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EMPLOYMENT-BASED U.S. PERMANENT RESIDENCE

Please complete the attached questionnaire as much as possible as the information provided will assist us in preparing your employment based immigration in the strongest way possible. Take the time and effort to answer the questions accurately and completely to the best of your ability. It doesn't have to be perfect, but the more information we have to work with, the better we can prepare your case and maximize its chances of success. **Part A** (with 3 sections) pertains to the Employer, and **Part B** (with 4 sections) pertains to the Employee. You may choose to fill out the Questionnaire form or provide the requested information in any form in the numbered order.

Pay particular attention to the Proposed Job Duties. The job description sets the parameters for evaluating the qualifications of any U.S. applicant. It should be complete, yet concise since it also forms the text of the advertisement that is published offering the job to qualified U.S. workers. Longer ads draw more attention and cost more. Further, the Labor and Immigration examiners appreciate brief job descriptions, e.g, for an IT occupation, you may show what kind of applications/software you design, develop, test, analyze and implement; what languages or tools you use; what platforms they are written for, etc.

Also of particular importance is the Previous Employment Information where you should **detail ALL prior relevant experience**, including that from outside the U.S. Prior experience letters from previous employers are **no less important** than your degrees and diplomas. These letters should show your dates of employment (mere job offer letters are NOT sufficient), when you started and when you left, your skill sets and your title (title should be descriptive of your occupation, e.g., software engineer (not assistant engineer or associate consultant), systems analyst, programmer analyst; if not possible, we can make do with titles such as software consultant, software developer, systems executive, IT team leader as long as it identifies your profession.

Make sure that your title, dates and skills match as shown on your H-1/EAD, resume, etc. The name of the employer should also match your H-1/EAD employment authorization dates. DO NOT SHOW the names of your employer's client company where you were assigned, in your resume or under EMPLOYMENT HISTORY, as they are not your employers. Your employer is the one who gives you the paycheck and who petitioned for your H-1 visa.

Return the Questionnaire to us. At the same time you should send us copies of your educational documents (degree certificates, diplomas, transcripts, marksheets, training certificates, foreign education evaluation, etc.) and immigration related documents (passport, I-94 card, all H-1B approval notices, I-20 forms if you were on F-1 student status, any Employment Authorization cards, etc.). See the complete checklist, Attachment.

You should have also received a Retainer Agreement which should be reviewed and signed by either the employer or employee, whichever will be responsible for the legal fees. This agreement should be returned to us along with the initial installment toward our fee (for established clients, we will invoice).

Once all of the above is returned to us, we will prepare a draft of the labor certification application and proposed advertisement which will be sent for review by both the Employer/Sponsor and Employee/Beneficiary. We will address any concerns or changes to be made, and then finalize the ad and application.

On the next page will begin our written list of procedures detailing the entire employment-based immigration process. Both the Employer/Sponsor and Employee/Beneficiary should read through this list carefully to know what is to be required of them throughout this lengthy process.

Finally, please note that the labor certification process is only the first step (of three) towards obtaining an employment-based "green card." Its purpose is to document that there is a shortage of qualified and/or available U.S. workers in a particular occupation. Labor certification (which is not filing GC, as is commonly mistaken), by itself, does not give a foreign national permission to remain in the U.S. It does not legalize his/her stay in the U.S. Labor certification does not grant employment authorization. Nor does it, by itself, grant permanent residence.

STEP 1 – LABOR CERTIFICATION FOR PERMANENT EMPLOYMENT OF FOREIGN NATIONALS IN THE U.S. UNDER THE “PERM” PROGRAM

Pre-Filing Recruitment – The heart of a PERM labor certification application is the recruitment for the position conducted by the employer prior to the filing of the application with the U.S. Department of Labor. Depending upon the organization and the position offered, such recruitment activity will consist of between 4 – 8 separate sources.

Posted Notice -- The employer must post notice of the job opportunity for at least ten consecutive business days. The notice period must be between 180 and 30 days prior to filing of the application. The notice must contain the salary, but may contain a wage range, so long as the lower level of the range meets or exceeds the prevailing wage. The primary purpose of the posted notice is to give employees an opportunity to comment on the application and inform them that they may provide documentary evidence bearing on the application to the Certifying Officer of the U.S. Department of Labor. We will provide the employer with the Job Posting and specific posting instructions.

