

H-1B BFCA Q&A

8/28/2008

Q: What is an H-1B nonimmigrant?

A: An H-1B nonimmigrant worker is a temporary worker coming to perform services in a specialty occupation under section 101(a)(15)(H)(i)(b) of the Immigration and Nationality Act (the "Act"). A specialty occupation is one that requires the theoretical and practical application of a body of highly specialized knowledge. It requires the attainment of a bachelor's or higher degree in a specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States. Specialty occupations include, but are not limited to computer professionals, engineers, accountants, financial analysts, management consultants, attorneys, business executives, university professors and teachers, and scientists and researchers.

The H-1B nonimmigrant classification also includes aliens coming to the United States to perform services of an exceptional nature relating to a project administered by the U.S. Department of Defense, and fashion models who have attained national and international acclaim.

Q: What is a Benefit Fraud and Compliance Assessment (BFCA)?

A: In February 2005, U.S. Citizenship and Immigration Services (USCIS) developed and implemented the Benefit Fraud Assessment (BFA) Program to evaluate the integrity of various nonimmigrant and immigrant benefit programs that require the adjudication of an application or petition. While conducting these assessments, the entire scope of a program is analyzed for fraud vulnerabilities as well as customer compliance with program requirements. For this reason, USCIS recently redesignated the program the Benefit Fraud and Compliance Assessment (BFCA) Program. While the name of the program has been changed to reflect the full range of issues reviewed, the methodology used to conduct the assessments has not changed. The applications and petitions reviewed are not selected because they are suspected of fraud, but rather they represent a statistically valid random sampling of pending and completed cases over a recent six-month period. The results of the BFCA serve as a basis for proposed changes to existing regulations, policies, and procedures, and as warranted, recommended legislative remedies.

Q: What petitions were included in the H-1B BFCA sample population?

A: To ensure that the beneficiary was present in the United States and thus available for an interview regarding their purported employment, this BFCA drew a random sample of case files from a population of I-129 petitions filed in behalf of individuals who were:

- Seeking to extend their existing H-1B nonimmigrant status either with the current employer or a new employer; or

- Seeking new employment as an H-1B nonimmigrant while currently residing in the United States in another nonimmigrant status.

The H-1B BFCA sample consisted of 246 cases drawn from a total population of 96,827 approved, denied or pending I-129 petitions filed between October 1, 2005 and March 31, 2006.

Q: How was fraud defined and/or characterized for purposes of the H-1B BFCA?

A: For purposes of this BFCA, fraud is defined as a willful misrepresentation, falsification or omission of a material fact. Fraud entails any willful manifestation that amounts to an assertion or assertions not in accordance with the facts, a knowing untrue statement of fact, or a purposeful, incorrect or false representation material to the adjudication of the petition. This definition is consistent with section 212(a)(6)(C)(i) of the Act which states, “[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure (or has sought to procure or has procured) a visa, other documentation, or admission into the United States or other benefit provided under this Act is inadmissible.”

Additionally, the BFCA identified some circumstances where, although there was no evidence of willful fraud, there was evidence that the employer or alien beneficiary had failed to comply with applicable laws and regulations. For purposes of this BFCA, FDNS has identified those situations as Technical Violation(s).

Q: What are some of the key statistical findings of the H-1B BFCA?

A: There were a total of 51 cases within the sample of 246 H-1B petitions that were confirmed as representing fraud, a technical violation and/or multiple technical violations. For BFCA reporting purposes, these 51 cases are classified as Fraud or Technical Violation(s). It is important to note that for this particular sample size of 246 cases, the percentages listed represent statistically valid figures based on generally accepted statistical reporting guidelines.

Fraud:	13.4% (33 cases)
Technical Violation(s):	7.3% (18 cases)
Overall percentage inclusive of each category:	20.7% (21%)

Q: What types of fraud and/or technical violations were uncovered through the H-1B BFCA?

A: Instances and types of abuse in the H-1B program identified involved the following:

- Strong indicators of the presence of fraud or technical violations included:

- Petitioning organization in business for ten years or less

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- Petitioning organizations with twenty-five or fewer employees
- Petitioning organizations with less than \$10 million in annual income
- Other instances and types of abuse in the H-1B program identified involved the following:
 - Job location not listed on I-129 petition or LCA
 - Prevailing wage not being paid
 - Fraudulent/forged documents
 - Storefront/shell business
 - No bona fide job offer
 - Petition already under ICE investigation
 - Material discrepancy in job duties as reported
 - Beneficiary made to pay certain H-1B petition fees
 - Misrepresentation of H-1B status