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IMMIGRATION HANDBOOK FOR HUMAN RESOURCE PROFESSIONALS

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I. TYPICAL NONIMMIGRANT VISA STATUSES FOR EMPLOYEES

H-1B Professional Worker

The H-1B visa category applies to aliens coming temporarily to perform services in a specialty occupation, or as a fashion model of distinguished merit and ability. H-1B nonimmigrant workers include professional workers with at least a bachelor's degree (or its equivalent work experience) who seek entry into the United States to work in a specialty occupation. Specialty occupation is defined as requiring a (1) theoretical and practical application of a body of highly specialized knowledge and (2) attainment of a bachelor's or higher degree in the specific specialty as a minimum for entry into the occupation. There is an annual cap on H-1B visas.

L-1 Intracompany Transferee

The L-1 category applies to aliens who work for a company with a parent, subsidiary, branch, or affiliate in the U.S. These workers come to the U.S. as intracompany transferees who are coming temporarily to perform services either

- in a managerial or executive capacity (L-1A) or
- which entail specialized knowledge (L-1B)

for a parent, branch, subsidiary or affiliate of the same employer that employed the professional abroad. The employee must have been employed abroad for the corporation, firm, or other legal entity (or an affiliate or subsidiary thereof) on a full-time basis for at least one continuous year out of the last three-year period to qualify. There is currently no annual cap on L-1 visas.

TN Visa

NAFTA is the North American Free Trade Agreement. It creates special economic and trade relationships for the United States, Canada and Mexico. The nonimmigrant NAFTA Professional (TN) visa allows citizens of Canada and Mexico to work in the United States. Permanent residents, including Canadian permanent residents, are not able to apply to work as a NAFTA professional.

Professionals of Canada or Mexico may work in the U.S. under the following conditions:

- Applicant is a citizen of Canada or Mexico;
- Profession is on the NAFTA list;
- Position in the U.S. requires a NAFTA professional;
- Mexican or Canadian applicant is to work in a prearranged full-time or part-time job, for a U.S. employer. Self employment is not permitted; and
- Professional Canadian or Mexican citizen has the qualifications of the profession.

The requirements for applying for citizens of Canada and Mexico are different.

To look at the list of professions listed under NAFTA, please click here.

E-3 Visa for Australians

The E-3 is a new visa category only for Australians going to the U.S. to work temporarily in a specialty occupation. The legislation passed by the U.S. Congress limited the E-3 to nationals of Australia as well as their spouses and children. E-3 principal applicants must be going to the U.S. solely to work in a specialty occupation. The spouse and children need not be Australian citizens.

O-1 Aliens of Extraordinary Ability

The O category is reserved for:

- Aliens of extraordinary ability in the sciences, arts, education, business, or athletics (O-1),
- the artist's or athlete's support staff (O-2), and
- the O-1's spouse and/or child(ren) (O-3).

To qualify, the alien must be coming to the U.S. to work in his or her area of extraordinary ability or achievement. There is currently no annual cap on O visas.

P Visa for Athletes, Entertainers, and Musical Groups

The P visa is reserved for professional athletes, famous music groups, or culturally unique entertainers. P visas are available to certain artists, internationally recognized athletes, and certain entertainers who have achieved national or international recognition as outstanding in the discipline.

The P category has three subdivisions:

- P-1 nonimmigrants are defined as members of entertainment groups or individual athletes and members of athletic teams;

- P-2 nonimmigrants are entertainers who are part of reciprocal international exchanges; and

- P-3 nonimmigrants are those coming to perform in programs that are culturally unique.

The P-4 classification also allows nonimmigrants who are spouses and minor, unmarried children accompanying or following to join P-1, P-2 or P-3 nonimmigrants.

H-3 Trainees

The H-3 classification applies to aliens (beneficiaries) coming temporarily to the U.S. to participate in a training program. There are general H-3's, and those coming for special education training. There is currently no annual cap on H-3 admissions to the U.S.

B-1 Business Visitor

The B-1 visa status is available for individuals who need to visit the United States temporarily for a business purpose and have no intention of abandoning their residence abroad. The B-1 visitor should generally be paid by the foreign business. The B visa is generally used by individuals who are coming to the U.S. for the following reasons:

- to attend meetings or conferences;
- to engage in contract negotiations or new business venture discussions;
- to perform work pursuant to an existing service contract whereby the visiting foreign employee must be on U.S. soil to complete service to the product sold by the foreign company; and
- occasionally for short-term training programs.

This list of reasons under which a B visa may be used is not exclusive and depends on the facts and circumstances surrounding the case.

II. TYPICAL PERMANENT RESIDENCY PROCESS FOR EMPLOYEES

Overview of the PERM Labor Certification Process

The point of the PERM labor certification stage is to test the US labor market to see if there is a qualified US citizen or green card holder for the job offered.

As a preliminary step in this process, a company must first obtain a prevailing wage determination before engaging in any recruitment efforts. The wage determination will be valid for filing a period of 90 days to one year after issuance by the Department of Labor (DOL). The employer must file the labor certification or commence recruitment within the validity period specified on the prevailing wage form. As mandated by law, the employer will be required to pay the employee one-hundred percent (100%) of the prevailing wage upon ultimate approval of the employee's permanent residency application.

Under PERM, an employer is required to place two Sunday advertisements in a newspaper of general circulation appropriate to the occupation. The newspaper advertisements must:

- contain the name of the employer;
- direct applicants to report to, or send resumes to the employer;
- provide a job description specific enough to apprise U.S. workers of the job opportunity; and
- indicate the geographic location of the job opportunity clearly enough to permit applicants to understand the relative commuting distance.

If a wage rate is included in the ad, it should not be a rate lower than the prevailing wage for the position.