Use of Other In-House Media -- In addition to printed posted notice, the employer must use any and all in-house media, whether electronic or printed, in accordance with normal procedures used for recruitment for similar positions in the organization. Duration of the in-house media notification should be as long as other comparable positions are posted.

Job Order -- The employer must place a job order with the State Workforce Agency covering the area of intended employment for a period of 30 days. The advertisement will be posted in the State's job information system, and will be accessible electronically to those seeking employment in that area. The listing will be identical to the proposed advertisement we prepare for the employer's approval. We will also take care of placing it with the appropriate State Workforce Agency.

Print Advertisements --The employer must place two advertisements on two different Sundays in the newspaper of general circulation in the area of intended employment. Both ads must be placed more than 30, but not more than 180 days before filing. The ads may be placed on consecutive Sundays. If the job is located in a rural area with no Sunday edition, the employer may use the edition with the widest circulation. However, the use of a suburban newspaper on a day other than Sunday is not allowed.

The ad must list the name of the employer, the geographic area of employment (only if the job site is unclear, e.g., if applicants respond to a location other than the job site or if the employer has multiple job sites), and a description of the vacancy specific enough to apprise US workers of the job opportunity. The employer may include minimum education and experience requirements or specific job duties in the ad as long as those requirements also appear on Labor Certification Application. The ad must direct applicants to send resumes or report to the employer, as appropriate. The employer's physical address is not required. A central office or post office box may be designated for receipt of resumes. The ad need not include the salary or a detailed listing of the job description and requirements. However, if the ad does include the salary, the salary stated must meet or exceed the prevailing wage.

If the job requires experience and an advanced degree, the employer may use a professional journal in lieu of one of the Sunday ads.

Again, we will be preparing a proposed advertisement for the employer's review, and can take care of placing the ad with the newspaper and journal, if applicable.

Three Additional Recruitment Steps for Professional Jobs – For professional jobs (those for which the attainment of a bachelor's or higher degree is a usual education requirement), use of an additional three recruitment steps must be documented. The permitted steps include: 1) job fairs; 2) employer's web site; 3) job search web site other than employer's; 4) on-campus recruiting; 5) trade or professional organizations; 6) private employment firms; 7) an employee referral program, if it includes identifiable incentives; 8) a notice of the job opening at a campus placement office, if the job requires a degree but no experience; 9) local and ethnic newspapers, to the extent they are appropriate for the job opportunity; and 10) radio and television advertisements. The additional recruitment steps must take place no more than 180 days before filing. The employer is not required to take different steps each month. Only one of the additional recruitment steps may take place within 30 days of filing the Application.

The law requires the job be offered first to qualified U.S. workers (citizens or permanent residents of the U.S.) who meet the minimum requirements as advertised. Only if no qualified U.S. workers are available will labor certification be granted. The employer must pursue each applicant in good faith and promptly.

The Department of Labor has taken the position that the employer must contact all potentially qualified applicants within 14 days. Otherwise they may find that a good faith recruitment effort has not been conducted.

When a résumé is referred to the employer, the designated representative must evaluate the qualifications of the applicant to determine if he meets the minimum requirements **as advertised** (i.e., Does he have the required degree? Does he have the required years of experience? Does he satisfy the special requirements for the position?). ***We cannot require or insist that the applicant possess any qualification outside the parameters of the advertisement.***

If it is patently obvious from the résumé alone that the applicant does not meet the minimum advertised requirements, the employer may simply note this fact and write a detailed letter to the applicant rejecting his application as not meeting the minimum requirements for the offered position. The letter should be specific in listing which of the minimum requirements were not met. If, however on the face of the résumé, it appears that the applicant meets some of the minimum requirements as advertised. Perhaps he has the required degree and has some relevant experience in the field. In this case the applicant should be contacted for either a telephone or in person interview to inquire further into his experience and educational background to determine if he satisfies the advertised requirements for the position. The Department of Labor takes the position that a résumé is merely a summary of the applicant's background; it is not an exhaustive listing of one's experiences. When in doubt it is always best to default to the side of conducting the interview. Doing so can never harm your case; in fact it creates good will with the Department of Labor by showing that the employer did take the time and trouble to interview U.S. workers and made a good faith effort to recruit.

