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TO:
FROM: Nancy Colón
International Taxation Specialist
DATE:
RE: Explanation of the H-1B Non-Immigrant Visa

Established by the Immigration Act of 1990 (IMMACT 90), the H-1B nonimmigrant visa category allows U.S. employers to augment the existing labor force with highly skilled temporary workers. The H-1B visa program is utilized by some U.S. employers to employ foreign workers in specialty occupations that require theoretical or technical expertise in a specialized field. Typical H-1B occupations include architects, engineers, computer programmers, accountants, doctors and college professors. The current annual cap on the H-1B category is 65,000.

According to the USCIS, *"H-1B aliens may only work for the petitioning U.S. employer and only in the H-1B activities described in the petition. The petitioning U.S. employer may place the H-1B worker on the worksite of another employer if all applicable rules (e.g., Department of Labor rules) are followed. H-1B aliens may work for more than one U.S. employer, but must have a Form I-129 petition approved by each employer."*

To Explain:

1. The H-1B status creates an employer-employee relationship with the H-1B sponsor.
2. Must have the equivalent to a US bachelor's degree.
3. The I-129 petition that is submitted along with a letter from the sponsor will describe the job responsibilities of an H-1B status individual.
4. Filing Fees for H-1B visa:
 - a. Basic Filing Fee:
 - i. The basic filing fees associated with the H-1B petition should be paid by the petitioner (potential employer), not the individual.
 - ii. The basic filling fees (and even premium processing) are not considered compensation made to or on behalf of the individual. The fees are not reportable income to the employee because even though the employee receives a benefit. They are ordinary and necessary business expenses of the employer.

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- b. Legal Fees:
 - i. Legal fees which are clearly associated with the employer's certification process on behalf of one of his employees would be treated as an allowable employer expense and would not be accounted to be gross income to the employee.
 - ii. Legal fees paid by the employer which are clearly related to an employee's own efforts to change status would be treated as compensation to the employee which is includible in the gross income of the employee.
 - iii. Any legal fees which are not clearly one or the other would be analyzed on a case-by-case, facts-and-circumstances basis to determine its proper tax treatment.
 - c. Premium Filing Fee:
 - i. The premium filing fee can be paid by either the employer or the individual.
 - ii. The premium filing fee may or may not be considered income to the employee if paid by the employer. It would depend on who got the bigger benefit.
 - d. Dependent Filing Fee:
 - i. These may be paid by the employer if it is the employer's common practice to do so, but are ordinarily viewed as individual expenses and therefore taxable income to the individual if the employer pays them (this may depend upon a case by case analysis -- these are only general comments).
5. Length of Visa:
- a. Workers are admitted to the US for an initial period of 3 years which may be extended for an additional 3 years.
 - b. H-1B holders who want to continue to work in the U.S. after six years, but who have not obtained permanent residency status, must remain outside of the U.S. for one year before reapplying for another H-1B visa.
6. Extension of the Visa:
- a. An H-1B can't be extended once it has expired
 - b. The extension application must be submitted prior to the expiration of the current status.
7. Exceptions to the H-1B 6-year rule:
- a. If a visa holder has submitted an I-140 immigrant petition or a labor certification prior to his 5th year anniversary of having the H-1B visa, he is entitled to renew his H-1B visa in 1 year increments until a decision has been rendered on his application for permanent residence.

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- b. If the visa holder has an *approved* I-140 immigrant petition, but is unable to initiate the final step of the green card process due to his priority date not being current, he may be entitled to a 3 year extension of his H-1B visa.
- 8. Non-immigrant visa -- Even though the H-1B visa is a non-immigrant visa, it is one of the few visa categories recognized as *dual intent*, meaning an H-1B holder can have legal immigration intent (apply for and obtain the green card) while still being a holder of the visa.
- 9. Legally required to pay the same taxes as any other US resident
 - a. Must pay social security and medicare (FICA)
 - b. Must pay taxes on worldwide income
- 10. H-1B on sabbatical abroad:
 - a. If considered a resident alien for tax purposes, will still be considered a RA for the full calendar year (December 31st.) May possibly be considered a nonresident alien starting in January, if the individual plans to have less than 31 countable days in US and does not become a lawful permanent resident in the calendar year.
 - b. Sabbatical pay would be considered US-sourced because it is related to past services performed in the US, not to services being performed abroad.
- 11. Honorarium Payment:
 - a. Technically called “payment for services” for an H-1B
 - b. May not use the services of an H-1B independent contractor without proper steps – this would be knowingly violating the law by accepting services of an alien that is not authorized to perform those services. (This is because it gets into the realm of displacing a US worker.)
 - c. Must be considered as a guest appearing on behalf of UR (keeps him from being considered self-employed.
 - d. Payment Choices:
 - i. Choice #1 to properly pay an H-1B from another institution co-employment income:
 - 1. UR sponsors the alien as a co-employee
 - 2. H-1Bs are eligible for concurrent employment
 - 3. Process is run through International Education office
 - ii. Choice #2 to properly pay an H-1B from another institution payment for services:
 - 1. There is no official immigration guidance on this issue. However, it is common for professors to speak at other institutions.

