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MEMORANDUM AND QUESTIONNAIRE

TO: H-1B Visa Employers and Applicants

FROM: Mercedes Badia-Tavas, Esq.
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DATE: October 10, 2005

SUBJECT: H-1B Visa Petitions

H-1B Temporary Professional Visas.

The H-1B visa category is one of several H visas based on temporary employment in the United States. While the E and the L visas require the U.S. employer have some form of relationship with the a foreign corporate entity or the foreign national's country, the H-1B visa was created to permit U.S. employers to hire professional workers where there tends to be shortages of qualified workers, but a shortage is not a requirement for this visa. The H-1B Nonimmigrant visa may be used to bring a worker to the United States if the employee will work in a "specialty occupation" or a professional position. The current statute has a 65,000 annual quota on the issuance of H-1B visas to foreign nationals in specialty occupations filed by of U.S. employers. There are certain exemptions to this cap for previously issued H-1B visa holders, non-for-profits organizations, and educational institution. In addition, there are now 20,000 additional H-1B visa numbers available to foreign nationals with master's degrees from a U.S. educational institution. The Immigration and Nationality Act of 1990 and the American Competitiveness & Workforce Improvements Act of 1998 and subsequent legislation have made significant changes in the employer's obligations with respect to obtaining and maintaining the H-1B Visa, the forms used to apply for the visa, and the application procedures.

What does the Employer do?

First, the employer must qualify as a U.S. employer. The employer must have a U.S. taxpayer identification number. Foreign businesses not established in the United States cannot use the visa to bring employees here. Second, the employer must offer the employee requiring an H-1B visa the greater of the prevailing wage or the actual wage paid to worker in the same occupation in order to sponsor the prospective employee for an H-1B visa.

The prevailing wage determination is either obtained on-line from the Dept. of Labor's O*Net Wage Survey or requested from the State Work Administration ("SWA") for the job in the geographic area where the job / occupation is going to be performed. The employer is required to pay the greater of either the prevailing wage (determined by the SWA) **or** the actual wage (wage paid to all other individuals with similar experience and qualifications for the specific occupation doing substantially the same duties and responsibilities at the place of employment). Effective March 8, 2005, 100% of the prevailing wage must

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be paid by the employer; a 5% variance will no longer be allowed under the regulations. The prevailing wage must be determined at the time of filing and thereafter every 36 months and may be determined by federal prevailing wage laws, a collective bargaining agreement, the State Workforce Agency, and an independent authoritative source or other legitimate source. This prevailing or actual wage level must be paid by the employer during the entire period that the sponsoring employee is working for them. Otherwise, it is a violation of the regulations and the labor condition application to fail to pay the minimum wage for the occupation in the geographic area of intended employment.

“Benching” or periods of unproductive work without pay are not allowed under the current H-1B regulations, and it is a violation subject to penalty by the DOL. The use of voluntary leave without pay as an alternative to “benching” is not legally permitted and will result in legal liability.

After the wage issue is satisfied, the employer must prepare and file a Labor Condition Application (“LCA”) with the Regional Office of the Department of Labor (“DOL”). The LCA is a form which must be carefully prepared and certified by the DOL. The regulations further require that the LCA be posted in two conspicuous places at the work site for 10 consecutive business days. The form requires the employer to describe the position and the salary. The LCA also requires that the employer attest to complex facts concerning the wage, working conditions, labor conditions and the giving notice, which is to be maintained in a public access file at the employer’s main office. This posting requirement may be accomplished electronically by the employer.

Once the LCA is approved and signed along with the other documents required, the employer files a petition with the appropriate Service Center of the USCIS. The employer must document that the position requires the services of a person in a “specialty occupation” requiring a bachelor’s degree or equivalent, and that the foreign national meets the requirements of the position.

The H-1B employee’s spouse and unmarried children under 21 years old may be granted an H-4 visa. H-4 visa holders are not permitted to work in the United States. However, they may attend school without changing status to the F-1 Student Visa, but they will not be eligible for the benefits of the F-1 Visa such as Optional Practical Training after the completion of Studies.

What about the Employee’s Family?

The H-1B employee’s spouse and unmarried children under 21 years old may be granted an H-4 visa. H-4 visa holders are not permitted to work in the United States. However, they may attend school without changing status to the F-1 Student Visa, but they will not be eligible for the benefits of the F-1 Visa such as Optional Practical Training after the completion of Studies.

What are the Employer’s Liabilities?

