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**OVERVIEW**

- ▶ H-2B Visa
- ▶ H-1B Visa
- ▶ L-1 Visa
- ▶ E-2 Visa
- ▶ EB-5 Visa
- ▶ I-9 Forms and E-Verify

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**H-2B VISA AND RECENT CHANGES IN THE LAW**

- ▶ The H-2 visas fall into the non-immigrant category of USA visas. They consist of two categories, the H-2A and the H-2B. The H-2 visa was created to enable employers to fill jobs for which labor is in short supply.
- ▶ The H-2A visa applies to foreign workers entering the United States to perform agricultural work of a temporary or seasonal nature.
- ▶ The H-2B visa applies to foreign workers whose education/training or job position do not meet the requirements for an H-1B visa and who are entering the United States to perform temporary work for a U. S. employer.
- ▶ Foreign workers who qualify for H-1B visa status but do not meet the H-1B visa cap are now applying for H-2B visa.

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### H-2B VISAS AND TEMPORARY NEED/US WORKERS

For H-2B visas, the U.S. employer needs to demonstrate:

- ▶ Need for the H-2B workers is temporary in nature based on either:
  - ▶ A peakload demand
  - ▶ Intermittent need
  - ▶ Seasonal need
  - ▶ One-time occurrence (which can be up to three years)
- ▶ There are no U.S. workers who are willing and able to perform the job opportunity;
- ▶ The employment of the H-2B worker will not adversely affect wages and working conditions of employees in the U.S.

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### HOW LONG IS THE H-2B VISA AND CAN IT BE RENEWED?

The H-2B visa is granted for a one year period and may be extended in one year increments for a maximum of 3 years of employment. The worker must then depart from the U.S. for a minimum of 3 months. After the 3 months absence from the U.S., the worker can apply again for an H-2B visa in increments of one year for a maximum of 3 years of employment.

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### H-2B VISA STEPS

- ▶ Four step process for a U.S. employer to apply for H-2B workers on Guam:
  - ▶ **Step One:** Obtain a temporary alien labor certification for the job opportunity from the Governor of Guam or his designee.
  - ▶ **Step Two:** Submit an H-2B petition to United States Citizenship and Immigration Services ("USCIS").
  - ▶ **Step Three:** Worker applies for issuance of an H-2B visa at the U.S. Consulate in his country of residence.
  - ▶ **Step Four:** Worker registers with Guam Department of Labor upon arrival to Guam and pays \$1,000 annual registration fee.

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## OBTAINING A TEMPORARY LABOR CERTIFICATION

### Applying for a Temporary Alien Labor Certification

- ▶ In the United States, the temporary labor certifications are initially processed by the State Workforce Agencies and then forwarded to the National Processing Centers in either Chicago or Atlanta. Guam is unique in that the Governor of Guam has been granted certifying authority for temporary labor certifications issued in Guam.
- ▶ The application for the temporary labor certification is processed by the Guam Department of Labor through its Alien and Labor Processing & Certification Division ("ALPCD") with the assistance of Guam Employment Service ("GES"). Rules and regulations promulgated by the Government of Guam regarding the H-2B program are provided in Appendix A.

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## THE PREVAILING WAGE RATE FOR H-2B WORKERS

### Recent changes in the prevailing wage rate for H-2B workers.

- ▶ **Work performed by H-2B workers on military projects.** In the 2010 Defense Authorization Act signed by the President on October 29, 2009, requires H-2B workers to be paid wages/fringe benefits based on the Davis Bacon Act for work performed on military projects. The Davis Bacon Act sets the prevailing wage rates and fringe benefits based on workers similarly employed. However, in determining the prevailing wage rate and fringe benefits, the wages of H-2 workers are not considered. The prevailing wage rate is to be determined annually until 90 percent of the funds made available for the realignment of military installations and the relocation of military personnel on Guam have been expended.
- ▶ **Work performed by H-2B workers on non-military projects.** USCIS is required to approve the system to determine prevailing wages and working conditions of the H-2B workers in common construction occupations and must approve the wage data and rates prior to implementation of new prevailing wage rates. The prevailing wage rate must be based on a wage survey and GDOL currently plans to work in conjunction with USCIS in updating the prevailing wage rate for common construction occupations every two years. The last prevailing rate wage rates for common construction occupations was effective September 29, 2008 and is attached as Appendix B.

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## Requirement of testing the labor market for U.S. workers who are willing and able to perform the job opportunity

- ▶ **Current Practice:**
  - ▶ Advertising the job opportunity in the newspaper for one day and posting of the announcement for the job opportunity at the employer's office for three (3) days prior to the submission of the application;
  - ▶ Submission of required documents to GDOL
  - ▶ Advertising the job openings in the PDN for 3 consecutive business days.
- ▶ **Change made in 2010 Defense Authorization Act:**
  - ▶ For work on military projects, the contractor shall be required to advertise and solicit for construction workers in the United States, including Guam, the Commonwealth of the Northern Mariana Islands, American Samoa, the Virgin Islands, and the Commonwealth of Puerto Rico in accordance with a recruitment plan approved by the Secretary of Labor.

