

Responding To A 'Notice Of Intent To Revoke' From DHS

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We live in an era of increased immigration enforcement. While the [U.S. Department of Homeland Security](#) immigration enforcement mechanisms that grab headlines tend to be worksite raids or I-9 penalties, an increasingly common DHS enforcement tactic is the issuance of a notice of intent to revoke (NOIR). Although a variety of nonimmigrant visas can be revoked, the focus of this article is the H-1B and L-1 visa categories, given the increasing prevalence of NOIRs in these nonimmigrant classifications.

Visa Revocation

In order to fully appreciate the consequences of a NOIR, it is essential to first understand the potential ramifications of visa revocation. The term "visa revocation" can cause confusion, as the regulations do not distinguish between the visa, or travel document, and the underlying approval for nonimmigrant status. However, the regulations are in fact referring to the approval of nonimmigrant status (which will inherently impact the visa, too). Therefore, the beneficiary (the foreign employee) of a revoked visa petition is no longer considered to hold the underlying nonimmigrant status at the moment of revocation, but for rare instances where the visa is revoked only in part. The beneficiary of a revoked visa must immediately cease working unless he or she has an alternative basis to remain in the United States (e.g., a pending adjustment of status application). Remaining in the United States after revocation could subject the beneficiary to removal proceedings.

Beyond the initial concerns for the business (including how to replace an important employee with little to no notice), or the significant concerns for the employee (uprooting him or herself and family), there are several other possible ramifications. Visa revocation raises complex questions regarding unlawful presence, change of status and subsequent visa filings. For example, it is possible that revocation could lead the DHS to conduct further investigation into similar petitions filed by the employer, or apply additional scrutiny when adjudicating future petitions.

Revocation also has numerous negative effects on the employee. For example, revocation under certain grounds may call into question whether the employee was ever in valid status pursuant to the now-revoked petition, which could impact the employee's ability to change status (e.g., to a dependent status of a spouse). Further, the beneficiary of a now-revoked visa must disclose the revocation when seeking to obtain a visa at a U.S. Consulate or Embassy abroad, and may face additional scrutiny from border officials when seeking to



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enter the United States.

What is a NOIR?

A NOIR is the DHS' notice to the petitioner of an approved nonimmigrant visa petition that it intends to revoke the approval. There is no statute of limitations with regard to the DHS' authority to issue a NOIR or revoke a nonimmigrant petition. Rather, the governing regulations provide that the DHS has authority to issue a NOIR at any time after approval. A NOIR could be issued the day after approval or many years after. It could occur while the beneficiary is in nonimmigrant status pursuant to the approval in question, or it may even occur much later — after several subsequent approved petitions or even a change of status.

NOIRs vary in length, substance and complexity. At times, a NOIR serves as a "do over" for the DHS, if it believes it incorrectly approved a petition. Other times, it may be the tip of the iceberg with regard to a larger investigation surrounding the employer. A NOIR may also be issued in error, for example, if the DHS visits an incorrect address to conduct a site visit.

It is important to remember that a NOIR is not notice of revocation itself, but rather, of the DHS' intent to revoke. The NOIR is required by regulation to contain a detailed statement of the grounds for the revocation and the time period allowed for the petitioner's rebuttal. By regulation, the petitioner is afforded 30 days to respond to the NOIR.

What Events Lead to the Issuance of a NOIR?

A common question from employers is how the DHS determines that a NOIR should be issued. While the DHS does not publish data regarding its issuance of NOIRs, anecdotal evidence points to a few common fact patterns.

The most intimidating triggering event is the site visit. The DHS has the authority to conduct worksite visits of employees in nonimmigrant status to verify that the terms of employment are consistent with the facts contained in the petition, such as job duties, salary and work location. There have been widespread reports of increased site visits in the H-1B and L-1 context since January, which may be the result of President Donald Trump's executive orders that directed the DHS to conduct investigations into visa abuse.

The typical sequence of a site visit is as follows: (1) a DHS officer visits a worksite listed in the underlying visa petition; (2) the beneficiary or employer is not present, or the officer concludes that the employment appears to differ from the facts contained in the petition; (3) the officer contacts the employer or attorney listed in the underlying petition to verify the terms of employment; and (4) the employer receives a NOIR.

There are a few important notes to consider in this sequence. First, just because the NOIR is issued does not mean that the employer or employee has committed misconduct. It is possible that the employee was sick that day or the officer did not speak to anyone with knowledge of the employee's terms of employment, or that the DHS simply made a mistake. Second, step three was historically routine despite the absence of any regulatory mandate, providing the petitioner an opportunity to prevent the issuance of a NOIR and ultimately save time, cost and stress. However, this step has occurred less frequently of late and,

when completed, is often conducted without maximum effort by the DHS.

Other triggering events could involve revocation of similar visas filed by the petitioner, complaints from fellow employees that trigger investigation, or information provided by the employee during a consular interview or border crossing that raise questions about the underlying petition.

