the salary or title of the consultant. The onsite manager may only have the Statement of Work for reference, which is often very different than the actual terms of employment dictated by the employer – which is the consulting company, not the end client. This can result in the officer finding that the terms of employment are not compliant with the information stated in an immigration filing. These staff missteps and resulting findings by the officer can have detrimental outcomes for the end client, the consulting company, and the foreign national.

As part of the immigration petition to the U.S. Citizenship and Immigration Service, a consulting company should request an "end client letter" as evidence of the ongoing project and assignment of the contractor. This letter is just one option in a long list of evidence that can be submitted to the Immigration Service to demonstrate the ongoing assignment. The language contained in this letter is critical. It must match the Statement of Work, including the dates of the assignment, the type of project, and who the end client has engaged for this project (the consulting company).

That being said, it is important that the language in any letter is carefully scrutinized; and the end client should only include information that it knows to be true and can be independently verified. For example, the end client may not know who the employer of the consultant is, only that it has engaged the consulting company for the services of this contractor (there could be multiple levels of contracts and sub-vendors in play).

In a recent enforcement effort, the Department of State has been reaching out to end clients to verify the assignment of a consultant, including the Statement of Work, end client letter, project assigned, dates of assignment, and worksite.

There have been situations where end client letters could not be verified or the Statement of Work has been altered. The consequence of this is the contractor, a vital resource for the project, will not be able to do any work for the end client, putting the entire project in jeopardy

When these types of inaccuracies arise, it is important not to jump to any conclusions that fraud was intended. -The foreign national consultant may not have been involved with the immigration filing. However, this should serve as a word of warning for any company to pursue its own compliance efforts for its contracted consultants.

Reviewing consultants for immigration compliance can be done in several ways. Depending on the company's Master Services Agreement, the company may have a right to audit the I-9s of its consultants. This allows the company the opportunity to review and ensure work authorization. Another way is to have the consulting company provide an attestation that each consultant has employment authorization in the U.S., as well as to which project the consultant is assigned and for the exact dates of the assignment. Finally, it can be as simple as having an honest and direct conversation with vendors about how seriously the company is taking immigration compliance, and that giving notice that the company may start pursuing any of the above. Generally, these conversations are successful in communicating that the company is taking this compliance very seriously.

Many businesses use contractors to supplement their workforce or to assist on a project that requires a unique skill set that an employer may not have available in-house. This is an important function to many businesses, and this article is not meant to scare any company from utilizing such vital resources. Rather, this article is to emphasize the changes in tone and the actions by various government agencies to address immigration compliance as it relates to contractors, so that companies can be prepared when receiving inquiries from the government.

The material contained in this article does not constitute direct legal advice and is for informational purposes only. An attorney-client relationship is not presumed or intended by receipt or review of this presentation. The information provided should never replace informed counsel when specific immigration-related guidance is needed.

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