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**H-2B ELIGIBLE COUNTRIES**

- ▶ H-2B petitions generally can only be approved for nationals of countries that the Secretary of Homeland Security has designated as eligible to participate in the H-2B program. The first list of designated countries was published on December 19, 2009, and the list will be updated on an annual basis. The list of current designated countries is provided in Appendix C.
- ▶ USCIS can approve an H-2B visa for a national of a country not on the designated list of eligible countries if it determines that it is in the U.S. interest to approve the H-2 visa for the worker.

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**SUBMISSION OF THE PETITION TO USCIS**

- ▶ Petitions for H-2B workers are submitted to USCIS on Form I-129. A separate petition is required for each category of workers.
- ▶ The temporary alien labor certification is required to be submitted with the H-2B petition.
- ▶ Changes in 8 CFR effective January 2009 no longer require the I-129 petition to provide the names of the beneficiaries for new workers.

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**CHANGES REGARDING PAYMENT OF RECRUITING FEES BY THE H-2B WORKERS EFFECTIVE JAN 09**

- ▶ Require employer attestations on the scope of the H-2B employment and the use of recruiters to locate beneficiaries and provide for denial or revocation of an H-2B petition if an H-2B worker was charged a fee in connection with the employment either (a) by the petitioner, or (b) by a recruiter where the petitioner knew or reasonably should have known that the recruiter was charging such fees.
- ▶ If the H-2 worker has paid prohibited fees, the petition will not be denied or revoked if the petitioner demonstrates that:
  - ▶ a) prior to the filing of the petition, the alien beneficiary has been reimbursed for the prohibited fees paid;
  - ▶ b) where the prohibited fees have not yet been paid, that the agreement to pay has been terminated; or
  - ▶ c) where, after the petition is filed, the petitioner learns that the prohibition on collecting or agreeing to collect a fee has been violated by a recruiter or agent, the petitioner notifies USCIS about the prohibited payments, or agreement to make such payments, within 2 work days of finding out about such payments or agreements. The regulations are provided in Appendix D.

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### H-2B CAP

- ▶ 66,000 new H-2B workers per fiscal year.
- ▶ Divided into 1st and 2nd half of the fiscal year with 33,000 new workers per half of the fiscal year.
- ▶ Application period starts April 1st for the first half of the fiscal year starting October 1st.
- ▶ Application period starts October 1st for the second half of the fiscal year starting April 1st.
- ▶ Guam is exempt from the H-2B cap starting November 28, 2009 until December 31, 2014.

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### H-1B VISA

- ▶ Overview. An H-1B visa is a nonimmigrant visa for persons coming to the U.S. to perform services in a professional occupation. Spouses and children under 21 years of age qualify for H-4 visas.
- ▶ Requirements to Qualify For an H-1B Visa. Applicant must possess a bachelor's or higher degree (or equivalent) in the specific specialty for which employment authorization is being sought. USCIS determines whether the employment constitutes a specialty occupation and whether the alien is qualified to perform the services.
- ▶ Wage rate. The U.S. company must be willing to pay the applicant the prevailing wage rate established by the GDOL for this position.
- ▶ Validity Period of H-1B Visa. Up to six years in increments of three years each. After the six-year stay, if the applicant then leaves the U.S. for a period of one year, he is eligible for another six-year period of stay. Also, if a PERM I has been filed on behalf of the H-1B visa holder and one year has lapsed since the filing of either the PERM or immigrant petition, an extension beyond the six-year limit can be granted until the adjudication of the immigrant petition.

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### H-1B VISA CAP

- ▶ 65,000 per year with an additional CAP of 20,000 for persons who earned a master's degree from a U.S. university.
- ▶ Guam is exempt from the H-1B cap starting November 28, 2009 until December 31, 2014.

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### L-1 VISA

- ▶ **Overview.** An L-1 visa is a nonimmigrant visa issued to multinational executives, managers and applicants with specialized knowledge. Spouses and children of L-1 visa holders who are under 21 years qualify for L-2 visas.
- ▶ **Types of L-1 visas.** L-1 A are for executives or managers and L-1B for persons with specialized knowledge of the company's products, services, management research, equipment, techniques, management, or other interests and its application in international markets, or an advanced level of knowledge or expertise in the organization's processes and procedures.
- ▶ **U.S. Company.** There must be a U.S. company. The U.S. company can be newly established. There is no "set" amount that must be invested in the U.S. company; generally, however, companies invest U.S. \$100,000 or more. An applicant can apply for an L-1 visa as soon as:
  - ▶ 1) U.S. corporation is formed;
  - ▶ 2) office space or other business premises have been leased; and
  - ▶ 3) business license is issued.