Employers recruiting for professional positions, defined as those requiring a college or higher degree, would also have to select three other additional recruitment steps that would be required before filing the application. Acceptable recruitment channels include:

- the employer's Internet site;
- job fairs;
- job search websites;
- private employment agencies;
- on-campus recruitment;
- trade or professional organization;
- employee referral program;
- campus placement office postings;
- local and ethnic newspapers where appropriate; and
- radio and television ads

Employers are not required to submit recruitment results and documentation with the labor certification filing. PERM does require employers to maintain documentation of recruitment efforts that were undertaken and the results thereof, including the lawful job-related reasons for rejecting U.S. workers who applied for the job. U.S. workers who could acquire skills in a reasonable period of on-the-job training may not be rejected. You must sign a report describing the recruitment steps undertaken and the results achieved, the number of hires, and if applicable, the number of U.S. workers rejected, categorized by the lawful job related reasons for such rejections. Resumes and other documentation must also be maintained. Please note that you will be required to maintain documentation of recruitment efforts for five (5) years from the date the labor certification is filed with the DOL.

The employer will also be required to give notice of the planned filing of the labor certification to the employees' bargaining representative in the area of intended employment, if there is such a representative. If there is no bargaining representative, employers will be required to post a notice about the job opportunity for 10 consecutive business days in a conspicuous place at the location of employment.

In addition to the posting, the employer must place a job order with the state employment office serving the area of intended employment, for a period of 30 days. All recruitment must have taken place no more than six (6) months prior to filing.

If there has been a layoff by your company in the area of intended employment within six months of the filing of the labor certification application, the employer must attest to and document notification and consideration of potentially qualified U.S. workers involved in the layoff and the results of such notification.

Upon submission of the labor certification, cases may be flagged for audit on the basis of certain factors or simply randomly selected. The audit process may include a request for additional documentation, after which the certifying officer can certify or deny the application or call for supervised recruitment. If an application is selected for audit, the employer will be notified and required to submit, within 30 days, documentation to verify the information stated in or attested to on the application.

The I-140 Immigrant Visa Petition

After the Labor Certification is approved by the US Department of Labor, the employer must file an I-140 Immigrant Visa Petition notifying the United States Citizenship and Immigration Service (USCIS). In the I-140

petition, the employer must prove that the job opening exists, the employee meets the qualifications for the position, and the company is financially able to pay the pre-chosen prevailing wage for the job in the geographic market, as agreed on the Labor Certification.

The I-485 Permanent Residence Application

This is the final "green card" paperwork which is for the employee and his or her family. The I-485 can only be filed when the employee's 'priority date' is current. For an explanation of priority dates and visa availability, please see below.

During the adjustment stage, the USCIS will need biographical and medical data so they can be sure that the employee is not excludable from the US for medical, criminal or other reasons. The employer will need to sign a letter stating that the job offer is still open and that the salary is at least as much as originally offered on the Labor Certification.

Upon approval of the I-485 adjustment application, the employee will be a U.S. permanent resident.

Visa Availability and Priority Dates

An employee can only file an adjustment of status application or obtain permanent residency through consular processing if a visa number is available to them. The United States Department of State publishes visa availability through the Visa Bulletin for all employment-based categories on its web site at http://travel.state.gov. A visa number is available to the employee if the date on Visa Bulletin for the employee's category (EB1, EB2, or EB3) and country of nationality is higher than the employee's priority date. If so, then the priority date is 'current' and the employee can file an I-485 Adjustment of Status.

An employee's priority date is determined by the date his/her labor certification is filed, or in the case where a labor certification is not needed, the date his/her I-140 is filed.

III. PREMIUM PROCESSING PROGRAM

Overview of Premium Processing

Under Premium Processing, U.S. companies pay a $1,000 fee (in addition to the normal filing fees) and the United States Citizenship and Immigration Service (USCIS) guarantees a 15-day case turnaround for specified types of cases. Within the 15 days, USCIS will issue either an approval or a Request for Evidence requesting additional documents and/or information. Premium Processing can only be used for certain work visa petitions, including E-1,E-2,H-1B, H-2, H-3, L-1, O, P, Q, R and TN visas. Certain I-140 Immigrant Petition for Alien Worker can be premium processed as well depending on the employment-based category used for the employee's case.

When Premium Processing Is a Appropriate

We recommend paying the Premium Processing fee whenever a new or existing employee would otherwise go without work authorization or would experience a substantial delay in starting work. The most common

situation is when you're hiring a new employee who is not currently on a H-1B visa, EAD (Employment Authorization Document, typically for "Practical Training') or some other form of work permission that lets the employee begin work within a couple of weeks.

For instance, if you want to hire someone who currently works on an L-1 visa for another U.S. company, using Premium Processing would let that candidate begin working two to four months sooner than normal H-1B processing time. Likewise, if you have an overseas candidate for a time-sensitive project, and you can't get the candidate a "Blanket L-1" (fast intracompany transferee) visa, you could use Premium Processing to shave months off the typical L-1 turnaround time.

Premium Processing is also appropriate when a visa or other petition has been unduly delayed or improperly handled, through no fault of the company or employee. In that situation, you have the option of re-filing the case or "interfiling" a Premium Processing request with the Premium Processing fee.

When Premium Processing Is Not Needed

The benefits don't justify the costs in a situation where you hire someone who already has an H-1B visa for another employer. This candidate will be able to begin working for you once the H-1B filing Receipt Notice is issued, so Premium Processing isn't necessary.

In addition, there's no great benefit to premium process extensions for existing H-1B employees. However, in some situations, Premium Processing can help avoid the employee's travel limitations. A current H-1B employee who travels often and needs an approved H-1B extension petition before returning to the U.S. could get the approval within the guaranteed 15 -day timeframe rather than waiting outside the U.S.

IV. THE EFFECT OF A LAYOFF OR TERMINATION ON VISA STATUS AND IMMIGRANT PETITIONS OF EMPLOYEES

How does a layoff affect H-1B workers?

<u>The H-1B status is no longer valid when the H-1B employment ends.</u>

The USCIS takes the position that when an employee in H-1B status stops working for his or her petitioning employer, the employee is no longer complying with the terms of the H-1B approval, and is considered to be "out of status." The last day of actual physical employment at the job site (not the last day of payroll or any severance pay) is the last day in H-1B status.