If the applicant comes for a personal interview, ask him to bring his diplomas, transcripts, etc. Again, this applicant can be rejected only for **lawful job related reasons**. For example, his work experience is not relevant to the job duties as advertised; his skills are in computer languages that are not relevant to the hardware used by the employer; or his major is in a discipline unsuitably related to the job. Examples of **unlawful** job related reasons are: the applicant does not have a positive attitude; his command of the English language is inadequate; his grades are too low; he **does not meet a requirement which was not included in the advertisement**. This last reason is the single most common ground for denial of the labor certification application. Again, we cannot go outside the parameters of the advertisement.

It is very important that the employer **keep detailed notes on all contact or attempted contact with the applicant**, including dates and times, and these notes should be saved. We strongly encourage the employer to forward copies of all correspondence to our office to ensure that we maintain a complete record of all recruitment activity.

The U.S. Department of Labor considers a U.S. worker to be able and qualified for the job opportunity if the worker can acquire the skills necessary to perform the duties involved in the occupation during a reasonable period of on-the-job training. Thus, rejecting U.S. workers for lacking skills necessary to perform the duties involved in the occupation, where the U.S. workers are capable of acquiring the skills during a reasonable period of on-the-job training is not a lawful job-related reason for rejection of the U.S. workers.

At the conclusion of the recruitment steps, we will prepare a detailed **recruitment report** for the employer's signature which will describe 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. The Certifying Officer of the U.S. Department of Labor, after reviewing the employer's recruitment report, may request the U.S. workers' résumés or applications, sorted by the reasons the workers were rejected.

All recruitment supporting documentation **must be maintained by the employer for a period of five years** after the date of filing the Application.

Please note that neither the Attorney nor the Beneficiary can participate directly in the recruitment process. The attorney will be glad to clarify the procedures or answer any questions which the employer may have. You are encouraged to do so to avoid any lapses or delays in the assessment of the applicants.

Pre-filing Determination of Prevailing Wage – Before filing the Labor Certification Application with the U.S. Department of Labor, the employer must obtain a Prevailing Wage Determination from the State Workforce Agency.

In most cases the SWA will utilize the DOL's Occupational Employment Statistics (OES) Survey to determine the arithmetic mean of the wages of workers similarly employed in the area of intended employment.

However, the employer, either initially or after a Prevailing Wage Determination has been issued by the SWA, may submit their own survey for consideration. The employer must provide the SWA with enough information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow the SWA to make a determination about the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the US DOL Employment & Training Administration's national office. The survey submitted to the SWA must be based upon recently collected data. Any published survey submitted by the employer must have been published within 24 months of the date of submission to the SWA, must be the most current edition of the survey, and the data upon which the survey is based must have been collected within 24 months of the publication date of the survey. Alternatively, a survey conducted by the employer must be based on data collected within 24 months of the date it is submitted to the SWA.

Finally, the employer may utilize a current wage determination in the area under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act.

Ultimately, the SWA will enter its wage determination on the form it uses and return the form with its endorsement to the employer. The employer enters the prevailing wage information on the Application for Permanent Employment Certification and maintains the SWA PWD in its files.

Filing the Application for Permanent Employment Certification – So we've done the recruitment and obtained the prevailing wage for the position. It is now time to file the application (Form ETA 9089) with one of the two U.S. Department of Labor, Employment & Training Administration PERM processing centers either electronically or by mail. Documentation supporting the application for labor certification will not be filed with the application, but will have to be submitted later in the event of an audit of the application.

Upon receipt applications are screened to ensure they are complete. There is also some initial checking done to ensure that the employer is legitimate in an effort to curb fraudulently filed applications.

The application will then be reviewed electronically (by computer). This review may lead to identification of various "triggers" in the application causing it to be selected for audit by a USDOL analyst. Additionally, certain applications may be randomly selected for audit.

Audit Process – If selected for audit, an audit letter will be sent by the USDOL which sets forth the documentation that must be submitted by the employer, which the employer has 30 days to submit. If the required documentation has not been sent by the date specified the application will be denied. Furthermore, if the USDOL considers it to be a substantial failure to submit the requested documentation, not only will the application be denied, but the employer may be required to conduct supervised recruitment in future filings of labor certification applications for up to 2 years.

The USDOL may grant one extension up to 30 days from the initial 30 period in which to respond to the audit letter. After receipt of the response from the Employer, the USDOL may also request additional information and/or documentation or require that the Employer conduct supervised recruitment.