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### L-1 VISA continued

- ▶ **One year prior work experience with related foreign company.** The applicant must have been employed in an overseas company with a qualifying relationship to the U.S. company. Qualifying relationship means the U.S. company and the overseas company must be either:
  - ▶ 1) the same company;
  - ▶ 2) the branch of either company;
  - ▶ 3) parent/subsidiary companies in which one company owns at least 51% of the other company;
  - ▶ 4) affiliate companies owned and controlled by the same corporation or group of individuals; or,
  - ▶ 5) qualifying joint venture relationship.
- ▶ **Validity Period.** L-1A can remain in U.S. up to 7 years and an L-1B up to 5 years. Time spent outside the U.S. is not included in the calculation of the 7 or 5 year period. Eligible for another 5 or 7 year stay if reemployed with related foreign company for one year.

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### E-2 VISA

An E-2 visa is a nonimmigrant visa that is issued to applicants from Treaty Countries with the U.S. that make a substantial investment in an U.S. company. The company must be a national from a Treaty Country, which includes Japan, Korea, Philippines, Taiwan, or other Treaty countries.

- ▶ The U.S. company must be owned at least 50% by the treaty national.
- ▶ The U.S. company must be actively engaged in business and create jobs for U.S. workers.

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**E-2 VISA continued**

- ▶ There must be a substantial investment in the U.S. Company. "Substantial" means (i) the amount normally considered sufficient to ensure the investor's commitment to the successful operation of the enterprises; and (ii) a magnitude of investment to support the likelihood that the investor will successfully develop and direct the enterprise.
- ▶ The applicant must be either the principal investor who will develop and direct the business or an executive, supervisor or a person with special qualifications that makes him an essential employee for the development of the business.

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**EB-5 INVESTOR VISA**

- ▶ The EB-5 visa was created to encourage investment in the U.S. by foreign investors through granting U.S. legal permanent residency to the investor, spouse and children under 21. Generally, to qualify, an investor must:
  - ▶ 1) invest or be in the process of investing \$1,000,000 (or \$500,000 if in a "targeted employment area", which will not be the case here on Guam);
  - ▶ 2) the investment will benefit the U.S. economy by creating jobs for at least 10 U.S. citizens or legal permanent residents; and
  - ▶ 3) the investor will be involved in the management of the business either through formulating business policy (including acting as a limited partner) or through day-to-day management.
- ▶ For the first two years following admission on an EB-5 visa, the investor and his or her family is in "conditional" LPR status. With the conditional status is the added requirement that the investor and family file a petition between the twenty-first and twenty-fourth months following admission in conditional LPR status, seeking removal of the conditions. At that time, USCIS will review the fact that the requisite investment had been made and sustained and that the requisite 10 jobs had been created or will be created within a reasonable amount of time. If successful, the conditions are removed and legal permanent resident status is granted. Other categories of "resident" visas (employment based and some family based) do not have conditional status at the start.

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**REGIONAL CENTER UNDER THE EB-5 PROGRAM**

- ▶ In 1993, Congress created the Immigrant Investor Pilot Program, which allows for the creation of Regional Centers. By investing via a Regional Center, the investor gains the benefit of being able to include both direct as well as indirect jobs created by virtue of the investment in meeting the requirement of creating 10 jobs for U.S. workers. The indirect employment factors for any industry are assessed through an economic Input-Output Model.
- ▶ Guam Strategic Development LLC ("GSD") was recently designated by the USCIS as a qualified Regional Center and has been approved for six target industry economic clusters: 1) retail trade; 2) hotels; 3) restaurants; 4) warehouse and distribution; 5) office buildings and 6) mixed-use developments.

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### I-9 FORMS and E-VERIFY

- ▶ I-9 Forms. At the time of hiring an employee, U.S. employers are required to complete and retain Form I-9. This applies to both U.S. workers and non-US workers. On the form, the employer must examine the employment eligibility and identity document(s) an employee presents to determine whether the document(s) reasonably appear to be genuine and relate to the individual and record the document information on the Form I-9. Civil penalties can be imposed for failure to comply with the I-9 requirements. I-9 Form is provided as Appendix E.
- ▶ E-Verify Took effect September 8, 2009 and requires Federal contractors, through language inserted into their Federal contracts, to agree to use E-Verify to confirm the employment eligibility of all persons they hire during a contract term, as well as their current employees who perform work under a Federal contract within the United States.

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### Questions?

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