H1B
OVERVIEW

Established by the Immigration Act of 1990 (IMMACT), the H1B nonimmigrant visa category allows U.S. employers to augment the existing labor force with highly skilled temporary workers. The H1B visa program may be utilized by U.S. businesses and other organizations to employ foreign workers in specialty occupations that require theoretical or technical expertise in a specialized field. Typical H1B occupations include architects, engineers, computer programmers, accountants, doctors and college professors.

The below overview addresses:

- Summary and Scope of H1B Nonimmigrant Visa
- Younossi Law's Processing Steps for H1B Petitions
- Obligations for H1B Employers

SUMMARY AND SCOPE OF H1B NONIMMIGRANT VISA

ELIGIBILITY:

The H1B category is designated for foreign national employees coming to the United States to perform services in a specialty occupation (temporary professional workers) or as a fashion model. A "specialty occupation" means an occupation that requires:

- A theoretical and practical application of a body of highly specialized knowledge AND
- Attainment of at least a bachelors degree (or equivalent) in the specialty.

If an occupation requires state licensure (ie: pharmacist or architectural license, etc), the H1B candidate must demonstrate that he has full state licensure to practice in the occupation.

AUTHORIZED PERIODS OF STAY:

The H1B category has a 6 year maximum period of stay, but is unique from other visa categories in that employers may request post-6th year H1B extensions for employees if certain stages of the permanent residency process are in place for the employee. Periods of time spent in L status count towards the H1B 6 year limit. The United States Citizenship & Immigration Service (USCIS) grants H1B status in increments of up to 3 years at a time.

DUAL INTENT:

The H1B nonimmigrant visa is a dual intent visa. As such, H1B employees are allowed to pursue permanent residency in the United States while they hold nonimmigrant H1B status.

TYPES OF H1B PETITIONS:

The manner in which an H1B petition is filed with the USCIS depends on the H1B employee's current immigration status and/or employment circumstances in the United States. The manner in which the H1B petition is filed also controls the way in which the USCIS approves the H1B petition.

- H1B "Loose" or "Consulate Petition"***: This manner of H1B filing is typical when the H1B employee is physically outside the United States. The H1B petition filing requests that notification of the H1B approval be sent to a specific U.S. consulate abroad. When the USCIS issues the H1B approval notice, the H1B employee will need to make an appointment with the U.S. consulate to apply for an H1B visa stamp to be placed in their passport. Once the H1B visa stamp is issued, the employee can enter the United States in H1B status and commence employment with the H1B employer.

- H1B Change of Status***: This manner of H1B filing is typical when the H1B employee is physically in the United States in a nonimmigrant visa status other than H1B such as F-1, L-1, O-1, TN, etc. The H1B petition filing requests that the USCIS change the nonimmigrant status from the current status to H1B status. Once the approval notice is issued by USCIS, the H1B employee may commence

employment with the H1B employer on the effective date of the H1B approval notice.

- H1B Change of Employer: This manner of H1B filing is done when the H1B employee is currently employed in H1B status with another H1B employer. Under the American Competitiveness in the Twenty-First Century Act (AC21), a person already in H1B status may commence H1B employment with a new employer immediately upon the new employer's filing of an H1B petition as long as the person: (1) has lawfully been admitted to the United States; (2) the new employer's H1B petition was filed before the end of the current period of H1B authorized stay; and (3) the person has not been employed without authorization since the lawful admission to the United States. This "portability" of H1B employment allows an H1B employee to commence employment prior to USCIS approval of the petition as long as these three criteria are met.

- H1B Amendment: The H1B employer is required to file an amendment to the current H1B petition whenever there is a material change to the H1B position. This could entail a material change in corporate business structure, job duties, salary, worksite, etc. If such a change occurs, the H1B employer should notify Younossi Law immediately so that we may assess what actions may need to be taken with respect to the H1B petition(s). In most cases, the amendment should be filed prior to the material change taking place, but may be filed afterward in some situations. The amendment does not need to be approved by USCIS, however, before the material change takes place.

- H1B Extension of Stay: To extend a current H1B employee's H1B status, the H1B employer must file an H1B Extension petition with USCIS. In order for the H1B extension to be considered a timely filing, the extension petition must be received by USCIS prior to the expiration date of the current status. Even if the H1B Extension petition is not approved prior to the current H1B expiration date, the H1B employee has 240 days of work authorized stay in the United States by virtue of the timely extension petition filing taking place.

***With respect to Loose/Consulate H1B petitions and H1B Change of Status petitions, employers should note that these types of H1B petitions are often "new" H1B numbers where the H1B candidate has never held H1B status before. Such H1B petitions are

referred to as H1B Cap Filings and subject to the annual numerical H1B cap established by Congress. The regular H1B cap is limited to 65,000 available H1B numbers. There is also a separate allotment of 20,000 H1B numbers designated for individuals who have attained a United States Master's degree or higher. This is important for planning purposes because the earliest start date an employer may request on an H1B Cap petition is October 1st (start of the fiscal year) and the earliest any employer may submit an H1B Cap petition to the USCIS is April 1st (six months in advance of October 1st).