Supervised Recruitment -- When supervised recruitment is requested by the USDOL, either after receipt of an audit response or as part of the mandated supervised recruitment when an Employer has previously failed to respond to an audit letter, the Employer is advised to place an ad in a newspaper of general circulation for three days including a Sunday or for one edition of a professional, trade or ethnic publication. The Employer must submit a draft of the proposed ad to the USDOL for approval within 30 days of the notification that supervised recruitment is required. The USDOL will approve the ad and direct the timing of the advertisement. The Employer shall notify the USDOL when the ad will appear. The approved ad must advise applicants to send resumes or applications to the USDOL including an identification number and address as designated by the USDOL. The ad must describe the job opportunity, including a wage rate that meets or exceeds the prevailing wage rate, and summarizes the minimum job requirements as contained in the application form and offer training if the job would normally require the Employer to provide training. The wages, terms and conditions of employment must be as least as favorable as those offered to the alien. The USDOL may also require other specific recruitment efforts containing the same information.

Any résumés sent to the USDOL will be screened and forwarded to the employer for consideration and follow up. At the close of the recruitment period, the USDOL will request a detailed Recruitment Report from the Employer to be submitted within 30 days.

Final Determination – After audit, or after the initial screen and review if no audit was requested, the USDOL will notify the Employer in writing either electronically or by mail of the determination. If granted the certified application and Final Determination form will be sent to the Employer or attorney. If the labor certification is denied, the Final Determination will state the reasons for denial, advise of the review process, and advise that failure to request review within 30 days of the date of determination constitutes a failure to exhaust administrative remedies. If a request for review is not timely made, the denial becomes the final determination of the Secretary of the USDOL. If no request for review is made, a new labor certification can be filed at any time. If a request for review is made, no new application in the same occupation for the same alien can be filed until the review procedures are completed.

Revocation of Approved Labor Certification – Even after approval, the USDOL may revoke the labor certification if he/she finds that the certification was not justified. A Notice of Intent to Revoke containing a detailed statement of the grounds for revocation and the time period allowed for the Employer's rebuttal will be sent. The Employer has 30 days within which to submit a response. If the Employer fails to submit a rebuttal, the Notice of Intent to Revoke becomes final. If the Employer files rebuttal evidence the CO must inform the Employer within 30 days whether or not the labor certification will be revoked. If the labor certification is revoked, the CO will send a copy of the notification regarding the revocation to the DHS and the DOS. The Employer may file an Appeal.

Request for Review -- If the labor certification application is denied, or revoked, a request for review of the denial or the revocation may be made to the Board of Alien Labor Certification Appeals (BALCA) by the Employer. The Request for Review (RFR) is filed with the Certifying Officer (CO) who denied the application and must be filed within 30 days of the date of the determination. It must set forth the grounds for the request, include the Final Determination, and may not include evidence not already in the record.

Upon receipt of a RFR, the CO must assemble an Appeal File and send it to the BALCA and send a copy to the Employer. The Employer may furnish or suggest to the BALCA that additional information be made part of the Appeal File if such information was submitted to DOL before issuance of the Final Determination.

In considering RFR's the BALCA will afford all parties 30 days in which to submit or decline to submit a legal brief or Statement of Position. The BALCA must either (a) affirm the denial or revocation of the labor certification; (b) direct the CO to grant certification or overrule the affirmation of the revocation; or (c) direct that a hearing be held to consider the case.

Invalidation of Labor Certification – Additionally, a labor certification may be invalidated by the Department of Homeland Security or a Consul of the Department of State upon a determination, either by one of those agencies or by a court, of fraud or willful misrepresentation of a material fact involving the labor certification application. If evidence of fraud or a willful misrepresentation becomes known to the USDOL's Certifying Officer or the Chief, Division of Foreign Labor Certification, he/she shall notify the DHS or Department of State, as appropriate, in writing, as well as the DOL's Office of Inspector General (OIG).

STEP 2 – IMMIGRANT PETITION

Approval of the Labor Certification application gives the foreign national employee eligibility for a preference visa. Members of the Professions with Advanced Degrees (or the equivalent – Baccalaureate with Five Years of Progressively Responsible Experience) or Aliens of Exceptional Ability in the Sciences, Arts or Business qualify under the Second Preference category (EB2). While Professionals and Skilled Workers (jobs requiring at least two years of experience or training) qualify under the Third Preference category (EB3). Unskilled Workers (jobs requiring less than two years of experience or training) qualify under the Third Preference - Other Workers category.

