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TEMPORARY PROFESSIONAL (H-1B) VISAS

This memorandum is not intended to provide legal advice on individual cases, each of which presents specific problems. Rather, it is intended as an overview of the H-1B nonimmigrant process. Due to the complexities of the process, it is recommended that you seek specific advice from an experienced immigration attorney.

The H-1B visa category allows US employers to hire qualified professionals on a temporary basis (up to 6 years) to work in "specialty occupations." The process of obtaining H-1B status is complex. Before filing a Petition for a Nonimmigrant Worker with US Citizenship and Immigration Services (USCIS), a prospective employer must file a Labor Condition Application with the United States Department of Labor. As discussed below, the Labor Condition Application certifies that the wage, working conditions, and benefits offered to the temporary worker are comparable to that paid to others with similar experience. There are significant fees to file a Petition for a Nonimmigrant Worker. The base fee for petitions is $780 (with a $50 discount for online filing). For-profit employers also pay fees to support asylum programs - $600 or $300 for small petitioners. With some exceptions, employers pay a "training fee" of $1500 (or $750 if they have 25 or fewer employees) for each initial H-1B application and first extension. This amount may not be reimbursed by the employee. A further fee of $500 to be used for anti-fraud programs is required for initial applications. H-1B visa status is only valid for employment with the sponsoring petitioner, and any change of employment requires approval of a new petition.

A job is in a "specialty occupation" if it meets any one of the following criteria:

> (a) A baccalaureate or higher degree or its equivalent is normally the minimum requirement to entry into a particular position; or
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> (b) The degree requirement is common to the industry in parallel positions; or
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> (c) The employer normally requires a degree or its equivalent for the position; or
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> (d) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate degree or higher.

To demonstrate that a position is in a "specialty occupation", a complete position description including terms and conditions of employment, and evidence of the temporary worker's qualifications for the position must accompany the petition. Prospective workers in the United States on another nonimmigrant visa, for example as business visitors (B-1) or students (F-1), sometimes may change to H-1B status. Those not able to change status, or not present in the United States, must take the notice of approval to the United States Consulate where they reside and apply for an H-1B visa to enter the United States.

LABOR CONDITION APPLICATION:

The initial step in the process is to file a Labor Condition Application (LCA). By filing this application, the employer agrees to each of the four labor condition statements summarized below:

1. That for the period of authorized employment of the foreign worker, the employer will pay all employees in H-1B status who have similar experience and qualifications for the specific position listed on the LCA at least the higher of:

   the actual wage level including benefits paid by the employer to all other individuals with similar experience and qualifications for the specific position in question including benefits; or

   he prevailing wage including benefits for that specific occupational classification by all employers in the geographic area of intended employment.

2. That, for the entire period of authorized employment, the employment of the foreign worker will not adversely affect the working conditions of workers similarly employed in the area of employment. Please note that H-1B employees must be paid for non-productive time.

3. That, on the date the LCA is signed and submitted, there was not a strike, lockout, or work stoppage in the course of a labor dispute in the relevant occupation at the place of employment.

4. That, on or before the date of filing the LCA, notice of the filing was posted in two conspicuous locations at the employer or that the employer has notified the collective bargaining representative of workers in the occupation in which the foreign worker will be employed, if there is such a representative.

In addition to these attestations, an employer is also liable for the reasonable costs of the return transportation of the alien abroad if the alien is dismissed from employment before the end of the authorized stay.

The employer must post a notification of the labor condition application in at least two conspicuous locations at the worksite(s). The Department of Labor regulations suggest that appropriate locations for posting notices include locations in the immediate vicinity of the wage and hour notices and occupational safety and health notices required under other regulations. After ten days, the Labor Condition Application and Posting Notice copies should then be removed and kept in the Public Access file where the employer maintains its business records. The Labor Condition Application is filed with the U.S. Department of Labor (DOL). The law requires that this application be reviewed for completeness and obvious inaccuracies, and that a certification shall be provided within seven days of the date of filing, unless the application is incomplete or contains obvious inaccuracies.

PREVAILING WAGE:

As noted above, on the H-1B petition and Labor Condition Application, the employer must offer to pay the actual wage or the prevailing wage level for the occupational classification in the area of employment, whichever is greater, based on the best information available. The prevailing wage must equal the average of the rate of wages paid to other workers similarly employed in the area of intended employment and it must be based upon recently collected data (within 24 months preceding the prevailing wage survey date).

An employer must retain documentation on how the prevailing wage was determined at the time the LCA was filed. This wage must be updated and adjusted upward if the prevailing exceeds the actual wage every 24 months during the period of validity of an LCA.

There are several ways available to the employer to determine the prevailing wage: 1) Use the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, if it applies; or 2) Use a collective bargaining agreement, if there is one covering this position; or 3) Request a prevailing wage determination from a State Workforce Agency (SWA); or 4) Use an independent authoritative source (such as Merchants' and Manufacturers' Association surveys); or 5) Rely on another "legitimate source." The SWA wage determination has the advantage that DOL regards it as per se determinative of the prevailing wage although it is not a mandatory method.

ACTUAL WAGE

In addition to the prevailing wage determination, the employer must document the actual wage the employer has paid or will pay workers in the occupation for which the H-1B non-immigrant is sought. The actual wage is defined as the rate paid to all individuals with similar experience and qualifications as the H-1B worker for the specific position. The employee will be considered to be receiving the "actual wage," if his or her salary falls within (or above) the range of wages currently paid to comparable employees in the same department. Factors to take into consideration include: experience; qualifications; education; job responsibility; function; specialized knowledge; and other legitimate business factors. Please note that this is not an average wage. The employer must show how the wage set for H-1B workers relates to the wages paid by the employer to all other individuals with similar experience and qualifications for the specific employment. The employer must maintain detailed records on how the *actual wage* offered to the nonimmigrant has been computed, and separate records on how the *prevailing wage* has been determined.

PUBLIC ACCESS FILE:

The LCA and related documentation must be available for public examination at the employer's principal place of business within one working day after the LCA is filed with the DOL. All records must be retained for one year beyond the period of employment specified on the LCA.

The specific documents that must be available for public examination are:

(1) A copy of each completed and filed Labor Condition Application (Form ETA 9035 Rev.)
(2) Documentation of the wage paid to the H-1B worker(s);
(3) Documentation of the system used to set the actual wage for the occupation;
(4) A copy of the documents used to establish the prevailing wage for the H-1B occupation(s);
(5) Documents showing compliance with the notice requirement; and
(6) A summary of benefits and statement confirming that the same benefits are provided to H-1B workers and U.S. workers.

PAYROLL RECORDS:

The employer must keep accurate payroll records. These records do not have to be made available for public examination; however, these records must be available to the U.S. Department of Labor, if it so requires. The DOL requires that the employer:

(1) Retain payroll records of all employees in the occupational classification of the H-1B worker from the time the LCA is filed throughout the period of employment, containing employees':
    a) full name and home address;
    b) occupation, rate of pay, and hours worked each week;
    c) overtime earnings each week;
    d) total additions and deductions from each pay period and total wages paid for each pay period, date of pay, and period covered;

Payroll records must be retained for three years from the date of the creation of the records. If a complaint is filed the employer must retain the payroll records until the complaint is resolved.

Employers who are found to be in willful violation of the law can be required to pay civil fines and back pay. Employers may also lose the ability to file nonimmigrant petitions and immigrant petitions for twelve months.

While the H-1B process is complicated, numerous employers successfully navigate the required course each year and hire qualified professionals for their business.