<u>Does the H-1B employee have to leave the U.S.?</u>

No. A terminated H-1B employee who wants to remain in the U.S. may file a petition with USCIS to transfer to another employer in H-1B status (if such an employer has been secured) or to change to another type of status (B-2, H-4, L-2, etc.). Ideally, since there is no official law granting an USCIS "grace period" for filing a new petition, the employee should file the new application no later than the last day of employment, which ensures that the employee does not go "out of status." In the past, some people have successfully filed H-1B petitions for new employers up to two months after their layoff. However, recent layoffs, bad

economic conditions, and national security concerns post-9/11 have seen the USCIS backpedal from this statement, and some USCIS Service Centers do not recognize any grace period at all. Ultimately, however, it is in the USCIS officer's discretion whether or not to forgive a delay in filing a case.

What can the H-1B employee do before the last day of work to stay legal in the U.S.?

Even if the employee has not yet secured a new employer to file an H-1B petition, he or she can request a change to B-1 (Business Visitor) or B-2 (Tourist) status. Currently, USCIS takes between 3-5 months to adjudicate such requests. The employee must prove that he/she has the intention of returning to their home country at the end of their stay in the U.S. as a visitor. The B-1/B-2 visitor will only be admitted for a period of time that is "fair and reasonable for the completion of the purpose of the visit." Often, the USCIS provides visitors with a stay of up to six (6) months.

When can the employee begin work for a new employer?

Under the AC 21 legislation, a worker currently on H-1B status can begin work with a new employer after the USCIS has received the new employer's H-1B visa petition, rather than waiting for USCIS approval.

If the USCIS decides that too much time has elapsed between the old job's end and the filing of the new H-1B visa petition, the USCIS may approve the new H-1B petition but deny the "extension" portion of the petition. If this happens, the worker's work authorization ends upon approval of the "new" petition, and the worker must take the H-1B Approval Notice and either reenter the U.S. using a valid existing H-1B visa or get a new H-1B visa issued at a consulate outside the U.S.

If the USCIS makes an explicit finding that the worker did not maintain status and , therefore, does not qualify for the extension of status requested with the new employer's petition, the worker will be required to return to his or her home country to apply for all future nonimmigrant visas. Once the worker reenters the U.S. with a new visa and the new Approval Notice, work authorization for the new employer will be restored.

How does the layoff affect the status of the H-1B employee's spouse and/or children?

The H-4 visa classification for dependents (spouse and children under 21) is linked to the H-1B status of the employee. Once the employee is terminated from the H-1B employer, all dependent family members lose their H-4 status. However, dependents have the same option of filing with the USCIS for an alternative visa status (e.g., B-1 or B-2 Visitor Visas, or F-1 Student Visa) to remain lawfully in the U.S.

How does a layoff affect L-1 and TN employees?

Layoffs have the same effect on L-1 and TN employee status as they have on the status of H-1B employees, with two exceptions: (1) these individuals are not guaranteed return transportation costs under the terms of their visa; and (2) those who haven't previously held H-1B visas must wait until USCIS approval of a new work visa petition before they can work for another employer. Still, L-1 and TN employees are permitted to file changes to B-1 or B-2 or other status, as discussed above.

What if the employee is in F-1 Practical Training status?

An employee in F-1 status, who has either Curricular or Optional Practical Training authorization for the USCIS, does not go out of status if terminated by a company. The employee is free to stay in the U.S. for the duration of his or her authorized practical training plus 60 days and may accept employment at another company during the validity dates of the authorized employment.

If the employee has a spouse or dependent children in F-2 status, their status is unaffected by the layoff. They are authorized to stay in the U.S. for as long as the "principal" (student) maintains valid F-1 status.

How does a layoff affect a pending Labor Certification Application?

Labor Certification Applications are filed by the employer. When an employer lays off an employee who is the beneficiary of a pending labor certification, the employee will be unable to file an I-140 immigrant petition based on the labor certification.

How does a layoff affect a pending or approved Immigrant Petition (I-140)

Employment-based immigrant petitions **are** affected by a layoff:

Most I-140 immigrant petitions are filed by a petitioning employer, not by the employee; consequently, if an employer lets the employee go, the employee loses this I-140 petition. The employee must start the process again with the next employer (or with the same employer, where a laid-off employee is later re-hired by the employer).

Family-based immigrant petitions are **not** affected by a layoff:

If an employee has pending Form I-130 family-based immigrant petition at USCIS (i.e., through marriage or other relation to a U.S. citizen or permanent resident), the layoff of the H-1B employee will have no effect on this petition. However, in most cases, the employee must still maintain and document lawful status in the U.S.

How does a layoff affect a pending a Adjustment of Status (Form I-485) Application?

Family-based Adjustment of Status is **not** affected:

As long as the employee is able to comply with the regulations governing eligibility to adjust to permanent resident status (including affidavit of support requirements), a layoff will have no effect on a pending family-based adjustment of status application.

Employment-based Adjustment of Status **may** be affected:

Historically, employees had to still be employed by the petitioning employer on the date their green cards became final. However, under the AC 21 legislation passed in October 2000,those who have had their **I-140 petition approved and I-485 Adjustment applications pending for at least 180 days** may work for another

employer in the "same or similar occupation"-a term which has not yet been defined. USCIS has indicated in a policy memo that it will consider the job description in the Department of Labor's Dictionary of Occupational Titles or its online O*NET classification system in determining whether the new job is in the "same or similar occupation" as the job which the application was made.

V. MERGERS, ACQUISITIONS, SPIN-OFFS AND HOW THEY AFFECT YOUR FOREIGN NATIONAL WORKFORCE

Basic Overview

Changes in corporate structure, including, but not limited to, mergers, acquisitions, stock sales, etc. (collectively referred to herein as "corporate changes') can directly impact the immigration status of your foreign national workforce. How an individual is affected will depend **both** on the type of corporate change **and** the type of immigration status s/he holds. Thus, a corporate change that leaves one visa holder unaffected may adversely impact another individual holding some other immigration status. For this reason, it is imperative that immigration counsel be consulted when a corporate change is imminent so that counsel can analyze the nature of the transaction, evaluate the impact on your foreign national workforce, and take steps to protect the immigration status (and employment authorization) of your workforce.

Effects of a Corporate Change on Nonimmigrant Visa Status

H-1B Status

In October 2000,the "Visa Waiver Permanent Program Act" was signed into law. The law included a provision amending a section of the Immigration and Nationality Act related to H-1B visa holders. This provision provided that when there is a corporate restructuring (including a consolidation, merger, acquisition, etc.), the new employer is **not** required to file amended H-1B petitions to report the corporate change **provided** that the new employer succeeds to the interests and obligations of the original employer and the terms and conditions of employment for the H-1B worker remain the same.

