

## **XI. H-1B VISA/STATUS – SPECIALTY OCCUPATIONS**

The H-1B is arguably the most popular and sought after U.S. work visa. The H-1B program is designed to allow U.S. employers to hire foreign nationals to fill highly specialized positions within the U.S. workforce. These positions, in “specialty occupations,” require the foreign national employee to have both theoretical and technical expertise in their field of expertise.

The regulations also provide for a cap on H-1B applications every year. Up to 6,800 visas are set aside from the cap of 65,000 during each fiscal year for the H-1B1 program for Chile and Singapore under Free Trade Agreements between these countries and the United States.

Therefore, 58,200 new H-1B numbers are available each for each fiscal year. The fiscal year for U.S. Citizenship and Immigration Services (USCIS) starts on the first day of October of each year. H-1B petition can be filed 6 months in advance of the requested effective date, April 1. As its demand is much higher compared to the availability, employers should start contacting the attorney/s three to four months in advance of April 1 to be sure that the petitions are prepared on time and filed on the 1st of April. Because it is oversubscribed, petitions were selected by a lottery.

To apply the first challenge the foreign national has to overcome is to find and secure an H-1B Sponsorship Employment Offer from a U.S. employer. After he or she has done this, the application process can begin. In a nutshell, here is the process:

**STEP ONE -- Offer & Acceptance of H-1B Employment.** H-1B Sponsoring Company files a petition on your behalf. An employer can be an individual, partnership or corporation. Applications are "job specific." If your situation changes (for example, you lose your job or change locations), your new employer must file a new H-1B visa petition. The visa is only valid for work with the employer that filed the original petition.

**STEP TWO -- The 'Prevailing Wage' and Actual Wage Must be Determined and Compared.** The H-1B sponsoring company is required to pay the higher of the two. The prevailing wage is determined by the State Employment Security Agency by completing a special form, which asks the employer for the responsibilities, skills and experience needed for the job. The actual wage is determined by comparing other workers in the same positions with the same level of experience.

**STEP THREE -- File the Labor Certification Application (LCA).** This is a form that contains information about the H-1B Sponsoring Company. By completing and signing the form, the sponsor company is agreeing to pay the higher of the two wages, that the employment of this individual will not adversely affect the conditions of other workers and that there is no strike for their occupation at the workplace.

**STEP FOUR --** When the LCA is approved, the Department of Labor (DOL) will return a Certified Copy to the H-1B Sponsoring Company.

**STEP FIVE --** The Sponsor Company Must Post Notices at Two Conspicuous Places at their Business Of the H-1B Visa Filing for 10 Days or Provide Notice of the Filing To the Collective Bargaining Representative for their Employees.

**STEP SIX – H-1B Petition Assembled & Filed with Appropriate USCIS Service Office.** The filing must include the required forms, fees, documents and information; form I-129, education & experience evaluation & documents, training certificates, professional memberships, resume, employment agreement and letter of support.

**STEP SEVEN --** Wait for the H-1B Petition to be processed. Processing times vary depending upon service center and the visa. It could be a few months wait. If the H-1B employer can show a substantial need for the employee, USCIS might approve the petition sooner. Employment cannot begin, however, until USCIS has issued the appropriate visa.

**STEP EIGHT --** Receipt issued by USCIS. The petitioner (sponsoring company) is sent a receipt by the USCIS Service Centre which bears a 9 digit reference number pertaining only to that particular case, H-1B processing times and general information about the petitioner and foreign worker. This is the petitioner's first confirmation that the petition is in the adjudicating queue.

**STEP NINE --** A notice is generated by the prospective employer and mailed to the applicant notifying him/her of this receipt and outlining information on processing times etc. The notice should warn the consultant not to resign from current employment, sell accommodation or make any major life changes until it is communicated that the H-1B visa petition has been approved.

**STEP TEN -- Petition Approval.** An approval notice (Form I-797) is issued to the petitioner. The Form I-797 shows dates of validity for the foreign worker to work in H-1B status for the petitioner.

**IF THE VISA IS APPROVED,** H-1B status can be granted for up to three years. While the specialty occupation continues and the company continues to be capable of paying prevailing wage, it can be extended up to a maximum of six years. As by law, the maximum duration of stay in any H status is six years. But there are some limited exceptions which allow an H-1B worker to extend his or her status past the six-year maximum. If the foreign national's work in the U.S. is seasonal or intermittent in nature, or if he or she has spent six months or less per year in the U.S., then the six year limit does not apply. Foreign workers can apply for one year incremental extensions of H-1B visa/status if he or she remained in status and had a labor certification or I-140 pending for a year or more. Also, H-1B status can be extended by three years if his or her employee has an I-140 approved on his or her behalf.

Also, note that spouses and children (below 21 years old and not married) are eligible to obtain H-4, which is a derivative status. They are allowed to accompany the H-1B Specialty Occupation worker and remain in the United States. Individuals with H-4 status may also attend schools.

NOW, what if the foreign national does not obtain H-1B status due to the quota? Big problem. However, not all H-1B non-immigrants are subject to this annual cap. One notable exemption is one having a U.S. Master's Degree. Under the law the first 20,000 H-1B petitions that are filed on behalf of foreign nationals that have earned an advanced degree from a U.S. institution of higher education are exempt from the H-1B quota. **Note:** this exemption is only available to those foreign nationals who have earned a Master's or higher graduate degree from a U.S. institution of higher education. It does **not** include foreign graduate degrees.

There are two other classes of exemptions we should take note of. Consider H-1B cap exempt petitioners. The H-1B cap does not apply to certain applicants filing for H-1B visas through institutions of higher education, nonprofit research organizations, and government research organizations. Now consider a class known as H-1B cap exempt beneficiaries. Even after the H-1B cap is reached, visas will still be available for applicants filing for amendments, extensions, and transfers, unless they are transferring from an exempt employer or exempt position and were not counted toward the cap previously; i.e., if you have been counted once you will not be counted a second time. Accordingly, U.S. Citizenship and Immigration Services (“USCIS”) will continue to process petitions filed to: (a) extend the amount of time a current H-1B worker may remain in the United States; (b) change the terms of employment for current H-1B workers; (c) allow current H-1B workers to change employers. Note: it does not include workers who currently hold H-1B status in a cap-exempt job, such as a faculty or researchers at a university or government research institution, or physicians at teaching hospitals; (d) the H-1B cap exemption also applied to workers who are currently outside the U.S., as long as they held an H-1B visa status during the past six years, have not exhausted the full six years, and have not spent a full year outside the U.S.

To find out more about the procedural steps involved and an estimate of fees, call or email us today for your free in-depth consultation!