Immigrant Visas based on an offer of employment are subject to a quota system. Currently the overall cap for employment-based immigration is set at 140,000 per fiscal year. This number may be increased by unused employment-based visa slots from prior years and by any unused family based immigrant visas. There are 40,000 employment-based visas available each for the EB1, EB2, and EB3 categories. Any visas not used in any one of these 3 preference categories will spill down to the next category (EB1 down to EB2 down to EB3). Furthermore, there is a per-country limit on these preference immigrant visas. Thus, immigrant visa availability depends on 1) the preference category for which the alien employee qualifies; 2) his country of birth (regardless of current citizenship); and 3) his priority date (the date the labor certification office was filed with the State Department of Labor Office). Immigrant Visas may, at any given time, be backlogged due to the laws of supply and demand – too many persons born in a particular country applying for a limited number of visas within a particular preference category. Immigrant Visas under the EB2 and EB3 preference categories typically tend to get backlogged for nationals of P.R. China, India and the Philippines. The length of the backlog may vary from none to 4 years, depending on the country and preference category (EB3 tends to be backlogged further than EB2). This amount changes every month when the State Department issues its Visa Bulletin. You may check with us around the middle of each month to get the current visa processing dates.

In order to have the alien employee classified for a preference immigrant visa, a petition (Form I-140) is filed by the employer (**within 180 days of Labor Certification approval**) with the regional office of the Citizenship & Immigration Services or CIS (for example, the Southern regional office is in Mesquite, Texas). There are two basic issues being looked at by the CIS (formerly the INS) when adjudicating this petition.

First, it must be shown that at the time the labor certification application was filed, the employer had the financial ability to pay the wage offered in the application, and continues to have that ability going forward. As evidence of this ability, the **CIS will require a copy of the employer's federal income tax returns, audited financial statements, or annual reports** from the year in which the labor certification application was filed through to the most current year available at the time of filing the immigrant petition. Ideally this financial documentation would show a taxable net income of at least the proffered wage as listed in the labor certification application. However, they will take into account whether or not the foreign national beneficiary is already being paid by the employer. And they will also look to the net current assets of the entity.

Second, the CIS requires evidence that the foreign national employee satisfies the minimum requirements for the position as defined in the labor certification application. Thus, they will want to see copies of the employee's educational documents, experience verification letters, etc.

STEP 3 – PERMANENT RESIDENCE APPLICATION

Once the I-140 immigrant petition has been approved and the foreign national employee's priority date becomes current, he must make an application for permanent residence. This is done either by applying inside the U.S. with the CIS for adjustment of status (Form I-485), or outside the U.S. by filing an immigrant visa application with a U.S. Embassy or Consulate (Consular Processing). If the employee is inside the U.S., it is preferred that he apply for adjustment of status. In certain, very limited circumstances (looked at on a case by case basis), it may be advantageous for the employee to elect consular processing. If the foreign employee has ever been out of legal visa status in the U.S. or worked without valid employment authorization, he will ordinarily be ineligible for adjustment of status and will be required to obtain the immigrant visa from the U.S. Embassy/Consulate (there are some limited exceptions to this general rule). Note that the foreign national employee's dependents (spouse/minor children) will be processed for permanent residence at this time as well.

Generally, the CIS Service Center will approve the adjustment of status application without requiring a personal interview and the employee will be sent an approval notice to take to the local CIS office where he will submit photographs, a single fingerprint, and signature to appear on the Permanent Resident card. In the meanwhile, a stamp will be placed in the passport as temporary evidence of the employee's U.S. Permanent Resident status. The actual Permanent Resident card will be mailed to his home within a few weeks to months.

In certain types of situations and in some random cases a personal interview with an immigration examiner at the local CIS office will be required before the adjustment of status application may be approved. We will fully prepare the employee for (and in some cases we can also attend) the interview. The CIS officer will approve the application and issue the same temporary evidence of U.S. Permanent Resident status.

Thank you for considering our firm for your immigration needs, and if you have any further questions, doubts or concerns, please don't hesitate to contact us.