It is important to keep in mind that both the Department of Labor (DOL) and the USCIS exercise jurisdiction over the H-1B process. Prior to filing an H-1B petition with the USCIS, the employer must first obtain a certified Labor Condition Application (LCA) from the DOL, which entails that the employer assume certain obligations related to wages and working conditions for the H-1B worker.

At one time, the DOL required that any corporate change (including change in Federal Employer Identification Number) necessitated the filing of a new LCA, which in turn, triggered a requirement to file an amended H-1B petition with USCIS. The Visa Waiver Permanent Program Act changed this . Now, in the successor-in-interest context, the DOL requires that a successor employer explicitly attest that it assumes all wage and working condition obligations and liabilities as set forth on the Labor Condition Application filed with the H-1 B petition.

The assumption of liability should be evident in the transaction documents effecting the corporate change. Moreover, the DOL expects the new employer to take physical control of the public access files kept in

connection with the Labor Condition Application and , along these lines, to include a statement in the public access files that the new employer has assumed the obligations and liabilities for the Labor Condition Application. This attestation, which remains in the employer's public access files, should be completed on the date the transaction occurs. According to the DOL, failure to complete the attestation at the corporate closing is a failure to comply with its requirements, necessitating re-filing of Labor Condition Applications, which in turn, triggers a requirement to file amended H-1B petitions. Failure to comply with DOL requirements could result in fines and penalties. Thus, it is important that appropriate steps are taken at the time of the corporate transaction to protect the immigration status of the H-1B workforce and eliminate the need to file amended H-1B petitions.

Sometimes a corporate change will result in an H-1B worker working for a new employer while his or her H-1B visa (in passport) and petition approval notice still lists the predecessor. Alternatively, in cases where an amended H-1B petition has been filed, the individual's H-1B visa in his/her passport will list the old employer's name and the petition approval notice will list the new employer's name. It is important to note that in both of these instances, **the H-1B visa in the passport remains valid for the visa validity period specified, despite the change of employer.** There is no requirement, nor need, to obtain a new visa in the passport listing the new employer's name. These foreign nationals should travel with a letter confirming their current employment with the new entity and documentation confirming the corporate change, e.g., press release, etc.

L-1 Status

Eligibility for L-1 status is predicated on the foreign national having worked for an affiliate company abroad prior to his or her transfer to the United States company. If the corporate change causes a change in the relationship between the "qualifying organizations," i.e., the U.S. employer and the foreign affiliate company, amended L petitions must be filed. In some cases, the corporate change will sever the relationship between the U.S. employer and the foreign affiliate. In this case, the L-1 visa holder's status will terminate, and he or she will need to change to some other immigration status or depart the United States. If the change in corporate ownership result from a Share Purchase Transaction and the company maintains is the same original qualifying corporate structure, an amendment is not required. Finally, if the US Company maintains an L Blanket, it may be necessary to amend the Blanket petition, adding new qualifying companies to the Blanket or removing companies that no longer qualify from the Blanket.

TN Status

If the corporate change results in a new entity that is different than the original sponsoring employer, and amended TN must be filed. This can be accomplished by either 1) filing and amended TN petition with the USCIS or, 2) in the case of a Canadian national only, the individual may present a TN application sponsored by the "new" employer for immediate adjudication at a Port of Entry.

E Status

If the corporate restructuring changes the nationality of ownership of the company, the foreign national employees in E status will have to change to some other immigration status. To qualify to sponsor E visas, the US employer must be majority-owned/controlled by nationals of a country that is a signatory to a Treaty

of Friendship, Commerce, or Navigation or its equivalent with the United States. Thus, if a US employer that is majority-owned/controlled by UK nationals (either privately or through a UK listing) undergoes a corporate change through which it becomes majority-owned/ controlled by US nationals (either privately or through a US listing), it will no longer qualify to sponsor E visas.

Typically, individuals in E status will change to H or L status. However, once the transaction occurs, the foreign nationals in E status will not be permitted to work until the petitions to change them to H or L status are approved

Other Visa Statuses

Individuals working for the company utilizing open-market Employment Authorization Documents (EADs) (typically granted to students completing Optional Practical Training, Asylees, individuals in Temporary Protected Status, employee's with pending I-485 adjustment of status applications etc.) are unaffected by corporate changes. Individuals completing training programs or other exchange visitor programs pursuant to an approved J visa will require immediate review of their visa application to confirm whether they still qualify under the previously submitted application.

When to File an Amended Petition

The USCIS has no official policy stating how soon after a corporate change has taken place an amended petition must be filed. Prudent practice dictates that the amended petition be filed as soon as possible to ensure that your employees are maintaining proper nonimmigrant status. In some cases, depending on the immigration status, the individual may continue to work while the amended petition is pending with USCIS; however, in other cases the individual must not work until the new petition is approved.

Effects of a Corporate Change on Those in the Immigrant Visa Process

Individuals who have already received their Green Cards (Lawful Permanent Residents) are not affected by corporate changes. However, individuals who are in the process of applying for their green cards through employment sponsorship will likely be impacted. Because almost all employment-immigrant petitions are employer-specific, any corporate change (including merely a change in Federal Employer Identification Number or company name) will require that an amended petition be filed. These types of nominal changes are reported by filing an amended permanent resident petition with USCIS.

When there is a change in corporate ownership or structure, it is necessary to evaluate the transaction to determine whether the new employer is a successor-in-interest. To qualify as a successor-in-interest, the new employer must establish that it has assumed all or substantially all of the assets and liabilities of the predecessor. If the new employer meets the test of successorship, it may then file a successor-in-interest petition with appropriate evidence to assume its predecessor's labor certification application and permanent resident petition. The successor-in-interest petition must be filed either: 1) after approval of the labor certification application; 2) while the predecessor's permanent resident petition is pending; or 3) while the foreign national's adjustment of status application is pending (within the first 180 days). If the foreign national's adjustment of status application has been pending for more than 180 days, it is not necessary to report any corporate change.

