

The ABC's of Immigration: The H-1B Visa

by Gregory Siskind

For thousands of American employers, the H-1B visa program is the primary method for bringing in professional level foreign employees. The visa has been the subject of considerable media attention in recent years because Congress has set limits on the numbers of workers allowed in on H-1B visas.

What is an H-1B visa?

The H-1B is a nonimmigrant classification used by an alien who will be employed temporarily in a specialty occupation or as a fashion model of distinguished merit and ability.

What is a specialty occupation?

A specialty occupation requires theoretical and practical application of a body of specialized knowledge along with at least a bachelor's degree or its equivalent. For example, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts are specialty occupations.

Is there a limit on the number of H-1B aliens?

Yes. Under current law, there is an annual limit of 65,000 aliens who may be issued a visa or otherwise provided H-1B status. Under the "L—1 Visa and H—1B Visa Reform Act of 2004", beginning March 8, 2005, up to 20,000 additional H-1B slots are available to graduates of US masters degree (or higher) programs. There are some types of jobs that are exempt from the H-1B cap and these are discussed below.

The number of H-1B visas for FY2004 was reached on the very first day of the fiscal year. Petitions for positions starting on or after October 1, 2005 may be submitted up to 180 days ahead of the requested start date. In other words, applications for the next quota of H-1B visas (excluding the new 20,000 slots for graduates of US educational programs) will be accepted beginning in April 2005.

Who is actually subject to the cap?

Not every H-1B applicant is subject to the cap. Visas will still be available for applicants filing for amendments, extensions, and transfers. The cap also does not apply to applicants filing H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations. Physicians taking jobs under State 30 or federal government agency waivers based on serving underserved communities are exempt from the H-1B cap.

What are the advantages to applying for an H-1B?

One of the things that makes this visa so desirable is that, unlike many other nonimmigrant visa categories, it is a "dual intent" visa. This means that a visa will not be denied simply because an individual has intentions to become a permanent resident. The assumption is that if for some reason the permanent residency petition is denied, the person would still have the intention to return home. Thus, assuming the applicant meets all of the statutory requirements for the H-1B visa, the main reason it would be denied is if the consular officer feels there is good reason to believe the applicant will not comply with

the terms of the visa (such as having a history of failing to comply with the terms of a visa).

Another advantage to the H-1B category is that the employer does not need to demonstrate that there is a shortage of qualified US workers and, consequently, a labor certification process can be avoided. Aside from documenting that the position offered is in a specialty occupation and that the employee has the appropriate credentials for the job, the employer need only verify that the H-1B worker is being paid the prevailing wage for the work being performed and that employment of a foreign worker is not harming conditions for US workers.

How does one apply?

In an H-1B visa application, the US employer is called the petitioner and the foreign worker is called the beneficiary. After an offer of employment is made, the petition process begins. The first step is for the petitioner to ensure that the worker will be paid at least 95% of the prevailing wage paid to similarly employed workers in the geographic area where the beneficiary will be employed. The employer must also be sure that it is not paying less than the actual wage paid to its other employees with similar qualifications. The prevailing wage can be determined through a private wage survey or through a state Employment Security Agency. The benefit of relying on a state wage determination is that it cannot be challenged later by the US Department of Labor. On the other hand, state determinations are frequently not a close match to the job performed and are slow in being issued.

Once the wage information has been obtained, a Form ETA 9035 Labor Condition Application (LCA) must be submitted to the US Department of Labor. On this form, the employer must submit the wage to be paid, the prevailing wage, and must make certain attestations. The form is submitted by the web or by fax and the Department of Labor only reviews the form to make sure it is properly completed. It does not look to see whether the information is accurate and instead investigates a small percentage of cases where violations of the regulations appear to be occurring.

(For more information, see the Department of Labor's Foreign Labor Certification web page at <http://workforcesecurity.doleta.gov/foreign/>.)

The certified LCA petition is submitted to USCIS as part of the H-1B petition package. Other information that should be included in USCIS petition includes documentation of the beneficiary's qualifications, the petitioner's type of business, and the type of work the beneficiary will be performing. Each of these will be further detailed below.

Additionally, the employer must send an accompanying fee of \$130. (Prior to FY2004, employers were required to submit an additional \$1,000 fee to sponsor the H-1B worker, unless specifically exempt. This requirement sunset on October 1, 2003, but there is a possibility that the fee may be reinstated in the future.) Based on USCIS petition approval, the alien may apply for the H-1B visa, admission, or a change of nonimmigrant status.

For more information on the application process, see our H-1B flow chart at <http://www.visalaw.com/02dec1/H1B.pdf>.