H1B Cap Filings do not include filings for employees/candidates who already hold H1B status. This means that H1B Change of Employer, H1B Amendments, and H1B Extension petitions are not considered H1B Cap Filings.

EMPLOYER SPONSORSHIP:

H1B status requires a sponsoring U.S. employer. Once an employer indicates they wish to pursue sponsorship of an H1B petition on behalf of a candidate, the employer should notify Younossi Law so that relevant fact gathering information may be sent both to the employer and the H1B candidate.

YOUNOSSI LAW'S PROCESSING STEPS FOR H1B PETITION FILINGS

Step 1-- Initiation & Fact Gathering: Upon employer's request to initiate an H1B petition, Younossi Law will send out fact gathering information to the employer and H1B candidate.

Step 2-- Labor Condition Application (LCA): Upon receipt of completed fact gathering documents, Younossi Law will prepare a Labor Condition Application (LCA) which is filed with the Department of Labor. The LCA will later be submitted with the H1B petition filing. Younossi Law will prepare the LCA based on the information provided by the employer with respect to worksite, job description, job requirements and offered wage. In the LCA, the H1B employer must attest that wages offered to the H-1B employee are at least equal to the actual wage paid by the employer to other workers with similar experience and qualifications for the job in question, or alternatively, pay the prevailing wage for the occupation in the area of intended employment, whichever is greater.

Younossi Law will review available prevailing wage data and discuss any potential issues with the employer before finalizing the LCA and sending it to the employer for posting.

The H1B employer is required to post the LCA at two conspicuous locations at the worksite for a period of at least 10 days. Once the H1B employer confirms that the LCA has been posted at the worksite, Younossi Law will submit the LCA to the Department of Labor (DOL) for certification. DOL processing is approximately seven (7) days.

Step 2-- Sending Documents to Employer for Signature: Once the LCA has been certified by the DOL, Younossi Law will forward the certified LCA and H1B petition paperwork to the employer for signature. The H1B petition paperwork will describe the H1B employer, the offered position, and the H1B employee's background and qualifications for the position.

Younossi Law will also forward to the employer a Public Access File (PAF) in connection with the LCA along with instructions for recordkeeping requirements. The regulations require that the H1B employer make available for inspection certain documentation in connection with the LCA---Younossi Law provides this required documentation to the H1B employer in the form of a PAF which must be retained by the employer for at least one year beyond the end date listed on the LCA or for at least one year after the termination of employment of the H1B employee---whichever occurs earlier.

By signing the LCA, the H1B employer attests that: (1) the prevailing wage rate for area of employment will be paid to the H1B worker; (2) the working conditions of H1B position will not adversely affect conditions of similarly employed American workers; and (3) the place of H-1B employment is not experiencing labor disputes involving a strike or lockout.

Step 3-- Filing the H1B Petition with USCIS: Once Younossi Law receives the signed LCA and H1B petition paperwork from the employer, the LCA and H1B petition are filed with the USCIS. USCIS processing time is approximately 2-3 months. However, the USCIS also allows premium processing of the petition which entails the submission of a $1000 premium processing fee (in addition to regular H1B fees) in order to obtain an adjudication within 15 days of USCIS' receipt of the petition filing.

OBLIGATIONS FOR H1B EMPLOYERS

Aside from the documentary requirements involved in the USCIS petition filing itself, H1B employers must be aware of a number of compliance issues that fall under the jurisdiction of both the Department of Labor and the USCIS.

WHEN CAN THE H1B EMPLOYEE BE PLACED ON PAYROLL?

The H1B employer should consider the following when deciding when to place an H1B employee on payroll:

- The H1B employer cannot commence the H1B employee's employment before the start date of the labor condition application (LCA) and the H-1B petition. This includes any mandatory orientation programs for which the employee's presence is required.

- Pursuant to Department of Labor (DOL) regulations (20 CFR 655.731(c)(6)) below are the timeframes in which an H1B Employee must be placed on payroll:

    - If the H1B employee is coming to the United States from abroad in H1B status (H1B Loose/Consulate Petition), the employee must be placed on payroll on the date that he presents himself for employment or by the 30th day after entry in the U.S. in H1B status (whichever is earlier).

    - If the H1B employee is in the U.S. and a change of status has been applied for, the employment relationship may not commence until the effective date of the change of status. From that date, the employment must commence on the date that the employee presents herself as ready for employment or by the 60th day after the effective date of the change of status to H-1B (whichever is earlier).