If the new employer is not a successor-in-interest, the entire process must be started again, including filing a new labor certification, if applicable, and new permanent resident petition. Also, changes to the location of employment or substantial changes to the job duties may invalidate the underlying labor certification application and/or permanent resident petition in its entirely, requiring the filing of a new labor certification application and the additional recruitment that entails. One exception is when the foreign national's adjustment of status application has been pending for more than 180 days. In this instance, a new labor certification and/or permanent resident petition need not be filed if the foreign national will continue to work in the same or similar occupation.

VI. I-9

Overview of I-9

The I-9 process is designed to require employers to verify the identity and work eligibility of individuals who present themselves for employment. At the same time, the form is designed to prevent unnecessary or discriminatory inquiry into the employee's nationality. As with many employment issues, it is critical for employers to be familiar with the rules and requirements of the I-9 process in order to avoid expensive litigation and possible fines.

What questions can you ask regarding nationality and visa status; what questions can you absolutely not ask.

You CAN:

- Ask if an applicant is "currently authorized to work in the United States on a full-time basis for any employer."
- If the applicant answers "yes," you may then ask "will you require now or in the near future employment visa sponsorship (i.e., H-1B visa).
- You MAY NOT ask what their employment eligibility is based on.
- If the applicant answers "no" to your original question whether they are currently authorized to work in the United States on a full-time basis, you may ask what their current immigration status is.
- These questions, if asked, should be asked of everyone, not just "foreign-looking" or "foreign-sounding" candidates.

You CANNOT:

- Ask if the person is a U.S. citizen.
- Ask how the person obtained citizenship.

- Ask if the person is a permanent resident alien (i.e., green card holder).
- Ask what kind of work authorization the person has.
- Ask to see the green card.
- Ask what the person's visa status is.
- Ask what the person's home country is.
- Ask when their work authorization expires.
- Ask if the applicant has "unlimited work authorization" or work authorization for an "indefinite period of time."

  Under IRCA employers cannot reject "protected individuals" because of time limited employment eligibility, even if the remaining eligibility is short. For example, asylees, refugees, and temporary resident aliens or applicants for temporary residents may have work authorization that is only valid for six to eighteen months from the time that it is obtained. However, all of these people are able to obtain automatic extensions of work authorization and are, protected under IRCA as "intending citizens" of the United States. Thus, the better practice is never even to inquire as to the remaining time left on work authorization, since it is not relevant at the recruiting or interview stage.

- Ask what the person's native language is.
- Ask how the person acquired the ability to read, write or speak in that language.
- Ask if the person intends to become a citizen of the United States.
- Ask if the person intends to remain permanently in the United States.

  Note : Persons who would need an employer to petition to obtain an H-1B visa or a green card are not "protected individuals" under IRCA. Therefore, the employer is free to provide this service or not provide this service. However, the employer should not have a policy that has a disproportionate impact on employees of certain national origins. In other words, you may not apply for green cards only for nationals of certain countries and not nationals of other countries.

I-9 Verification

The following is a list of "dos and dont's" to be relied upon in the I-9 verification process.

Do:

- Perform I-9 processing at time of hire, not at time of interview. (Note: Some employers have employees fill out the I-9 at the time of interview. This is not, in and of itself, improper as long as all interviewees are required to fill out the I-9. **However, this practice is not advisable since a rejected applicant could bring a claim alleging that information on the I-9 was used for unlawful purposes).**

- Accept all documents listed on the I-9 form that "reasonably appear to be genuine," and "relate to the individual."

- Set up a tickler system to track cases that must be reverified (i.e., those employees whose work authorization has an expiration date).

- Keep I-9 forms separate from personnel files so that they may be easily reviewed and produced. It also makes it easier to destroy after three years from date of hire or one year from date of termination, whichever is later.

- Keep terminated employees' I-9 forms separate from current employees.

Do Not:

- Specify which documents an employee may present in connection with the I-9 verification.

  Note: Employers may request social security numbers at the time of application as long as all applicants are required to provide a social security number and that any applicant who cannot provide one be given a reasonable time to do so.

- Refuse to accept specific documents.

- Ask to see a document with an expiration date if the document the applicant presents does not have an expiration date on it.

- Ask for actual I-9 documents rather than receipts for such documents. If an employee presents receipts for any of the documents listed on an I-9, that person has 90 days from the date of hire to submit the original documents, and may work in the interim.

  Note: A notice that an application for work authorization has been filed with INS, but has not yet been adjudicated, is not a "receipt" for this purpose.

- Ask F-1 students who are still performing practical training while in school to verify that they are enrolled full time. This would be considered document abuse under IRCA.

- Fire an employee at the time of reverification if their work authorization had expired without first giving that person a chance to show that he or she is still eligible to continue working. Generally, an employee will have three days to present I-9 documents. This policy must be consistently applied to all employees to prevent the possibility of national origin discrimination.

In summary, recruiters should obtain as little information as possible about citizenship status, employment authorization or national origin before actually hiring the applicant. Once the applicant has been hired, the person responsible for performing I-9 verification should strictly follow the instructions on the I-9 form and allow the employee to select whatever documents within each column s/he chooses to present and not inquire any further about documents which "reasonably appear to be genuine on their face."

I-9 Compliance

Acceptable I-9 Documents

For a list of acceptable I-9 compliance documents, please click HERE.

Three instances when INS receipts are acceptable in lieu of a required document:

- **Application for replacement of lost or stolen documents.** Please note that an application for initial work authorization or extension of existing but expired work authorization is not an application for "replacement" document.

- **I-94 Card that INS has marked with a "Temporary I-551" stamp** is a receipt for Form I-551 until the expiration of the stamp or if no expiration, within one year from date of admission. Then it would need to be reverified.

- **I-94 Card indicating refugee status**. If individual presents a I-94 card with a refugee admission stamp, then they have 90 days to present either a Form I-688 or I-766 EAD (List A) or a social security card containing no employment restrictions (List C) and some other List B document.

