ABCs OF H-1Bs (THIS IS PART I OF AN VIII PART SERIES): WHAT PROSPECTIVE H-1B EMPLOYERS AND H-1B EMPLOYEES NEED TO KNOW IN ORDER TO GET H-1Bs FILED AND APPROVED IN APRIL 2014.

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There are Only 58,200 Regular H-1B Visas: Do Not Delay - It's Now Time to Strategize for the H-1B Season.

The current annual cap on the H-1B category is 65,000. All H-1B nonimmigrants are not subject to this annual cap. Up to 6,800 visas are set aside from the cap of 65,000 during each fiscal year for the H-1B1 program specifically designed for the citizens of Chile and Singapore. Unused numbers in H-1B1 pool are made available for H-1B use for the next fiscal year. Thus, in effect, only 58,200 H-1Bs visas are granted each year except 20,000 additional H-1B visas which are restricted to individuals who have received master's degrees or higher from U.S colleges or universities.

U.S. Citizenship and Immigration Services (USCIS) reached the statutory H-1B cap of 65,000 for fiscal year (FY) 2014 within the first week of the filing period, which ended on April 5, 2013. USCIS received approximately 124,000 H-1B petitions during the filing period, including petitions filed for the advanced degree exemption.

On April 7, 2013, USCIS used a computer-generated random selection process (commonly known as a "lottery") to select a sufficient number of petitions. Given that, in FY 2014, the H-1B cap was met by the first week of the filing period, it is imperative that employers file all new quota-subject H-1B petitions on March 31, 2014. Employers should immediately begin identifying persons for whom H-1B sponsorship will be needed. This will allow sufficient time for petition preparation, including the time required to file and receive certification of the prerequisite Labor Condition Application (LCA). Thus, strategically strategizing the filing of H-1B Petition is a key to hiring an H-1B employee for the financial year beginning on October 1, 2014.

The H-1B Employer Must Exercise Sufficient Level of "Control" Over the Prospective H-1B Employee.

In order for the H-1B petition to be approved by United States Citizenship and Immigration Services (USCIS), Department of Homeland's agency responsible for adjudication of H-1B petitions, petitioning employer must establish that employer-employee relationship exists and will continue to exist with the employee throughout the duration of the requested H-1B validity period. Hiring a person to work in the United States requires more than merely paying the wage or placing that person on the payroll of the H-1B petitioning organization. In considering whether or not there is a valid "employer-employee relationship" for purposes of H-1B petition adjudication, USCIS must determine if the employer exercises a sufficient level of "control" over the prospective H-1B employee.

Thus, the prospective H-1B petitioner organization must be able to establish that it has the "right to control" when, where, and how the prospective H-1B nonimmigrant beneficiary will perform the professional and specialty occupation job and USCIS considers various factors in making such a determination (with no one of the following factors being decisive with regard to the issue of "control").

Both the Proffered Position and Prospective H-1B Employee Must Qualify for the H-1B.

Not only the prospective employee but *both* the proffered position and prospective employee should qualify for the H-1B visa. For a proffered position to qualify for H-1B visa, it must be a "specialty occupation". "Specialty occupation" is an occupation that requires: (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 (or its equivalent) as a minimum for entry into the occupation in the United States.

The H-1B regulations further requires that a position also meet one of the following criteria, in order to qualify as a specialty occupation: 1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position; 2) The degree requirement is common to the industry in parallel positions among similar organizations, or, in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree; 3) The employer normally requires a degree or its equivalent for the position; or 4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Therefore, reading the law and regulations together, in order to qualify as a "specialty occupation," a proffered position must 1) require theoretical and practical application of a body of highly specialized knowledge, 2) necessitate a bachelor's degree or higher in the specific specialty (or its equivalent) as a minimum for entry into the occupation, and 3) meet one of the four alternative criteria listed above.

For a prospective employee to qualify for the proffered H-1B position, regulations specify that s/he should have either one of the following: (1) Full state licensure to practice in the occupation (if required); (2) Completion of the degree required for the occupation; or (3) progressively responsible work experience in the specialty equivalent to the completion of such degree. Thus, a general degree absent specialized experience may be insufficient because there must be a showing of a degree in a specialized field.

The H-1B Filing Fee depends upon the Type and Size of H-1B Employer.

Besides legal fee, the employer needs to pay the USCIS filing fee. Remember there is no flat fee that every employer is required to pay. The amount of H-1B filing fee depends on the size and type of employer. All employers are required to pay the base filing fee of $325.00 for the H-1B petition. Additionally, pursuant to the American Competitiveness and Workforce Improvement Act (ACWIA), employers are required to pay an additional fee (commonly referred as ACWIA fee) of $750 or $1500 unless exempt under Part B of the H-1B Data Collection and Filing Fee Exemption Supplement.