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2. H-1B visa holder may represent university as a speaker at another school.
 3. May not be paid directly (that would make him an independent contractor and such services are inconsistent with H-1B status.)
 4. Letter from individual's home institution's department chair/supervisor is required. Letter should state that individual is involved in a "collaborative" speaking engagement – individual is being assigned to speak at another institution. The letter shows that the speaking engagement is considered part of the H-1B's original employment. (Without a letter the payment would not be acceptable because a payment for services must have both institutions in the picture – otherwise it becomes unauthorized self-employment.)
 5. Payment must be made to the home institution which will then take appropriate taxes and pay the individual.
12. Peripatetic Employment:
- a. An H-1B who is employed at one institution may travel to another institution to work on behalf of the same approved employer for purposes of the activities described in that employer's petition and approved by USCIS. (i.e. a professor may be hired to also teach a class at another university.)
 - b. This is concurrent H-1B employment.
 - c. A Form I-129 must be filed and a fee around \$200.00 must be paid
 - d. The new job is in the same classification so the petition need not be approved for the employment to commence as long as the petition is filed.
13. Portability:
- a. H-1B's new employment will be in the same job classification
 - b. IF the H-1B will be working in the same job classification as at the other school, he may continue working as long as the new employer's H-1B petition has been filed. (For I-9 purposes, accept the I-94 issued with respect to the original employment as if it were your own. Update the new I-9 when it arrives.)
 - c. 240 day extension rule: A nonimmigrant alien within [named classifications referenced in] this section whose status has expired but who has filed a timely application for an extension of such stay pursuant to Secs. 214.2 or 214.6 of this chapter. These aliens are authorized to continue employment with the same employer for a period not to exceed 240 days beginning on the date of the expiration of the authorized period of stay. Such authorization shall be subject to any conditions and limitations noted on the initial authorization. However, if the district director or service center director adjudicates the application prior to the expiration of this 240 day period and denies the

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application for extension of stay, the employment authorization under this paragraph shall automatically terminate upon notification of the denial decision.

- d. An H-1B may work for a subsequent H-1B employer as soon as its new H-1B petition is filed (i.e. the FedEx receipt date.)
 - i. The H-1B must be in status when the new petition is filed
 - ii. The subsequent H-1B job must be in the same job classification as the originally approved H-1B job.
 - iii. If approved, the approval period takes over from where the portability rules left off.
 - iv. If denied, the H-1B must start working.

14. Travel Reimbursement:

- a. If it can be considered a research collaboration between the H-1B alien and someone at UR, it is equally a collaboration between the two universities. This is fully acceptable.
- b. Most conservative approach would be to reimburse expenses to the other university and have it, in turn, reimburse the employee.
- c. Other university's DSO should submit note to UR to state that this payment is fine.
- d. This would not be considered a payment for services unless the other university is NOT part of the picture. This would be unauthorized self-employment.

15. Moving Expenses:

- a. To be allowed as moving expenses (without taxation), the individual must be moving for a new job
- b. Normal withholding and reporting rules apply when using an international moving company (for example, moving a new employee from Canada to US)
- c. UR would be responsible to withhold and report the amount related to US services. (Section 864 spells out the rules for determining US source and foreign source income for payments to individuals for services.)
- d. Tax exemption:
 - i. Foreign company may be exempt from withholding if the company does not have a permanent establishment in the US and can complete a W-8BEN (Part I and II) and has a US EIN
 - ii. Foreign company may be exempt from withholding if the company is engaged in a US trade or business and submits a W-8ECI and has a US EIN
- e. Separate invoices should be submitted for foreign and US-based services.