Completing the LCA is just the beginning. The employer must also maintain in a public access file the wage and hour records for the full-time or part-time H-1B employee, as well as information concerning working conditions and benefits for all similarly situated employees. We provide clients with complete documentation to compel the required public access file for the H-1B employee separate and apart from

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their personnel file. Upon request, the public access file must be made available to the DOL's Wage and Hour Division.

In addition, the attorney fees and filing fees (regular, training and fraud fees) associated with the H-1B visa petition are by DOL regulation viewed as a business expense of the employer not deductible from the employee's pay. This requirement is clearly stated in the Dept. of Labor regulations at 20 CFR §655.731(c) (9). An authorized deduction for purposes of the employer's obligation to pay the prevailing wage to the H-1B employee means a deduction in complete compliance with specific requirements in the regulation. Most importantly, the deduction must be "*reasonable and customary in the occupation and / or area of employment, **except that the deduction may NOT recoup a business expense(s) of the employer (including attorney fees and other cost connected to the performance of H-1B program functions which are required to be performed by the employer, e.g., preparation and filing of the LCA and H-1B petition.***" The employer cannot recoup the employer's expense of attorney fees and the related cost for an H-1B petition, mainly because this deduction would lower the employee's salary below the prevailing wage for the occupation in the geographic area of employment. The employer also cannot impose or collect a penalty for leaving employment early, although liquidated damages in a reasonable amount under state law maybe permitted in some cases. The liquidated damages depend on the requirements of the state law in effect at the time. A loan to an H-1B employee for which a deduction is imposed to recoup attorney fees and cost associated with the H-1B visa petition would not withstand scrutiny by the Dept. of Labor in an investigation.

If an employer does not document the wage, pay the required wage or maintain records, the employer could be liable for substantial penalties including back pay and fines of up to \$35,000 per violation. The employer could even lose the right to apply for an H-1B visa as a willful violator, as well as all other immigrant and nonimmigrant visas for up to three years. Effective December 1, 1998 and reinstated in December 2004, the DOL and USCIS requires an employer filing for a new H-1B employee to pay a training fee of \$1,500.00 for each H-1B application and first extension in addition to the regular filing fee of \$185 which is subject to change by INS on a periodic basis. Employers with less than 25 employees pay a reduced fee \$780.00. Certain non-profit entities and educational institutions are exempt from paying the training fee. In addition, new employers have to pay a new Fraud Fee of \$500.00 for each H-1B visa applicant.

If the employer terminated the services of the employee prior to the expiration of the H-1B Visa, the employer is responsible for paying the employee's return transportation to his or her last foreign residence.

What is a Dependent Employer?

A dependent employer is one who has employed more than the minimum allowed H-1B workers determined by the size of the employer. It is defined as an employer: (a) with 25 or fewer full time equivalent employees who employs more than 7 H-1B employees; (b) with at least 26 and not more than 50 full time equivalent employees and employs more than 12 H-1B employees; or (c) with at least 51 full time equivalent employees and employs a number of H-1B employees that is equal to at least 15% of the full time equivalent employees. The dependent employer must comply with the new attestation

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requirements, if it has more than the minimum number of H-1B workers as defined by regulation. There are exceptions to the new attestation requirement for H-1B employees who have a master's degree or higher (not work experience equivalents) in a specialty related to the intended employment or the employee will receive wages (including cash bonuses and similar compensation but not benefits) at an annual rate of at least \$60,000.

What does the Employee Do?

The employee must prove that he or she is qualified for the specialty occupation and the specific job offered by the employer. The employee must be able to show that his or her foreign university degree is the equivalent of a U.S. degree by obtaining a credential evaluation of his or her education. If the prospective employee is a graduate of a U.S. university or college, the equivalency is not required.

If the worker is in the United States and currently holds a valid nonimmigrant visa status, such as an F-1 student visa or a B-2 tourist visa, he or she may apply for a change to an H-1B visa status while in the United States. The H-1B visa status only gives the person the ability to work in the United States for the sponsoring employer. It is not valid for open-market employment. If the worker needs to travel abroad after an approved change of status to H-1B, he or she will need to apply for an H-1B visa stamp at a U.S. Consulate. If the prospective employee is residing abroad, then the petition is filed with the USCIS in the U.S. with jurisdiction. Once the petition is approved, the notice of action is cabled to the U.S. Consulate in the individual's country of residence. He or she must then apply with the U.S. Consulate according to their procedures and timeframe. The processing at U.S. Consulates can be lengthy depending on the numbers of applicants and security clearance requirements for all applicants.

