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H-1B Non-immigrant Work Visa

Foreign nationals who wish to work in the United States typically apply for H-1B non-immigrant work authorization from the United States Citizenship and Immigration Service ("USCIS").

1. "Specialty Occupation"

The H-1B enables the foreign national to work in a professional "specialty occupation" in the United States for up to six years. During the 6-year period, the foreign national can work with one employer or with a combination of employers. A professional "specialty occupation" is a position that requires at least a Bachelor's degree (or the equivalent) in a specialty area, and the foreign national must have the specialized degree. So, for example, an architecture position requiring a degree in architecture would be an appropriate professional "specialty occupation". A civil engineering position requiring a degree in engineering would also qualify. Other types of positions that are usually appropriate for H-1B visas include positions in finance, accounting, computer science and the hard sciences. The threshold question is whether the position requires the theoretical knowledge gained from bachelor's level studies in a particular field, and whether the beneficiary has the required bachelor's degree (or the equivalent). Positions that are "generalist" positions, such as sales jobs, data entry or simple computer programming positions, and administrative positions are often not eligible for H-1B work authorization. If the employer requires a Bachelor's degree but **any** degree is acceptable (for example, a degree in liberal arts or a degree in business administration [without a particular major, such as finance or marketing], then the position is typically not appropriate for H-1B classification.

2. Labor Condition Attestation

The H-1B petition is filed by the **employer** (not the employee). As part of the H-1B application process, the employer must submit a Labor Condition Attestation (LCA) to the Department of Labor (Form ETA 9035). The LCA contains a number of important employer attestations. They are the following:

- The employer will pay the foreign national employee the "actual wage" or the "prevailing wage" for the position, whichever is higher. The "actual wage" is the wage set by the employer for the position for employees with similar experience and skills. Usually, the "prevailing wage" is a figure provided by the state workforce agency, which it obtains from a Department of Labor database available on the internet at http://flcdatacenter.com (although other prevailing wage sources are also be available). Again, the employer must agree to pay the higher of the two wages, as the required wage rate. The employer must pay the salary until the employment relationship terminates. While legitimate

leaves of absences are permissible, “benching” or “furloughs” are not permitted for H-1B employees.

- The employer must affirm that employing the foreign national will not adversely affect the working conditions of other similarly employed workers. So, for example, it would not be permissible for an employer to hire foreign national employees without paid vacation and health insurance in order to justify a decision to not offer those benefits to US workers.

- The employer must inform the Department of Labor of any strikes, lockouts, or work stoppages if any of these develop after the Labor Condition Application is filed with the Department of Labor.

- The employer must provide notice of the LCA to its employees through posting the LCA on the premises for at least ten business days. The posting must be done in two different conspicuous locations.

- The employer must create a “public access file” which can be available for public inspection. The file must contain documentation showing that the employer is complying with the aforementioned requirements.

Employers who are considered to be H-1B dependent employers have additional requirements to those set forth above. Employers are considered to be H-1B dependent if they have less than 25 workers and more than 7 H-1B workers; between 26 to 50 workers and more than 12 H-1b workers; or more than 50 workers with 15% or more of them being H-1B foreign nationals. H-1B dependent employer must fulfill 2 additional requirements.

3. Export Compliance Attestation

In addition to the above, the employer must confirm that it is in compliance with export regulations with respect to the employment of the foreign national. The export compliance process is highly dependent on an employer's business purpose and product, and most exports **do not** require licenses. Technology or technical data that is **not publically available** or **in the public domain** and has military, space, or "dual use" applications may require an export license before it can be shared with a foreign national worker, with a higher likelihood for individuals from Cuba, Iran, North Korea, Libya, Sudan and Syria**.**

4. Filing Fees

The filing fees for H-1B professionals are substantial. The basic filing fee is $460. There is an also an Anti-Fraud fee of $500. In addition, the employer is required to pay a $1,500 training fee to the USCIS (employers with fewer than 25 employees pay $750 instead of $1,500). The Department of Labor will require the employer to pay all of the H-1B costs. (Please note that some employers, such as universities, are except from the $1,500 training fee). Normal review times range from 2-6 months; a case can be premium processed for an additional $1225 fee to

the USCIS. With premium processing, the government will review the case within 15 calendar days from the date it is filed.

5. Termination of the employment relationship

In the event the employer terminates the employee relationship before the end of the requested period of work authorization, the employer must also agree to pay for a return plane ticket for the H-1B worker to their country of origin (assuming the H-1B employee does not quit or accept employment with another US employer in lieu of returning home).

