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MEMORANDUM

RE:	H-1B Petition
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This memorandum briefly describes the requirements and procedures for (the “**Employer**”) to petition for a specialty occupation worker (“**H-1B**”) visa on behalf of a foreign employee (“**Beneficiary**”).

1. **Requirements for the H-1B Status.**

a. The Employer must be a U.S. Company and must have a U.S. federal employer’s identification number.

b. An employer/employee must relationship exists between the Employer and Beneficiary – Employer may hire, pay, fire, supervise or otherwise control the work of Beneficiary. Independent contractors do not qualify for H-1B status.

c. The Employer must offer Beneficiary a position which requires, as a minimum requirement for entry into the position in the United States, a bachelor’s degree or higher in a specific field;

d. Beneficiary must have a bachelor’s degree or higher in the specific field. If Beneficiary has a degree from a foreign institution, Beneficiary will need to obtain a credentials evaluation which confirms that the foreign degree is the equivalent of a Bachelor’s or higher degree from an accredited institution of higher education in the United States;

e. **Obligations of the Employer:**

(i) The U.S. Employer must make the following attestations regarding the H-1B petition: (a) it will pay the Beneficiary, at a minimum, the prevailing wage for the position offered; (b) it will not treat the Beneficiary any differently than any other person in the same or similar position; (c) there is no strike or lockout at the Employer’s facilities; and (d) appropriate notification has been given to other employees or bargaining unit. These attestations are made in the Application for Labor Conditions Application (Form ETA 9035) (“**LCA**”) which must be certified by the U.S. Department of Labor (“**DOL**”) before the H-1B petition is filed with the USCIS. In addition, the Employer is required to maintain an H-1B Public Access File which contains documentary evidence in support of these attestations.

(ii) The U.S. Employer is required to pay the ACWIA Fee and the Fraud Fee (as those terms as described below in the section regarding Filing Fees).

(iii) In the event that the US Employer terminates Beneficiary prior to the end of the H-1B period, Employer is required to pay for Beneficiary's return transportation home.

2. **Benefits of H-1B Status.**

a. Beneficiary is eligible to continue to work for U.S. Employer pursuant to this status for a period of up to six years which is normally granted in two 3 year increments. The six year limit may be extended under certain conditions.

b. The H-1B is not transferable between U.S. companies. In the event Beneficiary decides to leave the U.S. Employer, he/she will not be able to work for any other U.S. employer unless and until the new employer files a new petition on his/her behalf.

3. **H-1B Cap.** At the present time, there is a cap of 65,000 H-1B visas which are available for new H-1B applicants during a fiscal year ("***H-1B Cap***").¹ The new fiscal year starts on October 1. Since the U.S. Citizenship and Immigration Service ("***USCIS***") will accept H-1B petitions at least six months prior to the desired employment start date, the Employer may file an H-1B petition as early as April 1.² We recommend that the H-1B petition be filed as close after April 1 as possible because it is difficult to predict when the cap will be reached.

The H-1B Cap created a "cap gap" for those beneficiaries who are in the United States pursuant to academic student (F-1) status whose authorized stay in the United States after optional practical training expired prior to the start of the next fiscal year. For these students, the USCIS will automatically extend both their authorized stay in the United States and their employment authorization through October 1 ("***Cap Gap Extension***") but only in the following situations: (a) the optional practical training period expires after April 1st prior to the beginning of the next fiscal year, (b) a valid H-1B petition has been filed and accepted for processing under the H-1B Cap and (c) the job offer is for a position to start on October 1st of the next fiscal year. In the event that the H-1B petition is denied prior to October 1st, the Cap Gap Extension will automatically expire and the student must leave the United States or seek other immigration options.

¹ There is an additional 20,000 visa available to new H-1B employees who are graduates of U.S. Institutions with Masters or higher degrees ("***Master Graduate H-1Bs***"). In addition, there are certain entities which are exempt from the cap such as institutions of higher education or non-profit entities engaged in research.

² Any H-1B petitions received at the USCIS prior to April 1st will be rejected based on the H-1B cap of the prior year.

4. **H-1B Application Process.** The application process is technically a three-part process: (a) The Employer must file the LCA with the DOL as described above, (b) The Employer must file a petition with the USCIS seeking to classify Beneficiary as an H-1B1 employee (“***H-1B Petition***”) and (c) if the H-1B Petition is approved, Beneficiary (i) if eligible, may seek to change his/her immigration status in the United States³ or (ii) apply to the U.S. Embassy or Consulate outside the United States for a nonimmigrant H-1B1 Visa to enter the United States. Beneficiary is eligible to change his/her status in the United States without leaving the United States if he/she has continuously maintained lawful status in the United States. However, if Beneficiary leaves the United States after obtaining a change to H-1B status, he/she must apply for the nonimmigrant H-1B visa prior to his/her re-entry into the United States.