"Good Faith" Compliance Attempts

The 1996 legislation adds a "good faith" defense for employers who have committed merely technical or procedural errors in completing the I-9 form. Under the change in the law, an employer cannot be fined for merely technical or procedural errors in completing the form, unless the USCIS or the Department of Labor has first explained the error to the employer and given the employer 10 business days to correct the error. Only if the error has not been corrected will USCIS or DOL be eligible to fine the employer. Please note that this revision to the law only applies to persons hired and I-9 forms completed after September 30, 1996. Technical and procedural violations on I-9 forms completed prior to September 30, 1996, but still required to be retained under the law, would not receive the benefit of the 10-day cure rule. To get additional information what the USCIS and DOL consider to be technical or procedural errors, please click HERE.

Requirement of "Discriminatory Intent"

For an employer to be liable for "document abuse" (asking for more or different documents than required for work authorization), the employee must show that the employer intended to discriminate based on national origin or citizenship status. This "intent" requirement only applies to employer requests for documents on or after September 30, 1996.

Document Fraud

Despite the seemingly pro-employer revisions to I-9 laws, you can now be found civilly liable for document fraud if you prepare, file or assist another person in preparing or filing an application for benefits with knowledge or in reckless disregard of the fact that such application or document was falsely made. This law would cover signing an I-9 form when you know that the documents presented are false or insufficient, or you know that the person is not authorized to work in the U.S. In fact, the law created a criminal penalty of up to 5 years in jail, on top of the civil penalty, if you fail to disclose your role as preparer of a false document. For example, if you as an employer, complete an I-9 for someone who does not speak English (or not very well), but fail to disclose your role as preparer by signing the certification, then you could be criminally liable if the I-9 is considered "falsely made."

Increased Enforcement

The law also made it a priority to focus on work site enforcement initiatives and justified increasing the number of agents and support staff who investigated I-9 compliance. Although most of the increased enforcement will focus on industries traditionally associated with illegal employment, including food processing, construction and agricultural production, this is still a substantial increase in the pressure by USCIS on employers to establish proper I-9 procedures.

VII. H-1B PUBLIC ACCESS FILE

Overview of Public Access File

Preparing the supporting documentation for the Labor Condition Application (LCA) is really the core of the employer's responsibility. The employer must be careful to meet Department of Labor (DOL) requirements for the content of that documentation and for its retention and availability. The DOL recognizes two types of supporting documentation: (1) documentation which must be made available in a public inspection file within one working day after the date of filing the LCA with the DOL, and (2) documentation which must be made available to DOL investigators "upon request." It is important for employers to distinguish between the two types of documentation, and put into the public inspection file only the documentation required by regulation to be there.

Contents of The Public Access File

The public inspection file must be available to the public within one working day after the date on which the LCA is filed with a DOL. The file may be kept at the employer's principal place of business in the United States or at the actual place of employment for the H-1B worker. Any member of the public may request

access to the file. Access is not limited to "aggrieved parties" or "interested parties." The employer must make the file available to the requester within one working day of the request.

It is good practice to maintain the public inspection file regarding an H- 1B worker separate from that worker's personnel file. Some employers may choose to maintain a separate public inspection file for each H-1B worker admitted under an LCA, while other employers may opt to keep all of their LCAs (with their relating documentation) in one public inspection file. By maintaining public inspection files separately for each H-1B worker (or at a minimum, each LCA when multiple workers are included in the same LCA), the employer is able to provide access limited to those files actually requested by a member of the public.

The public inspection file must include the following elements:

1. A copy of the completed LCA on Form ETA 9035

A copy of the certified LCA must be included in the public inspection file.

2. A statement of the wage rate to be paid the H-1B worker or workers admitted under the LCA

The LCA may include the initial wage rate to be paid the H-lB worker, and is sufficient initial documentation of the wage rate in that case. If the LCA contains a wage range, however, in the case of a single H-1B nonimmigrant or in cases involving multiple H-1B nonimmigrants included on the same LCA, the employer should include a separate statement listing the specific wage rate to be paid to each H-1B nonimmigrant admitted under the LCA. In addition, the wage rate information must be current. Therefore, every time any H-1B nonimmigrant admitted under the LCA receives an adjustment in his or her wage rate, the statement in the public inspection file must be updated.

3. An "actual wage" pay system memorandum

The DOL rules require that the public inspection file contain a "full, clear explanation of the system that the employer used to set the "actual wage" paid to workers in the occupation for which the LCA is filed. The explanation must be in the form of a "memorandum summarizing the system or a copy of the employer's pay system or scale." The rule makes clear that payroll records are not required in the public inspection file, but must be made available to the DOL in an enforcement action.

For documentation purposes, the memorandum must discuss the weight given to each factor in accounting for variations in wage levels, describe any periodic increases paid by the employer and the standard used by the employer to award those increases, and place the employer's workers within the system. The explanation provided in the memorandum must be clear enough to permit a third party to use the memorandum to calculate the rate of pay actually being received by H-1B nonimmigrants.

The actual wage memorandum does not need to be updated as workers move in and out of the pool of employees who are comparable to the H-1B nonimmigrants. Theoretically, the compensation system remains stable even as workers enter and depart the occupational classification. In practice, however, some of the factors used by the employer to establish compensation levels may evolve over time, and as the

employer makes the decision to rely on additional or different factors to establish compensation levels, revisions to the actual wage memorandum might be necessary.

In addition, the only way that the employer will know if the memorandum continues to describe accurately its compensation system and can be used by a third party to establish the wage rates of H-1B nonimmigrants within the system is to monitor the system occasionally. An employer may choose to review, on a regular basis, the current pool of employees in the occupational classification who are comparable to the H- 1B nonimmigrants and test the actual wage memorandum with these employees to assure that it can establish the wage levels actually being paid to these employees accurately by making use of the factors described in the memorandum. If the employer is not able to place current workers accurately within its pay system by following the explanation in the memorandum, this result is an indication that the employer's pay system has changed or was not properly described in the initial memorandum. Revisions to the memorandum may be necessary in this case.

4. A copy of prevailing wage documentation

The DOL rules require the public inspection file to contain a copy of the documentation used to establish the prevailing wage. The rules elaborate that "a general description of the source and methodology is all that is required to be made available for public examination." In particular, the "underlying individual wage data" used to determine the prevailing wage rate need not be included in the public inspection file, but must be available to DOL investigators in an enforcement action.