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16. Other Expenses:
- a. Benefits such as paying an individual's home phone bill, cable bill and cost of SDL set-up are benefits in kind when made to an employee. These are generally treated as additional wages.
17. Sailing Permit -- Form 1040C & Form 2063:
- a. Technically, there is still a requirement that departing foreign nationals get a sailing permit, although it has not been effectively enforced for decades.
 - b. Before leaving the United States, all aliens (except those listed under Aliens Not Required to Obtain Sailing or Departure Permits) must obtain a certificate of compliance. H-1B's are included in this category (B's, F-1's and J-1s are not.)
 - c. IRC 6851(d) imposes the requirement that certain aliens obtain "sailing permits" or file Form 1040-C prior to departing from the United States. This document must be secured from the IRS before leaving the U.S.
 - d. The alien will receive a sailing or departure permit after filing a Form 1040-C or Form 2063. To obtain a permit, file Form 1040-C or Form 2063 (whichever applies) with the local IRS office before leaving the United States.
 - e. Form 2063: This is a short form that asks for certain information but does not include a tax computation.
 - i. This form is for aliens, whether resident or nonresident, who have had no taxable income for the tax year up to and including the date of departure and for the preceding year, if the period for filing the income tax return for that year has not expired.
 - ii. The form is also for resident aliens who have received taxable income during the tax year or preceding year and whose departure will not hinder the collection of any tax.
 - f. Form 1040-C: If you must get a sailing or departure permit and you do not qualify to file Form 2063, you must file Form 1040-C.
 - i. Ordinarily, all income received or reasonably expected to be received during the tax year up to and including the date of departure must be reported on Form 1040-C and the tax on it must be paid. When you pay any tax shown as due on the Form 1040-C, and you file all returns and pay all tax due for previous years, you will receive a sailing or departure permit.
 - ii. However, the IRS may permit you to furnish a bond or an employer letter guaranteeing payment instead of paying the taxes for certain years. The sailing or departure permit issued under the conditions in this paragraph is only for the specific departure for which it is issued.
 - iii. If you submit an employer letter guaranteeing payment of tax with your Form 1040-C, you do not need to fill out the form in detail. Just fill out the identifying information on the form, check the "Yes" box

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- on line A, sign it, and attach the letter. The IRS office where you submit the form will then issue your sailing or departure permit.
- g. All the tax shown as due on Form 1040-C must be paid and any taxes due for past years. If the tax computation on Form 1040-C results in an overpayment, there is no tax to pay at the time you file that return. However, the IRS cannot provide a refund at the time of departure. If you are due a refund, you must file as appropriate, at the end of the tax year.
 - h. Form 1040-C is not an annual U.S. income tax return. If an income tax return is required by law, that return must be filed even though a Form 1040-C has already been filed. The tax paid with Form 1040-C should be taken as a credit against the tax liability for the entire tax year on annual U.S. tax return.
 - i. Obtain the sailing permit at least 2 weeks before you plan to leave. You cannot apply earlier than 30 days before your planned departure date.
 - j. Bring to the IRS office papers and documents related to your income and your stay in the United States. Bring the following records with you if they apply:
 - i. Your passport and alien registration card or visa.
 - ii. Copies of your U.S. income tax returns filed for the past 2 years. If you were in the United States for less than 2 years, bring the income tax returns you filed for that period.
 - iii. Receipts for income taxes paid on these returns.
 - iv. Receipts, bank records, canceled checks, and other documents that prove your deductions, business expenses, and dependents claimed on your returns.
 - v. A statement from each employer showing wages paid and tax withheld from January 1 of the current year to the date of departure if you were an employee. If you were self-employed, you must bring a statement of income and expenses up to the date you plan to leave.
 - vi. Proof of estimated tax payments for the past year and this year.
 - vii. Documents showing any gain or loss from the sale of personal property, including capital assets and merchandise.
 - viii. Documents relating to scholarship or fellowship grants including verification of the grantor, source, and purpose of the grant.
 - ix. Documents indicating you qualify for any special tax treaty benefits claimed.
 - x. Document verifying your date of departure from the United States, such as an airline ticket.
 - xi. Document verifying your U.S. taxpayer identification number, such as a social security card or an IRS-issued CP 565 showing your individual taxpayer identification number (ITIN).
 - xii. If you are married and reside in a community property state, also bring the above-listed documents for your spouse. This applies whether or not your spouse requires a certificate.

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