    - If the H1B employee is already in H1B status with another employer, the employment can commence as soon as the H1B petition is filed pursuant to H1B portability. However, there is no requirement that an H1B employer utilize H1B portability if it does not wish to do so. Rather, the H1B employer can delay commencement of employment of the H1B

employee until the effective date of the H-1B approval notice on the 60th day after the notice date of the H1B approval notice.

- Social Security Number Issuance: If the H1B employee is unable to obtain a social security number (SSN) within the timeframes listed above, the H1B employer is still required to place the H1B employee on payroll no later than the dates specified above. The H1B employer may have to consider issuance of a "dummy" social security number so that payroll computer systems can process paychecks for the H1B employee in the interim.

H1B & NONPRODUCTIVE STATUS

An H1B employee may be in nonproductive status (ie: not rendering productive employment or services to the H1B employer) for a number of reasons. However there are circumstances where wages must be paid to the H1B employee and circumstances where wages need not be paid.

- Nonproductive status is due to a **decision by the H1B Employer**: If the H1B employer is in nonproductive status because of a lack of assigned work, lack of a permit or license, or disciplinary reasons, the H1B employer is required to continue paying the H1B employee the required wage during the period of nonproductive status. 20 CFR 655.731(c)(7)(i).

- Nonproductive status is due to conditions unrelated to employment and the **decision of the H1B employee**: If the H1B employee voluntarily requests nonproductive status or circumstances exist that render the H1B employee unable to work (ie: extended sick leave due to a medical condition or incapacity), the employer is NOT obligated to pay the required wage during the period of nonproductive status (unless the nonproductive status is subject to payment under the H1B employer's benefit plan such as the Family Medical Leave Act or Americans with Disabilities Act.) The employer is also not required to pay the required wage if there has been a bona fide termination of the employment relationship. 20 CFR 655.731(c)(7)(ii).

In addition to the wage obligation of the H1B employer, the issue of maintenance of H1B status during nonproductive status should also be considered. Although not stated

specifically in any regulation or memo, USCIS has previously indicated in opinion letters that the issue of whether the employee maintains H1B status during nonproductive status is dependent upon whether there is an expectation of continuing employment at the conclusion of the leave of absence. If there is -- even if the leave is extended -- the employee is in valid status. If there is no expectation of continuing employment, the employee is not in valid status during the leave period.

USCIS policy places no time limit on the length of the leave; however, both the employee and the employer should be aware that if there is an expectation of continuing employment at the conclusion of the leave, the H1B status and work authorization should be maintained and extended throughout the period of nonproductive status.

RESIGNATION OR TERMINATION OF H1B EMPLOYEE:

Payment of Return Trip Abroad: If the H1B employee is terminated from employment by the H1B Employer prior to the expiration of the H1B status, the H1B employer is liable for the reasonable costs of return transportation of the alien to his last place of foreign residence. If the H1B employee voluntarily terminates his employment prior to the expiration of the H1B status, there is no such obligation. 8 CFR 214.2(h)(4)(iii)(E).

Notifying Government Agencies:

- With respect to the Department of Labor (DOL) it is advisable, although not required, to withdraw the Labor Condition Application (LCA) filed in support of the H1B petition filed for the terminated H1B employee. This is because the H1B employer's liability under the LCA continues for a period of one year after either the end date of the LCA or the withdrawal of the LCA (whichever is earlier). 20 CFR § 655.760(c).

- With respect to USCIS, while there is no sanction for failure to notify USCIS of a H1B termination, the regulations do require the H1B employer to notify USCIS when the H-1B employment relationship ends, whether by termination or resignation. 8 CFR 214.2(h)(11)(i)(A). H1B Employers should also note that

recent case law has held that H1B Employers are obligated to pay salary until the H1B employer notifies USCIS of the H1B Employee's termination. In those cases, H1B employers have been ordered to pay back wages in addition to other penalties and assessments.

Some employers may opt to delay notification to the DOL and USCIS while the H1B employee seeks a new H1B employer to sponsor a petition on his behalf. The USCIS's revocation of the petition can preclude the H1B Employee's eligibility for H-1B portability with the new employer. Furthermore, once the H1B petition is revoked, USCIS may issue a notice indicating that the employee is out of status.

Although the H1B employee is technically out of status immediately after the employment relationship ends, as a practical matter, especially if the petition is not revoked, a new H-1B petition filed by a new employer within 30 days or less after the employment relationship terminates is often approved for the employee's H-1B extension of status. If the employee finds a new position at a later date, it is likely that an extension of status would not be granted. In that case, the new employer's H-1B petition could be approved; but in a manner that requires the employee to depart the U.S. and apply for a new H-1B visa to return to the U.S. (similar to a Loose/Consulate petition).

Should questions arise regarding H1B and LCA compliance, employers should contact Younossi Law to discuss and resolve such issues. Employers should also contact Younossi Law regarding terminations and resignations of H1B employees so that timely notification to the relevant government agencies can be prepared and submitted.