If the prospective employee is already in H-1B visa status with another employer, they are "portable" to another H-1B petitioner so long as the application is filed with USCIS and other conditions are satisfied.

What are the Employee's Liabilities?

Under current law, a person who fails to maintain status, such as engages in unauthorized employment, stays beyond his/her authorization period of stay on the I-94 Entry Document, or ceases to work for the authorized employer will be subject to deportation by U.S. Immigration and Customs Enforcement Agency or "ICE". If any foreign national remains in the U.S. without proper immigrant status for a period of more than 180 days, they will be subject to a 3 year bar to legal readmission upon departure from the U.S. If this period exceeds 365 days, the bar increases to 10 years.

How Long Can the H-1B Employee Remain in the United States?

The H-1B is a temporary visa with specific limitations on periods of stay in the United States. The initial petition may be approved for up to three (3) years. After the initial period, three (3) more years are available. If the foreign national does not have a permanent residency case in process, then the worker must spend one (1) year outside the United States before he or she is entitled to have another H-1B Visa. The only exception to this rule occurs when the beneficiary has a labor certification or I-140 Immigrant Visa Application pending for more than 365 days. Then, the beneficiary is entitled to an extension

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beyond the 6-year limit in one-year increments. Many foreign national employees in H-1B visa status obtain permanent resident (or the “green card”) during their period of stay in the United States through employer sponsorship, which often requires an approved labor certification from the Federal Department of Labor.

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TEMPORARY WORKER/SPECIALTY OCCUPATION (H-1B) QUESTIONNAIRE

Information requested on this form will facilitate the more efficient preparation of the necessary forms and documents required to file an H-1B Nonimmigrant Visa Petition. I would request that this form be completed and returned to the undersigned. If the response to one or more of the questions is not applicable, please indicate that by putting "N/A". If you have questions regarding any item, please correspond, fax or call me.

In addition to answering the following questions, please provide us with the following materials:

From the Company:

- Articles of Incorporation/Corporate Charter of the Company
- Copy of any current annual report, promotional brochures, pamphlets on the employer.
- Copy of Company's previous year's annual report.
- Ten pieces of your company's stationery to be used for the employment support letters
- Copy of internal job description for the job offered to the foreign national.
- Copy of the company's most recent bank statement.
- Copy of the corporate tax return for the most recent year or quarterly filings with the IRS.
- Copy of the lease or title to property of the corporate office with photos of the office operations.

From the Prospective Employee:

- Copy of prospective employee's resume;
- CLEAR color copies of state driver's license or state ID card or other form of identification.
- Copy of all of the prospective employee's college or university diplomas **and** transcripts.
- A complete CLEAR copy of prospective employee's passport.
- If prospective employee is currently working in the U.S., copies of the most recent pay stub.
- If applicable, copy of all previous H-1B visa or other visa classification approval notices.
- If applicable, copy of all of prospective employee's I-20's and work authorization card
- If the prospective employee has a spouse or children include complete copies of their passports with the I-94 Entry Cards (front and back), copies of marriage and birth certificates.

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QUESTIONNAIRE TO BE COMPLETED FOR CORPORATE EMPLOYEES/EMPLOYERS

Information to be Provided by Prospective Employee

NAME _____
(last, first, middle)

MARITAL STATUS _____

NAME OF SPOUSE _____ DATE OF MARRIAGE _____
(last, first, middle)

CITY/PROVINCE/COUNTRY OF BIRTH

(You) _____ (Spouse) _____

DATE OF BIRTH (month/day/year)

(You) _____ (Spouse) _____

COUNTRIES OF NATIONALITY

(You) _____ (Spouse) _____

DATES AND COUNTRIES OF BIRTH OF CHILDREN _____

INDICATE ANY FAMILY MEMBERS OF YOURS OR YOUR SPOUSE'S WHO WERE EVER U.S. CITIZENS OR PERMANENT RESIDENTS

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U.S. SOCIAL SECURITY NUMBER (if any) _____

FOREIGN ADDRESS _____

U.S. ADDRESS (if any) _____

PHONE NUMBER _____

FAX NUMBER _____

PRESENT OR LAST POSITION

Name of employer _____

Address of employer _____

Job Title _____

Occupational Title of person to whom you report _____

Date employment began _____

Date employment ended (if applicable) _____

Number and job titles of people supervised _____

PREVIOUS ENTRIES TO U.S.