5. **Export Control Attestation.** Under U.S. laws, the release of controlled technology or technical data to a foreign national working in the United States, even if the company does not engage in any other exporting, is considered to be “an export.” Therefore, although it has always been an implicit requirement, the newly revised Form I-129 requires that the U.S. Employer make an affirmative certification that it has reviewed the Export Administration Regulations (EAR) and the International Traffic in Arms Regulations (ITAR) and has determined that either U.S. Employer is not required to obtain a license from the Dept of Commerce or Dept of State to release “technology” or “technical data” to the H-1B Beneficiary or that if a license is required, it has obtained a license and will take measures to ensure that the Beneficiary will not be exposed to such data without first obtaining an export license covering Beneficiary. Information about EAR’s requirements pertaining to the release of controlled technology to foreign persons can be found at www.bis.doc.gov/deemedexports. Information about the ITAR’s requirements pertaining to the release of controlled technical data can be found at http://www.pmdtc.state.gov/faqs/license_foreignpersons.html.

6. **Filing Fees.** Unless the U.S. Employer is exempt, the filing fees for the H-1B, as of the date of this memorandum, include the following: (a) \$325.00 for the Nonimmigrant Petition for Alien Worker; (b) \$1,500.00 -- training fee⁴ to train U.S. workers so that employers in the U.S. are not dependent on foreign workers (“**ACWIA Fee**”); and (c) \$500.00 -- fraud fee for investigations (“**Fraud Fee**”). If the U.S. Employer desires to expedite the process and pay a premium processing fee in the amount of \$1,225.00, the Petition may be adjudicated within a period of 15 days.

7. **FDNS Site Visits.** The Office of Fraud Detection and National Security (“**FDNS**”) was created by the U.S. Citizenship and Immigration Services (USCIS) in 2004 to conduct site visits to businesses that sponsor foreign nationals who receive benefits from the USCIS. These site visits are conducted to investigate immigration benefit fraud and to ensure

³ The request to change immigration status in the United States can be done at the time that the initial petition is filed.

⁴ If the petitioner employs less than 25 employees, this training fee is reduced to \$750.00.

that benefits, such as H-1B status, are not granted to persons who threaten national security or public safety. The FDNS is funded by the Fraud Fee. Employer's filing H-1B petitions on behalf of any beneficiaries may be subject to these site visits. The purpose of these site visits are to ensure that Employer exists and to verify that the information contained in the H-1B petition is accurate.

8. **Services provided by the Law Offices of KahBo Dye-Chiew.** KahBo Dye-Chiew, the principal of the Law Offices of KahBo Dye-Chiew, has been assisting clients file H-1B petitions since 1991. She will work with Employer and Beneficiary to advise them as to the viability of the H-1B petition based on the position offered and the qualifications of Beneficiary. She assists Employer in obtaining the prevailing wage determination for the position offered, filing the LCA and prepare the H-1B Public Access File, preparing the petition forms and preparing the Employer's letter in support of the H-1B Petition which contains the evidence in support of the petition to show that both the Employer and the Beneficiary meet the requirements of the H-1B Petition.

Ms. Dye-Chiew assists clients in preparing this information based on the information which she obtains directly from the client. The LCA, the H-1B petition and the Employer's letter must be signed by the Employer prior to filing with either the DOL or the USCIS as appropriate. Prior to filing, Ms. Dye-Chiew will request that Employer carefully review all the documentation and that Employer's signature on these documents confirm that the documents accurately represent all information contained therein and that the documentation is ready for filing with the USCIS. An accurately documented petition is Employer's best defense in the event of an FDNS Site Visit.

9. **Next Steps.** As indicated above, if the Employer desires to file the H-1B petition on behalf of Beneficiary for a position to begin no earlier than October 1 of any specific year, we would recommend that the Employer file the H-1B petition as close after April 1 of that year as possible.

In order for this law firm to start working on the H-1B process, we will request that Employer and Beneficiary sign an engagement letter with our law firm which sets forth the terms of the engagement of this law firm to assist Employer and Beneficiary in filing the H-1B petition. We will provide you with our standard checklist of documents which we will request from the Employer to start processing the H-1B.

Should you have any questions concerning the foregoing, please do not hesitate to contact the Law Offices of KahBo Dye-Chiew.

End of Memorandum