6. H-1B numerical quota

While university employees and affiliated entities are **not** subject to any numerical quotas (they are "cap exempt" employers), the USCIS only issues 85,000 **new** H-1B's in any year to "non-cap exempt" employers. Sometimes an employer will hire a foreign national employee who has work authorization pursuant to his or her student status in the United States. Typically, student work authorization (called "optional practical training" or "OPT") is only valid for 12 months, and the employer must file an H-1B petition if a longer period of employment is desirable. Individuals moving from "cap exempt" to "cap subject" employers are subject to the cap when they move (unless they work for BOTH entities at the same time)

During the past several years, the government has RUN OUT of new H-1B's very early. Regulations were changed in 2008 to allow for a 5-business day "filing window", beginning **April 1st,** in anticipation that the number of petitions received would exceed the number available. In 2008, the number of petitions filed exceeded the number of H-1B's available during the first 5 business days of April, and a random lottery was held to see which would be reviewed. Those cases not selected by the lottery were returned to the attorney/employer with the applicable filing fees. Between 2009 and 2012, the cap was NOT reached during the first 5 business days in April. Rather, H-1B's were available for approximately 3-6 additional months. **Please note that in all subsequent years, the quota was exceeded during the first 5 business days of April and a lottery was held. For FY2016, 2017 and 2018, the government received approximately triple the number of the quota. We expect to see high demand for the 2019 "cap" (filings for the 2019 "cap" will begin on April 1, 2018. We recommend that cases be started in January or February to assure filing during the initial filing window.**

"Cap subject" H-1B's cannot have an effective date earlier than October 1st, even though they can be filed as early as April 1. However, under regulations issued in 2008, if an individual has F-1 OPT status that ends **after** April 1, and if the petition is accepted by the random lottery, then OPT will automatically be extended to 10/1 when the H-1B begins. Additionally, under these same new regulations, if an employer participates in the E-verify employment verification program, **and** the F-1 OPT employee has an eligible degree in the Sciences, Technology, Engineering or Math ("STEM degree"), then the student may be eligible for 27 months of OPT rather than the normal 12 months of OPT. Information about the E-verify program is available at http://www.dhs.gov/ximgtn/programs/gc_1185221678150.shtm. Students in F-1 status should check with the International Student Advisor at their university to determine whether their degree area is eligible for an OPT extension.

Please note that the H-1B quota or "cap" **does not** apply to individuals **already** in H-1B status (for example, an employee needing an H-1B extension or where the H-1B visa holder is changing employers is not subject to the cap--unless the employee is moving from a university or other "cap exempt" employer to private industry).

Please also note that nationals of Chile, Singapore, Australia, Mexico and Canada have different visa options available and can often avoid problems with the H-1B cap.

7. When can the employee begin working?

Because H-1B work authorization is employer specific, a new petition must be filed when any time an H-1B visa-holder changes employers. If the individual is not presently in H-1B status with another employer, then the new employer's petition must be **approved** before the individual can start working pursuant to H-1B status. Normal processing times are typically between 2-5 months, depending on USCIS workload. The USCIS will "premium process" a case in 15 calendar days for an additional $1,225 filing fee, and this may be advisable for individuals who are changing to H-1B status and need to have their case approved before they can commence new employment. If an individual is already in H-1B status with another employer, the individual can start working when the new employer **files** the petition with the USCIS, (i.e. the individual does not have to wait for the approval in order to start working for a new employer when filing a "change of employer" petition), but should be working for the old employer up to the date of filing. Sometimes individuals may be hired who are outside the United States. Those individuals must receive the H-1B approval and then secure an appointment at a US consulate abroad before they will be allowed to enter the United States in H-1B status. For individuals hired from abroad, employers can expect significant wait times (2-5 months for the petition approval, followed by 1-4 months for consular processing). Premium processing is available in all cases which can reduce the wait time for the approval.

8. H-1B Dependent employers

Companies employing a large percentage of H-1B employees may be "H-1B dependent employers", with significant additional obligations under the regulations. A "dependent employer is defined as an employer (a) with 25 or fewer FT employees who employs more than 7 H-1Bs; (b) with at least 26 and not more than 50 FT employees and employs more than 12 H-1Bs; or (c) with at least 51 FT employees with H-1B employees constituting 15% or more of its FT employee workforce.

9. Retaining Bordeau Immigration Law, LLC, to handle an H-1B

This handout is for informational purposes only. Receipt of this information does not create an attorney-client relationship. Our office often provides general information about H-1B requirements to individuals and employers before we have been retained to work a case. Because the H-1B is the employer's petition, with the foreign national as the beneficiary, our firm will **not** work a case until we have been retained by the employer, in writing, through the retention procedures we have in place with that particular employer. If we have not worked prior

H-1B's for a particular employer, we will need to enter into a retention agreement before opening an H-1B case.

(Note: this handout is intended to provide a high-level overview of the H-1B requirements. It does not provide an exhaustive review of the H-1B process nor does it include all information that may be relevant to a particular H-1B employee. For additional information, please contact our office or another attorney specializing in immigration matters).

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