What is the purpose of the LCA?

The LCA serves two related purposes: (1) ensuring that US wages are not depressed by the hiring of foreign labor and (2) that foreign workers are not exploited. On this

document, the employer makes specific representations regarding the conditions under which the foreign worker was hired and will be employed. These attestations are as follows:

- o The employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position
- o The employment of H-1B workers will not adversely effect the working conditions of US workers
- o When the LCA was filed, there was no strike, lockout or other work stoppage because of a labor dispute
- o The H-1B worker will be given a copy of the LCA, and the employer has notified the bargaining representative if the job is unionized, or if not, has posted in a conspicuous place notice that an LCA was filed.

Within one business day of filing the LCA, the employer must establish a public access file that may be viewed by any person. This file must include a copy of the LCA, a statement of the actual wage received by the H-1B worker, the prevailing wage, including its source, whether the state or a private survey is used, a memo from the employer explaining the actual wage determination, and evidence that the LCA has been filed.

In addition, the employer must keep other information that need not be made available to the public. This includes payroll data for all employees in the same occupations as the H-1B worker, a calculation of the actual wage paid the H-1B worker, the raw data behind the prevailing wage determination, documentation of any fringe benefits provided workers, and evidence that the H-1B worker has been given a copy of the LCA. Once approved, an LCA is valid for three years.

(Beginning in 1998, some new requirements were added to the LCA process. However, these requirements apply only to "H-1B dependent" employers, a concept also created in 1998. These requirements sunset on October 1, 2003, were restored in late 2004. Whether an employer is H-1B dependent depends on the following guidelines:

- o If the employer has over 50 employees, the employer is H-1B dependent if at least 15% of the workforce is comprised of H-1B visa holders
- o If the employer has 26-50 employees, the employer is H-1B dependent if it employs more than 12 H-1B workers
- o If the employer has 25 or fewer employees, the employer is H-1B dependent if it employs more than seven H-1B workers

While in most cases the new requirements apply only to H-1B dependent employers, they also apply to employers who have been found to have committed a willful failure or misrepresentation with regard to any attestation made on the LCA. If the employer is H-1B dependent, it must comply with these requirements:

- o The employer must attest (swear under oath) that it has not and will not "displace" a US worker during the period from 90 days before the H-1B petition is filed until 90 days after it has been filed.

- o The employer must attest that it has taken "good faith steps" to recruit US workers for the job, and that they have offered it to any US worker who applied that was at least as qualified as the H-1B nonimmigrant.)

What is the next action after filing the LCA?

Obtaining an LCA is only the first step in the H-1B process. The application for an H-1B visa must present evidence that will convince USCIS of three basic truths:

- o The employer has a legitimate need for a "specialty occupation worker"
- o The position offered is in a "specialty occupation"
- o The prospective employee is qualified for the position.

1. The employer's need

This is often the easiest aspect of an H-1B petition to demonstrate. As a general rule large and well-known businesses do not have much difficulty in showing they have a need for an H-1B worker. Problems can be encountered if the employer is small, or if the business was recently started. In such cases USCIS has requested evidence relating to the stability of the business, such as tax returns and payroll records. Court decisions have, in the past, said USCIS is not supposed to examine the financial background of a company. However, USCIS routinely asks for such documentation even for many large employers.

2. The nature of the position

Demonstrating that a position is in a specialty occupation is quite easy with some jobs, such as lawyers, accountants, engineers and professors. With many positions, however, it is not so simple. In these situations, the application must carefully define and describe the job. Two volumes published by the Department of Labor are helpful in this area. They are the Dictionary of Occupational Titles and the Occupational Outlook Handbook. The Dictionary of Occupational Titles contains a list of job titles and lists job duties that are associated with each. The Occupational Outlook Handbook lists general educational requirements for entry into certain areas of employment, but often it deals with such broad fields that it is of limited usefulness. While the books are helpful in documenting a case, neither is binding on USCIS and the use of the publication should always be used with caution. Also, the O*Net database provided by the Department of Labor provides helpful information in documenting a position is a specialty occupation.

In cases where the specialty nature of the position is not evident, many types of evidence may be used. Trade and association publications may be presented. Petitioners may also procure affidavits from authorities in the field. Such an affidavit would be especially useful if written by someone who has personally observed the workplace and the position's role in it. One of the best types of evidence is the employer's own hiring practice in hiring for the position. Evidence of the minimum qualifications required for positions below that for which an H-1B worker is sought can also be helpful, especially if such people are required to have a university degree.