<u>Year of Entry</u> (if in U.S., list present entry first)	<u>Length of Stay</u>	<u>Type of Visa</u>	<u>Expiration of Visa Status (if in U.S. presently)</u>
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Name of Proposed U.S. employer _____

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Please answer the questions below completely, in order that we may accurately advise you on documents you will need to present in order to be issued a visa for the United States. **Please copy this form and complete it for each member of the family who will be traveling to the United States.**

Name _____ Any other Names Used (e.g., maiden) _____

Passport Number _____ Issue Date _____ Expiration Date _____

Color of Hair _____ Color of Eyes _____ Complexion _____

Height _____ Marks of Identification _____

Have you ever applied for a United States visa before, whether nonimmigrant (temporary) or immigrant (permanent)? YES " NO "

If yes, where? _____ When? _____ What type _____

Visa was ISSUED " DENIED "

Has your United States visa ever been cancelled? YES " NO "

If yes, where? _____ When? _____ By whom? _____

Have you or anyone acting for you ever indicated to a U.S. Consular or Immigration Employee a desire to immigrate to the U.S.? YES " NO "

Has anyone ever filed an immigrant visa petition on your behalf? YES " NO "

Has labor certification for employment in the U.S. ever been requested by you or on your behalf? YES " NO "

Are any of the following in the U.S. (If YES, circle appropriate relationship and indicate that person's status in the U.S., i.e., studying, working, U.S. permanent resident, U.S. citizen, etc.)

Husband/Wife _____ Fiancé/Fiancée _____ Brother/Sister _____

Father/Mother _____ Son/Daughter _____

Please list the countries where you have lived for more than 6 months during the past 5 years. Begin with your present residence.

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Countries

Cities

Approximate Dates

Are any of the following applicable to you? (A YES answer does not automatically signify ineligibility for a visa, but if you answered YES to any of the above please discuss this issue with us as promptly as possible.)

Have you ever been afflicted with a communicable disease of public health significance, a dangerous physical or mental disorder

or been a drug abuser, or addict?

Yes " No "

Have you ever been arrested or convicted for any offense or crime, even though subject of a pardon, amnesty, or other such legal action?

Yes " No "

Have you ever been a controlled substance (drug) trafficker, or a prostitute or procurer?

Yes " No "

Have you ever sought to obtain or assist others to obtain a visa, entry into the U.S. or any U.S. immigration benefit by fraud or

willful misrepresentation?

Yes " No "

Were you deported from the U.S.A. within the last 5 years?

Yes " No "

Do you seek to enter the United States to engage in export control violations, subversive or terrorist activities, or any unlawful purpose?

Yes " No "

Have you ever ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion,

national origin, or political opinion under the control, direct or indirect, of the Nazi Government of Germany, or of the government of any area occupied by, or allied with, the Nazi Government of Germany, or have you ever participated in genocide?

Yes " No "

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Information to Be Provided by Employer

A. General Information about the Employer

1. Name of the Company: _____
2. Contact Person: _____
3. Address of Main Office: _____
4. Name and Title of Signatory: _____
5. Address of Job Site: _____
6. Nature of Business Activity: _____
7. Employer Federal Taxpayer I.D. Number: _____
8. Number of Current Employees in the U.S.: _____
9. Number of Current Employees Worldwide: _____
10. Public or Private company: _____
11. Gross Annual Income: _____
12. Net Annual Income: _____

B. Information about the Position Offered

Name of Employer _____

Name of Employee _____

Job Title for Proposed Position _____

Part-time or Full-time _____

Detailed Job Description for Proposed Position (please attach) (incorporate attached managerial or specialized knowledge criteria for corporate transferees)

Salary Offer _____

Beginning and Ending Dates of Intended Employment

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Supervisor (or other person who can provide technical information about job offered)

Name _____
Title _____
Phon _____
Fax _____

Location or Locations where services will be performed in U.S.

Number and Job Titles of people to be supervised in proposed position

Occupational Title of person to whom applicant will report

If your company has employed this individual previously or presently in or out of U.S.

1. Name of Employer _____

2. Job Title _____

3. Duties and Responsibilities, including managerial responsibilities _____

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4. Number and job titles of people supervised _____

5. Dates of Employment _____

6. Relationship, if any, of overseas employer to proposed U.S. employer _____

Depending on the circumstances, you may not have all the information required to fully complete the questionnaire, and/or some or all of these inquiries may not be applicable or the undersigned may already have the requested information. If this is the case please indicate the same and complete it as best you can with the information available to you. Thank you very much for your assistance. This will facilitate our processing of this application. Should you have any questions, please do not hesitate to contact M. Mercedes Badia-Tavas at 312-422-0838.