Grounds for Revocation

The governing regulations inherently distinguish between mandatory and nonmandatory revocation. Mandatory revocation in the H and L context is generally straightforward and occurs when the petitioner withdraws the petition or goes out of business or, in the H-1B context, when the [U.S. Department of Labor](#) revokes the labor condition application upon which the petition is based. However, the regulations provide for certain scenarios where the DHS is required to issue a NOIR, but is not mandated to ultimately revoke. A comparison of the mandatory and nonmandatory revocation regulations make clear that the agency has discretion regarding revocation in such instances.

Below are the main categories of nonmandatory revocation grounds. While revocation in the H and L contexts will differ as a result of the different eligibility requirements for each nonimmigrant status, the underlying reasoning for revocation is generally similar.

Facts Contained in the Petition are Not True and Correct

In this scenario, the DHS makes a determination that facts represented in the underlying H-1B or L-1 petition were incorrect at the time of filing. Notably, there is no requirement that the disputed facts impact the beneficiary's ultimate eligibility. Further, there is no requirement that the incorrect facts be a result of fraud or misrepresentation; mere incorrect facts are enough.

For example, employee X works remotely from home as correctly indicated in his or her H-1B petition. At the time the extension petition is filed, he or she has moved to a different home within the same metropolitan statistical area (MSA). The employee does not communicate the move to the employer, and the employer signs the H-1B extension petition that lists a previous (and incorrect) worksite. This would serve as grounds for NOIR issuance, although employee X is otherwise eligible for H-1B status.

Gross error

This scenario provides the DHS with the authority for a mulligan. Under this revocation ground, the DHS determines that it approved a petition but should not have done so. The fact that the DHS previously approved the petition does not prohibit it from subsequently correcting its mistake. For example, employee X spent 360 days outside the United States in a qualifying role in the three years prior to the filing of an L-1 petition, rather than 365 days as required. The employer petitioner, either by mistake or misunderstanding, files the L-1 petition on behalf of the employee and accurately reflects the number of days spent outside the U.S. If the DHS approves the petition, it may later seek to revoke the underlying L-1 status.

Change in Eligibility or Terms of Employment

This revocation ground applies in both the L and H context, albeit often for different reasons. A material change in the terms of employment unique to the H-1B context occurs when the employee changes worksites or adds a new worksite in a different MSA. An example unique to the L context occurs when there is a material change to the qualifying corporate relationship between the foreign and U.S. entity. In both the L and H contexts, this revocation ground could occur when there is a material change in job duties when no amendment petition is filed. For example, new job duties that the [USCIS](#) determines no longer constitutes a specialty occupation (H-1B), or no longer constitutes a specialized knowledge or managerial position (L-1)

A related ground of revocation unique to the H-1B context occurs when the petitioner violates the terms of the certified labor certification application filed with the H-1B petition, most often with regard to the salary and attestation requirements.

Responding to the NOIR

Consider the following five tips when responding to an NOIR:

- Read the NOIR thoroughly. While this may seem obvious, every detail is of significance. Confirm that the discrepancy raised by the DHS is truly a discrepancy rather than a DHS error.
- Confer with the employee to get the facts straight. Speak with employees who interacted with the DHS officer during the site visit.
- Identify the real issue. A NOIR may feel like it is attacking all possible elements of the underlying petition. In reality, these alternate grounds may dissolve once the pressing revocation grounds are addressed.
- Use discretion to your advantage. The employer should do all it can to rebut any inference that it intentionally mislead the DHS or DOL or that the U.S. workforce was negatively impacted.
- File an amendment petition. It is never too late in the game to file an amendment petition correcting the mistake that serves as the basis for the NOIR. Amendment petitions can be filed with a request for "nunc pro tunc" approval, which asks the DHS to apply the requested change retroactively to the date of the initial filing. This is particularly useful when the DHS is threatening to revoke a petition due to incorrect facts contained in the original filing.

Mitigating Risk of NOIRs

While the DHS has wide authority to issue a NOIR, the following steps can be taken to mitigate the risk of such an occurrence:

- Confirm that the worksite address, duties and title are correct with the employee and the employee's manager prior to filing any petition.
- Ensure that public access files for H-1B employees are intact and confirm that the relevant employees know how to respond to a DHS officer's questions during a site visit.
- Have employees review the most recent petition filed on their behalf prior to international travel, such that they are prepared to answer questions about their terms of employment when seeking to obtain a visa or enter the United States.
- Properly vet all changes to employment for employees in nonimmigrant status. Track the nonimmigrant workforce within the company to ensure that the proper stakeholders learn of proposed changes to employment before they occur to fully evaluate the potential ramifications of such changes.
- Instill a nature of immigration compliance within the company. Immigration compliance is larger than the issuance of a NOIR or any one nonimmigrant worker. An employer that regularly takes extra steps to ensure immigration compliance not only allows itself to honestly point to the correct steps taken (in addition to any mistakes) when responding to a NOIR, but also insulates the company from the negative ramifications of a larger compliance investigation.

The NOIR is a powerful enforcement mechanism, and its usage by the DHS appears to be increasing. By following the steps outlined above, companies can mitigate the risk of receiving a NOIR and improve its chances of success in avoiding revocation should a NOIR be issued.

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