If the occupation is little known or is relatively new, extensive documentation will be required to convince USCIS of the need for an H-1B worker. In these cases appropriate evidence would include affidavits from other employers in the field and professional

organizations in the field.

3. The alien's qualifications

To qualify as a specialty occupation, the position must require at least a bachelor's degree or its equivalent. Therefore, one of the most important parts of an H-1B case is documenting the alien's education and/or experience. A diploma may be submitted if it indicates the alien's field of study and that field is relevant to the position sought. If this is not the case, transcripts should also be submitted. If the relevance of the subjects studied is not apparent, course descriptions from the school catalog may be included. If the alien did not attend school in the US, their degree must be evaluated by a credentials evaluation service to ensure it is at least equal to a US bachelor's degree. Note that if the alien attended college abroad, and then obtained an advanced degree in the US, no evaluation of their undergraduate degree is required because it is presumed that the US graduate institution would not have admitted the student without at least possessing the equivalent of a bachelor's degree.

While possession of a degree is the most common way of establishing a person's ability to work in a specialty occupation, a degree is not required to obtain an H-1B visa. The applicant can demonstrate through work experience or a combination of education and experience that they have the equivalent of a bachelor's degree. If work experience will be used, USCIS requires affidavits from former employers outlining the alien's responsibilities and skills learned while there. Under USCIS rules, three years of work experience is equal to one year in college.

If there are any additional requirements that the alien must meet to take the position offered, documentation that these requirements are met must be submitted. An example would be when a license is required by the state in which the alien will be working.

How long can an alien be in H-1B status?

Under current law, an alien can be in H-1B status for a maximum period of six years at a time. After this time, an alien must remain outside the United States for one year before another H-1B petition can be approved. Certain aliens working on Defense Department projects may remain in H-1B status for 10 years. Additionally, certain aliens may extend their status beyond the 6-year period in one year increments if:

- o 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or
- o 365 days or more have passed since the filing of an EB immigrant petition.

For whom can an H-1B non-immigrant work?

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

H-1B employees may apply for a change of status from one employer to another. The application process is fairly similar to applying for a brand new H-1B except that the process can be completed in the US without a trip abroad to a US consulate.

How does an H-1B non-immigrant change or add an employer?

One of the easiest ways for an H-1B visa holder to run into trouble with his or her visa status is to fail to comply with immigration regulations when switching employers or changing the terms of his or her employment.

The most difficult problems are often created when someone changes jobs without taking care of immigration issues. In fields like computer programming or physical therapy, it is not unusual for an individual to move frequently from employer to employer. But for an H-1B visa holder, each change can present challenges.

The first basic rule to note is that an H-1B is employer specific. In other words, it is only valid for the petitioning employer and only entitles the recipient to work for the employer approved by USCIS. That means that each time a worker moves to a new employer, a new H-1B approval is required. It is possible to apply for a change of status to switch employers from the US without having to leave and get a new visa stamp, however. But it is important to remember that the process involved will be pretty similar to getting an H-1B visa from scratch.

At one time, it was thought that changing H-1B employers meant that a new visa stamp would be needed the next time someone leaves and reenters after a change of status in the US. USCIS and the State Department now make it clear that as long as the visa remains unexpired the applicant remains in H-1B classification. Note that someone who changed from another visa to H-1B status in the US (such as from F-1 to H-1B) and never has had a visa stamp will still need to get an H-1B visa at a consulate.

What is 'H-1B Portability'?

In October 2000, former President Clinton signed the American Competitiveness in the Twenty-First Century Act (AC21). One of the most sought after provisions in AC21 is the "portability" provision, which eases the process of changing jobs. Under it, H-1B workers can begin working for a new employer as soon as the new employer files an H-1B petition for the worker. In the past, the worker had to wait for the petition to be approved before he could begin working for the new employer. Because this provision applies to petitions for new employment filed before or after the enactment of AC21, workers for whom a new petition was filed can begin work for the new employer immediately.

The primary limitation on this portability provision is that the new employer must have filed a "non-frivolous" petition, which is one with some basis in law and fact. To take advantage of the portability provision, the worker must be in the US pursuant to a lawful admission, and must not have engaged in unauthorized employment since that admission.

The portability provision has created concern among employers about how they will comply with I-9 requirements, which obligate employers to ensure that all employees are legally authorized to work in the US. While the worker who begins working for a new employer after the filing of a new petition is work authorized, the I-9 form contains no provision for such a situation. Employers in this situation should follow current documentation procedures, as well as keeping a copy of the worker's I-94 and a copy of the receipt notice for the new H-1B petition.