What the employer includes in the public inspection file depends on the source for its prevailing wage determination. If the employer relies on a DOL determination, a copy of the determination should be included. If the employer uses an "independent authoritative source" or a "legitimate source of information," it may want to include copies of the title page of the survey and the extract from the survey containing the prevailing wage. The employer should prepare an explanatory memorandum to go with the survey to explain its choice of occupational classification within the survey. Choice of occupational classification becomes a major issue when the job titles of the employer and survey differ and it appears that the employer has classified the job at a lower pay level. Information concerning the methodology used should also be included in the explanatory memorandum as well as a statement concerning the lack of workers in the area of intended employment necessitating the expansion of the area surveyed if applicable.

4. A copy of the notification documents

The public inspection file must also include documentation that the employer has met the requirement that it provide notice of the LCA filing to the relevant bargaining representative, or to its own employees in cases in which there is no bargaining representative for the occupational classification at the place of employment.

In a case involving a bargaining representative, the file must include a copy of the dated notice given to the bargaining representative. The file must also include the name and address of the bargaining representative to whom the notice was provided. The employer may include this information in a memorandum attached to the copy of the notice, describing the manner of service of the notice on the bargaining representative.

In a case without a bargaining representative, the file must include a copy of the actual notice physically posted in two locations at each place of employment listed on the LCA or posted electronically, e.g., through the firm's intranet or e-mail system. The file must also include the dates when each notice was posted, and the locations where each notice was placed. The employer may include this information in a memorandum attached to the copy of the notice.

The employer's notice may be an exact copy of the LCA, or it may be a statement including the information listed in the regulatory sections cited above. The LCA form includes all of the descriptive information about the application which must be provided as part of the notification procedure, and the form also includes the requisite notice that complaints may be filed with the Wage and Hour Division. Because the LCA form includes additional information about the prevailing wage rate and source, which is not required to be a part of the notification procedure, employers may instead opt to use the statement, which includes only the required information.

Only the documents listed above must be included in the public inspection file.

Supporting documentation not for public inspection

The employer does not have to include the following documents in the public inspection file, even though they must be made available to DOL investigators "upon request."

1. Records showing the wage rate for all other employees for the specific employment in question at the place of employment

This documentation must be maintained for all such employees beginning with the date the LCA was filed and continuing throughout the employment period. This documentation is basically the payroll records for the employees in the same job at the place of employment, and must include (1) the employee's full name; (2) the employee's home address; (3) the employee's occupation; (4) the employee's rate of pay; (5) the hours worked each day and each week by the employee (if paid on other than a salary basis or the wage is expressed as an hourly rate); (6) the total additions and deductions for each pay period; and (7) the total wages paid each pay period, the date of pay, and the pay period covered by the payment. The coverage of this documentation requirement includes all other employees in the same job and not just employees in the same job with experience and qualifications similar to the H-1B nonimmigrant. It is the DOL's view that the information required by the rules is ordinarily maintained by the employer for purposes of complying with such other federal statutes as the Fair Labor Standards Act. In fact, the DOL has stated that, with respect to any additional employees for whom recordkeeping is required under the final rule, it will enforce this provision to require the employer to keep only those records which are required by the FLSA.

2. Data used to establish the actual wage rate for the H-1B nonimmigrants

This information is the underlying data used to prepare the actual wage memorandum in the public inspection file. The data must show how the wages set for the H-1B nonimmigrants relate to the wages paid to all other employees with similar experience and qualifications for the specific employment in question at the place of employment. The employer may prepare a more detailed version of the actual wage memorandum including the actual wage data for all comparable employees in the same job to establish

how the employer's pay system works and how it was used to set the H-1B nonimmigrants' wages. When adjustments are made in the pay system during the validity period of the LCA, the employer's documentation must also retain documentation explaining the adjustments and showing that after the adjustments were made, the H-lB nonimmigrants continue to receive at least the greater of the prevailing wage or the actual wage paid to similarly employed workers.

3. Documentation supporting the employer's prevailing wage determination

In the public inspection file, the employer must include documentation giving a general description of the source and methodology used in reaching its prevailing wage determination. In many cases, the public inspection documentation will encompass all of the employer's prevailing wage evidence, e.g., the prevailing wage finding from the DOL. In cases involving other prevailing wage surveys, however, the employer is not required to include the entire survey or the raw data from the survey in the public inspection file. This documentation must be maintained, however, for DOL examination upon request.

4. Documentation on working conditions

Under current rules, the public inspection file does not need to contain any documentation to support the employer's working conditions attestation. However, the DOL takes the position that it will be necessary for employers to retain certain documentation. The employer will need to retain (1) copies of fringe benefits plans and summary plan descriptions provided to workers, including all rules regarding eligibility and benefits, (2) evidence of what benefits are actually provided to individual workers, and (3) how costs are shared between employers and employees. If the IDOL decides to permit different, but equivalent, benefits to H-1B workers, such as through a foreign subsidiary or affiliate, the employer must keep detailed information regarding the benefits provided to the H-1B worker and information to demonstrate the value of these benefits, as well as documentation regarding the benefits provided to U.S. workers.

5. Evidence of notification to the H-1B nonimmigrant

The regulations impose a requirement on employers to provide an H-1B nonimmigrant admitted pursuant to an LCA with a copy of the certified LCA no later than the date he or she reports to work. Evidence that this requirement has been fulfilled must also be placed in the public inspection file. Employers may choose to place a memorandum in the file specifying the date and manner of service of the LCA on the H-1B nonimmigrant. Employers seeking protection against claims by the H-1B nonimmigrant that he or she was not given a copy of the LCA may choose to have the H-1B nonimmigrant sign and date a copy of the LCA indicating that he or she received an exact copy, or sign and date a separate statement indicating such receipt.

