Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 533-5800

DATE: March 10, 2016

TO: Eduardo Luna, City Auditor

FROM: City Attorney

SUBJECT: Authority to Sponsor H-1B Visa Applicant

INTRODUCTION

This Memorandum responds to your questions related the City of San Diego's (City) ability to sponsor an individual who is not a citizen of the United States for temporary employment under an H-1B visa.

QUESTIONS PRESENTED

1. May the City employ an individual who is not a citizen of the United States under an H-1B visa?

2. Who has the authority to sponsor an applicant for an H-1B visa?

SHORT ANSWERS

1. Yes. The City may employ an individual who is not a citizen of the United States if that individual is lawfully admitted to the United States for permanent residence, or is a nonimmigrant[1] alien who has the legal right to work in the United States. An H-1B visa grants a nonimmigrant alien the legal right to work in the United States.

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[1] A nonimmigrant is a person with a residence abroad that he or she does not intend to abandon, and who is coming to the United States for a temporary period, as specifically defined in categories under 8 U.S.C. § 1105(a)(15),

2. The Mayor, or his designee, has the authority to decide whether the City will sponsor an H-1B visa applicant. Sponsoring an employee for an H-1B visa is an administrative act that binds the City to specific terms and conditions of employment established by federal law. The Auditor is the appointing authority for the Office of the City Auditor (OCA), but administrative acts of the City itself fall under the authority of the Mayor.

ANALYSIS

I. THE H-1B VISA PROCESS ALLOWS AN EMPLOYER TO SPONSOR AND HIRE A NONIMMIGRANT ALIEN, IF CERTAIN CONDITIONS ARE MET.

To be eligible to work for the City, applicants for the classified or unclassified service must be: (1) citizens of the United States; (2) persons lawfully admitted to the United States for permanent residence; or (3) nonimmigrant[2] aliens who have the legal right to work in the United States under conditions authorized by the Immigration and Naturalization Service. Civil Service Rule II and Personnel Manual Index Code C-2 (II).

If a candidate for employment is not a United States citizen or lawful permanent resident, the City may sponsor the candidate for an H-1B visa. An H-1B visa permits a nonimmigrant to temporarily work in the United States for a specific employer and in a specific position. 8 U.S.C. § 1184(h). The position must qualify as a "specialty occupation" and the individual must be qualified to perform services in that specialty occupation. *Id.* A "special occupation" is expansive and is defined as a position that requires a bachelor's or higher degree and "the theoretical and practical application of a body of highly specialized knowledge." 8 U.S.C. § 1184(h)(i). To be qualified to perform services in the specialty occupation, an individual must have a baccalaureate or higher degree or its equivalent in the specialty occupation. 8 C.F.R. § 214.2(h)(ii)(B). For fiscal year 2017, the United States has capped the number of H-1B visas at 65,000.

An H-1B nonimmigrant may be admitted for a period of up to three years, and a subsequent extension may be granted for an additional three years for a total of six years. If the sponsoring employer dismisses the H-1B nonimmigrant for any reason before the end of the three year period of admission, the employer must pay the reasonable cost of the employee's transportation back to his home country. 8 C.F.R. § 214.2(h)(4)(iii)(E). Any dismissal is covered, including dismissal for cause. The only exception is when the nonimmigrant voluntarily resigns from employment. However, the employment status of an H-1B worker is "at will." The three year period of admission does not transform the employment relationship into a "for term" employment. *See Edwards v. Geisinger Clinic*, 459 Fed. Appx. 125 (3rd. Cir. 2012). H-1B visas

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Immigration and Nationality Act § 101(a)(15). An immigrant is a "lawful permanent resident" of the United States. *Id.*

[2] A nonimmigrant is a person with a residence abroad that he or she does not intend to abandon, and who is coming to the United States for a temporary period, as specifically defined in categories under 8 U.S.C. § 1105(a)(15), Immigration and Nationality Act § 101(a)(15). An immigrant is a "lawful permanent resident" of the United States. *Id.*

are job and employer specific. To change employers, an H-1B nonimmigrant must file a new application with the prospective employer. 8 U.S.C. § 1184(n)(1).