How does the H-1B cap affect an immigrant who requests a change in employers?

USCIS has stated that the limit on the number of H-1B visas does not apply in this situation. However, if one leaves an employer and waits more than 30 days to apply for a

new H-1B visa, the cap would apply again. Also, if one works for a cap-exempt employer and then switches to an employer that is not exempt from the cap, the cap will apply.

In the case of a concurrent filing of an H-1B application where a person is working for an exempt employer and then seeks additional employment with a non-exempt employer, the cap will not apply to the second position.

What if you change employers and then decide to go back to the first employer?

The news here is good. The H-1B petition continues to remain valid until it expires or until the employer has it revoked. USCIS takes the position that if neither of the above has occurred, one can resume work for the first employer without filing a new petition or an amendment.

What if several employers file H-1Bs for the same worker?

Let's say that two employers successfully file an H-1B and the worker enters to work for Company 1. After coming here, the worker decides to go work for Company 2 instead. Even if the worker never worked before for Company 2, the worker can switch to Company 2 without the need for a new petition. As noted above, a revocation of the petition by Company 2 or the expiration of the visa approval period for Company 2 would mean a new petition is required.

What about the case where an employee accepts a job with a second employer without giving up the first position?

There is no legal reason why this cannot take place. An H-1B worker can work for several employers simultaneously if desired. However, each employer must have a separate approval for the worker to work there. Also, USCIS does not recognize "co-employer" arrangements, so if this is the case either one employer must designate itself as the petitioner, or each employer must file a separate petition.

There are many times when a change in the nature of one's employment will trigger the need to file either an amendment to an H-1B petition or a completely new petition. USCIS position is that if the change in employment is "material" then an amendment must be filed. So, for example, if there is a significant change in job duties, then a new petition will probably be necessary. Also, being transferred to a different legal entity within the same corporation would trigger an amendment. Also, in certain cases, changing job locations could require an amendment.

Mere changes in job titles without a serious change in job duties will probably not require an amendment. The same holds true for raises in salary unless the change is so great that USCIS presumes that the position is really a new one.

Note that changes in the corporate structure of a company could mean that a new H-1B petition must be filed. The general rule is that if a new legal entity is created, a new petition is required. This would be the case, for example, if a company is sold and the new company dissolves the old company without assuming its liabilities. A merger that results in the creation of a new company might also mean that new petitions should be filed. If the new company is what in corporate law is called a "successor in interest" then a new petition is normally not necessary. Changes in a company's name will not trigger the need for an amendment or to refile, but an amendment is useful in order to avoid confusion when the worker reenters the country later on.

Must an H-1B alien be working at all times?

As long as the employer/employee relationship exists, an H-1B alien is still in status. An H-1B alien may work in full or part-time employment and remain in status. An H-1B alien may also be on vacation, sick/maternity/paternity leave, on strike, or otherwise inactive without affecting his or her status.

Can an H-1B alien travel outside the US?

Yes. An immigrant with H-1B status may reenter the US during the validity period of the visa and approved petition.

What are the filing fees associated with an H-1B visa?

There are four government filing fees that come up in H-1B cases. First, the base filing fee for an H-1B case is applicable in every case. As of publication of this article, that fee is \$185.

In late 2004, Congress passed legislation restoring a worker retraining fee. The previously applicable worker retraining fee was reinstated and increased from \$1000 to \$1500. Employers with less than 25 full-time equivalent employees in the US (including employees of affiliates and subsidiaries pay \$750. Previously exempt employers will continue to be exempt from the fee.

The following categories of employers and employees are exempt from the H-1B retraining fee:

- o The employer is an *institution of higher education* as defined in the Higher Education Act of 1965; or
- o The employer is a *nonprofit organization or entity related to, or affiliated with an institution of higher education.*; or
- o The employer is a *nonprofit research organization or governmental research organization*, that is primarily engaged in basic research and/or applied research; or
- o This petition is the second or subsequent request for an extension of stay filed by the employer regardless of when the first extension of stay was filed or whether the \$1,000 filing fee was paid on the initial petition or the first extension of stay; This petition is an amended petition that does not contain any requests for extension of stay filed by the employer; or
- o This petition is to correct an Immigration and Naturalization Service error; or
- o The employer is a primary or secondary education institute; or
- o The employer is a nonprofit entity which engages in an established curriculum-related clinical training or students register at the institution.

Applicants seeking faster processing can pay a \$1000 premium processing fee to be guaranteed an answer within 15 days.

Finally, on March 8, 2005, a new \$500 fraud prevention and detection fee will come into force.

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