H-1B Dependent Employer

The H1B Act also imposes additional attestation requirements to provide further protections to U.S. workers. These additional requirements apply to: (1) "H1B dependent" employers (generally, an employer is considered to be H1B dependent if H1B workers make up at least fifteen percent of its workforce); and (2) employers found (after October 21, 1998) to have committed certain labor condition application (LCA) violations. Even if the employer falls into one of these categories, it is not subject to the new attestations

if LCA involves "exempt" H1B workers (i.e. workers who will receive a salary of at least $60,000 or who have attained a masters degree or higher in the relevant field). These restrictions on application of the additional requirements means that most employers, especially large ones, will probably experience little difference in the H1 B process, other than payment of the additional fee and use of new LCA form and H1 B petition form. Employers subject to the new attestation requirements must affirm that:

- The employer has not "displaced" a U.S. worker during the period commencing 90 days before the filing of an H1B petition (not the filing of the LCA) and ending 90 days after the filing of the petition (job contractors may be liable to punishment for violation of the layoff attestation when the layoff has occurred at another employer where the job contractor has placed H1 B workers);

- The employer has taken "good faith steps" to recruit U.S. workers for the job for which H1B nonimmigrants are sought (the recruitment must meet industrywide standards and must offer compensation that is at least as great as that required to be offered to H1 B nonimmigrants), and

- The employer has offered the job to any U.S. worker who applies and is equally or better qualified for the job than the H1B nonimmigrants who the employer seeks to hire.

Enforcement and Penalties

Any aggrieved person or organization may file a complaint triggering an investigation and possible administrative proceedings against an H1B employer. An aggrieved party includes a person or entity whose operations or interests are adversely affected by the employer's non-compliance with the LCA. This may include an employee, a bargaining representative for employees, a competing business, and government agencies.

The DOL can conduct investigations in one of two ways. First, the DOL may conduct random investigations against an employer for a period of up to five years, when the employer has been found after October 21, 1998 to have committed a willful failure to meet a condition in the LCA, has been found by the Attorney General to have committed a willful failure with regard to offering employment to an equally or better qualified U.S. worker, or has made a willful misrepresentation of material fact in the LCA.

Second, the DOL may conduct preliminary investigations based on the receipt of "specific, credible" information from a source "whose identity is known" to the DOL whether or not the source is an aggrieved party. The source must be one "likely to have knowledge" of an employer's practices and its compliance with the LCA. Complaints must be filed with the DOL by aggrieved parties or other sources not later than twelve months after the failure of an employer to meet an LCA condition. Under these circumstances, the DOL may conduct a thirty-day investigation.

Conduct of the Investigation

If the DOL determines there is reasonable cause to believe that a violation has occurred, it may conduct an investigation. In the context of an investigation, the DOL may enter the employer's premises and the employer must make available such records, information, persons and places as the DOL deems appropriate to copy, transcribe, question or inspect.

The DOL will determine if the employer has done the following:

- filed an LCA which misrepresents a material fact;
- failed to pay wages as required;
- failed to provide fringe benefits and other working conditions as required;
- filed an LCA during a strike or lockout in the course of a labor dispute in the occupational classification at the place of employment;
- failed to provide notice of the filing of the LCA;
- failed to be specific on the LCA as to the number of workers sought, the occupational classification in which the H-1B workers would be employed, or the wage rate and conditions under which the H-1B workers would be employed;
- failed to comply with the displacement protections for U.S. workers (if applicable);
- failed to make the required displacement inquiry of another employer;
- failed to take good faith efforts to recruit (if applicable);
- required, accepted or attempted to require an employee to remit to the employer payment for any part of the special H1B fee of $1000 incurred when filing a petition;
- required or attempted to require an employee to pay a penalty for ceasing employment prior to an agreed upon date;
- engaged in retaliatory conduct against an employee because that employee has reported a possible LCA violation or cooperated with the DOL during the investigation;
- failed to make available for public examination the attestation and its accompanying documents at the principal place of business or work site;
- failed to retain documentation as required;
- failed to otherwise comply in any other manner with the provisions of these regulations.

Adverse Determination and Penalty Schedule

A number of penalties may be imposed. Criminal prosecution for knowing and willful submission of false statements may be initiated upon a finding of misrepresentation of a material fact. The penalties involve up to $10,000 in fines and/or up to 5 years imprisonment upon a finding of guilt. Civil penalties may also be assessed for violations.

Upon a finding of failure to pay wages as required, the DOL will assess and oversee the payment of back wages to any H-1B employee in the occupational classification. At least one Judge, however, has limited back pay recovery to one year prior to the complaint filing date.

Civil penalties of up to $1,000 per violation may be assessed and a one-year order of debarment from filing any immigrant and nonimmigrant petitions or LCAs may be entered for the following violations:

- a failure pertaining to a strike/lockout, displacement or contractor inquiry;
- a substantial failure pertaining to notification, LCA specificity, or recruitment;
- a misrepresentation of material fact on the LCA.

The DOL may assess civil penalties of up to $5,000 per violation and order a two-year period of debarment for the following violations:

- a willful failure pertaining to wages/working conditions, strike-lockout, notification, LCA specificity, displacement, or recruitment;
- a willful misrepresentation of material fact on the LCA;
- a retaliation against an employee.

Civil penalties of up to $35,000 per violation may be assessed and a three-year period of debarment may be ordered for a displacement violation accompanied by one of the following violations:

- a willful failure pertaining to wages/working conditions, strike/lockout, notification, LCA specificity, displacement, or recruitment;
- a willful misrepresentation of a material fact on an LCA.

The DOL may assess civil penalties of up to $1,000 per violation for the following:

- requiring payment of a "penalty" (not applicable to liquidated damages) by the employee for ceasing employment with the employer prior to a date agreed to by the employee and employer;
- requiring payment or compensation by the employee for the special H1B fee of $1000.

Mitigating Factors

The regulations include various mitigating factors which may be considered in determining the amount of civil penalties such as:

- the previous history of violations;
- the number of workers affected;
- the gravity of the violations;
- efforts to comply with the LCA conditions;
- the explanation for the violation;
- the commitment to future compliance; and
- the extent the employer received financial gain from the violation.

LEGAL DISCLAIMER: PLEASE NOTE THAT THE FOLLOWING IS PROVIDED FOR INFORMATIONAL PURPOSES ONLY AND SHOULD NOT BE CONSTRUED AS LEGAL ADVICE. IF YOU NEED SPECIFIC ASSISTANCE ON AN IMMIGRATION ISSUE, PLEASE CONSULT A QUALIFIED IMMIGRATION ATTORNEY.