Sponsoring employer is required to pay a fee of $750.00 if it employs 25 or fewer full-time equivalent employee. In all other cases, the employers need to pay $1500.00. Employers such as institution of higher education; nonprofit organization or entity related to, or affiliated with an institution of higher education; nonprofit research organization or governmental research organization, etc. are exempt from paying the ACWIA fee. Additionally, employers, either seeking initial approval of H-1B or seeking approval to employ H-1B nonimmigrant working for a different employer, must pay $500 Fraud Prevention and Detection fee as mandated by the H-1B Visa Reform Act of 2004.

Those H-1B employers required to submit the $500.00 Fraud Prevention and Detection fee are also required to submit $2,000.00 fee mandated by Public Law 111-230 if petitioners employ 50 or more employees in the United States; more than 50% of those employees are in H-1B or L nonimmigrant

status; petition is filed before October 1, 2014. Further, either the employer or employee can pay an optional premium processing fee of $1,225.00 to expedite the adjudication of petition. Thus, the H-1B filing fee depends upon the size and type of employer and can range from $825.00 to $5,550.00.

Be Aware of the Salary and Costs to Be Paid by Prospective H-1B Employer.

Prospective employer must obtain a certification from Department of Labor ("DOL") that it has filed an LCA in the occupational specialty. The employer attests on the LCA that H-1B nonimmigrant worker will be paid wages which are at least the *higher* of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question OR the prevailing wage level for occupational classification in the area of intended employment. Thus, Congress has been careful to build in safeguards to the H-1B program to ensure that H-1B foreign professionals do not undercut wages paid to the comparable U.S. workers. Additionally, employers are required to pay the costs for the petition process.

The Employer's obligation to pay H-1B workers the required wages begins on the date on which the worker "enters into employment with the employer." The H-1B worker is considered to "enter into employment" when he first makes himself available to work or otherwise comes under the control of the employer. Alternatively, even if the worker has not yet "entered into employment," where the worker is present in the U.S. on the date of the approval of the H-1B petition, the employer shall pay to the worker the required wage beginning 60 days after the date the worker becomes eligible to work for the employer. The H-1B worker becomes eligible to work for employer on the date set forth in the approved H-1B petition filed by the employer.

An employer must continue to pay an H-1B employee who is not working due to a nonproductive status at the direction of the employer (e.g., benching because of lack of work, lack of a permit or license). Thus, employer is liable for nonproductive time as well as productive time once employee becomes eligible for work. Furthermore, if the H-1B employee is terminated prior to the end of the period of admission, the employer is liable for "the reasonable costs of return transportation of the alien abroad

Note the Key Compliance Issues: Posting Notice of LCA & Maintaining Public Access files – Employers Beware of the H-1B Audit and H-1B Site Visit.

Notice of the LCA must be posted, or where there is a union it must be given to the union before filing the LCA. The notice may be the LCA itself or a document of sufficient size and visibility that indicates: (1) that H-1Bs are sought; (2) the number of H-1Bs; (3) the occupational classification; (4) the wages offered; (5) the period of employment; (6) the location(s) at which the H-1Bs will be employed; and (7) that the LCA is available for public inspection. The notice should state where complaints may be filed. Notice must be posted "in a least two conspicuous locations at *each* place of employment where any H-1B nonimmigrant will be employed" and the notice "shall be posted on or within 30 days before the date the labor condition application is filed and shall remain posted for a total of 10 days.

Notice may be posted in areas where wage and hour and OSHA notices are posted. An employer may also provide electronic notice to employees in the "occupational classification" for which H-1Bs are sought, through any means it normally communicates with employees including a home page, electronic bulletin board or e-mail. If accomplished through e-mail it need only be sent once; other electronic forms (e.g., home page) should be "posted" for 10 days. Notices must be posted at each worksite

including ones not originally contemplated at the time of filing but which are within the area of intended employment listed on the LCA.

Additionally, an employer must maintain a public access file accessible to interested and aggrieved parties. The public access file must be available at either the employer's principal place of business or at the worksite. An interested party is one that has "notified the DOL of his or her/its interest or concern in the administrator's determination."

The public access file must be available within one day after the LCA is filed with all supporting documentation including: A copy of the completed LCA; Documentation which provides the wage rate to be paid; A full, clear explanation of the system used to set the "actual wage"; A copy of the documentation used to establish the prevailing wage; Copy of the notice given to the union/employees; and A summary of the benefits offered to U.S. workers in the same occupational classification, and if there are differences, a statement as to how differentiation in benefits is made (without divulging proprietary information).

This article is Part I in a series of VIII that will provide helpful and basic information to employers considering the use of the H-1B for an employee. For any additional H-1B information or for information about options for avoiding the H-1B cap, please feel free to contact the Nachman Phulwani Zimovcak (NPZ) Law Group, P.C. at info@visaserve.com or by calling our offices at 201-670-0006 (x107). Our highly qualified immigration lawyers and immigration attorneys stand ready to assist employers with the H-1B nonimmigrant visa process.