An H-1B visa requires an employer sponsor. The "employer" who sponsors an H-1B applicant is defined as "a person, firm, corporation, contractor, or other association or organization in the United States that has an employment relationship with H-1B nonimmigrants. . . ." 20 C.F.R. § 655.715. The employer sponsor must obtain a certification of a Labor Condition Application (LCA) from the Department of Labor (DOL), which requires the following attestations: (1) the employer will pay a wage that is no less than the prevailing wage or the wage paid to similarly qualified workers, whichever is higher; (2) the employer will provide working conditions that will not adversely affect other similarly employed workers; (3) there is no strike or lockout in the workplace; and (4) notice of the DOL filing has been posted at the business. 20 C.F.R. §§ 655.705(c); 655.730(d). The LCA must be signed by a "representative" authorized to sign on behalf of the sponsoring employer. 20 C.F.R. § 655.730. If the DOL determines, after notice and opportunity for a hearing, that the employer violated any of these attestations or made misrepresentations on the LCA, the DOL may impose monetary penalties and a temporary bar on sponsoring future nonimmigrant petitions. 20 C.F.R. §§ 655.700-760; 655.800-855.

The City qualifies as an employer eligible to sponsor an applicant for an H-1B visa. However, as a sponsor, the City would have to comply with the terms and conditions of H-1B employment, as established by federal law.

II. SPONSORING AN APPLICANT FOR AN H-1B VISA IS AN ADMINISTRATIVE ACT WITHIN THE EXCLUSIVE PURVIEW OF THE MAYOR.

San Diego Charter (Charter) sections 265(b)(1) and 265(b)(2) provide that the Mayor is the chief executive officer of the City, who has the right, power, and duty to "give controlling direction to the administrative service of the City." Further, City administrative affairs not otherwise designated in the Charter fall within the catch-all authority provided to the Mayor in Charter section 28, which states, in part, "[i]t shall be the duty of the Manager to supervise the administration of the affairs of the City except as otherwise specifically provided in this Charter . . . ."

An act is administrative in nature if it "pursues a plan already adopted by the legislative body itself, or some power superior to it." *City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 399 (2001) (internal quotations and citations omitted). "Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body." *Id.* at 400 (internal quotations and citations omitted); *Valentine v. Town of Ross*, 39 Cal. App. 3d 954, 957-58 (1974).

Here, the decision to sponsor an applicant for an H-1B visa is an administrative act of the City: it legally binds the City to particular workplace terms and conditions set by the United States Legislature. *See* 20 CFR §§ 655.705(c); 655.730(d). The Charter does not expressly permit an

independent department head, like the City Auditor[3], to perform an administrative act of this caliber that would bind the City, as a whole. Therefore, since the Auditor's appointing authority does not permit him to authorize the administrative act of sponsoring an employee for an H-1B visa, the authority to perform this act falls within the exclusive purview of the Mayor, pursuant to Charter section 28.

CONCLUSION

The decision to sponsor an employee for an H-1B visa is an administrative act that would bind the City to specific terms and conditions of employment established by federal law. This administrative act falls within the exclusive purview of the Mayor or his designee, pursuant to Charter section 28. The Mayor, or his designee, has the exclusive authority to permit the City to sponsor an employee for an H-1B visa. The Charter does not provide an independent department head the authority to take an administrative act that would bind the City to employment terms and conditions beyond that already set by City policies.

JAN I. GOLDSMITH, CITY ATTORNEY

By /s/ Gregory J. Halsey
Gregory J. Halsey
Deputy City Attorney

GJH:sc
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cc: Honorable Mayor
Scott Chadwick, Chief Operating Officer
Hadi Dehghani, Director, Personnel Department

[3] The City Auditor is "the appointing authority of all City personnel authorized in the department through the normal annual budget and appropriations process of the City, and subject to the Civil Service provisions of this Charter." San Diego Charter § 39.2. As an appointing authority, the Auditor controls the day-to-day affairs of the Auditor's Office and has the authority to hire, fire and discipline employees in the OCA. The City Auditor reports to and is accountable to the Audit Committee. San Diego Charter § 39.2. The OCA is commonly referred to as an "independent" office because the City Auditor does not directly report to the Mayor. However, the OCA is subject to various personnel-related provisions in the San Diego City Charter, Council Policies, and Administrative Regulations, as well as the City's Equal Employment Opportunity Policy.