

# The H-1B Temporary Worker Visa

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## General Description

The H-1B visa is the primary visa used by United States employers to hire foreign nationals. Congress has placed a limit of 58,200 new H-1B visas and changes of status to H-1B visa status that can be approved during any fiscal year (running from October 1 to September 30). In addition, 20,000 additional new H-1B visas are available each year specifically to persons with Master's degrees or higher from United States educational institutions, non-profit organization and government agencies and 6,200 additional H-1B visas are available each year to nationals of Chile and Singapore. It is important to note that if a foreign national already has an H-1B status or had it in the past and since then has not been outside of the United States for more than 1 year, then an extension of H-1B visa status or a transfer from one H-1B employer to another does not count against the H-1B cap.

As noted above, a new batch of H-1B visas becomes available on October 1<sup>st</sup> of every year. Those visas may be applied for as early as April 1<sup>st</sup> of the year. Recently, the maximum number of new H-1B visas has not been reached for several months into the new fiscal year. Prior to 2009, however, the number of new filings exceeded these annual limitations within a matter of weeks. Once the USCIS determined that it had more than enough cases for the remaining H-1B visas available, it selected cases that would be processed for the H-1B by a lottery system.

This uncertainty from year to year with respect to the availability of new H-1B visas and the exact date on which the USCIS will run out of visas, means that employers seeking to hire first-time H-1B foreign nationals have a limited window of opportunity around April of each year and possibly extending into the Spring to obtain these employees. Accordingly, employers hiring foreign nationals who are not already in H-1B status (and thus exempt from the H-1B cap) need to plan their hiring needs carefully around the availability of H-1B visas under the cap.

## Basic Requirements of the H-1B Program

- A. The foreign national must be coming to the United States temporarily in order to perform services in a "specialty occupation". A specialty occupation is one (i) that requires a theoretical and practical application of a body of highly specialized knowledge and (ii) for which the minimum credential for entry into the occupation is the attainment of a bachelor's or higher degree or its equivalent in the field of specialization.
  1. The foreign national must hold at least the equivalent of a bachelor's degree in a field of specialization relevant to the occupation.
    - a. If the foreign national has a foreign degree or degrees, these must be evaluated to determine whether they are the equivalent to a United States bachelor's degree or higher.

- b. If the foreign national has no formal education or his or her degrees do not add up to a bachelor's degree, then progressively responsible experience in the particular occupation can be used in place of formal education. The USCIS regulations provide that a foreign national needs to show three years of progressively responsible experience for every one year that he or she lacks towards a bachelor's degree.
- 2. The prospective employer must show that it has sufficient resources to employ the foreign national at a prevailing wage.
  - a. New offices, start-up companies and marginally performing enterprises sometimes have trouble establishing that they are likely to be able to employ the foreign national on the terms specified in the H-1B visa petition.
- 3. The prospective employer must show that it will employ the foreign national at a prevailing wage and at prevailing working conditions.
  - a. The employer must affirmatively establish that its salary equals or exceeds the "prevailing wage" for the occupation.
    - i The prevailing wage is the median wage for an occupation in a particular geographic area.
    - ii The employer can establish a prevailing wage by: (i) relying on a US Department of Labor database of prevailing wages for all occupations in all geographic locations; or (ii) relying on alternative wage surveys that meet a number of requirements.

### The H-1B Process

- A. Once the foreign national's eligibility for the H-1B visa is established the first step in the H-1B process is for the employer to establish that it will be paying the foreign national at a rate that equals or exceeds the prevailing wage for the occupation (see discussion above)
- B. Once prevailing wage has been established, the employer must prepare a Labor Condition Application which (i) sets forth the prevailing wage for the position and the source of the prevailing wage, (ii) certifies that the employer will pay at least the wage offered (which equals or exceeds the prevailing wage) and (iii) certifies that the employer will employ the foreign national at prevailing working conditions.
  - 1. The Labor Condition Application must be posted at the employer's workplace where its other employees will see it for 10 consecutive days and must be filed electronically with the United States Department of Labor. If properly completed, the Labor Condition Application will be certified by the Department of Labor within three to five days.
- C. Once the Labor Condition Application has been certified, the employer can then file an H-1B visa petition on Form I-129 on behalf of the employee accompanied by documentation of the financial viability of the employer and the credentials of the foreign national with the appropriate Service Center of the USCIS.

- D. If the H-1B visa petition is approved, the foreign national will be provided with a copy of the approval notice which he or she will then use to apply for an H-1B visa at a United States Consulate abroad. Alternatively, if the foreign national is in the United States in another visa status (for instance F-1 student) and is eligible for a change of status, the H-1B visa petition can be accompanied by an application to change the foreign nationals' nonimmigrant visa status to H-1B status.

### **Period of Admission**

The H-1B visa petition can be approved for an initial three-year period and then renewed for a final three years. At the end of six years, the foreign national must leave the United States and reside abroad for one full year before he or she can return to the United States in valid H-1B. There is an exception to this limitation in a case in which a Green Card case is pending and was either commenced more than one year prior to the end of the 6th year or has reached a specific stage in the Green Card process – in either case, the H-1B status of a foreign national can be extended beyond the six year limitation until their application for adjustment of status is approved.

### **The H-1B Portability Rule**

The approval of an H-1B visa petition and a foreign national's H-1B visa status is tied to his or her continuing employment with the sponsoring employer. In the event that a foreign national who is in the United States in H-1B visa status wishes to switch to another employer, the second employer must go through the H-1B visa petition process discussed above. Under the H-1B portability rule, however, the foreign national may switch his or her employment to the new employer once the USCIS has accepted the new H-1B visa petition for processing – i.e., the new employer need not wait for the USCIS to approve the new H-1B case before beginning to employ the foreign national.

### **Miscellaneous Rules**

- A. The spouse and minor children of a foreign national who has had an H-1B visa petition approved on his behalf may apply for a derivative H-4 visa which permit them to remain in the United States while the foreign national remains in valid H-1B visa status. H-4 visa status entitles the spouse and children to attend school but not to work.
- B. Approval of the H-1B visa petition and visa status is tied to employment with the sponsoring employer. When that employment ends for any reason, the validity of the H-1B visa status of the foreign national ends as well.
- C. If a foreign national's employment is terminated by the employer, the employer is required to pay for the transportation costs of returning the foreign national to his or her country of nationality. In addition, the employer must provide written notification to the CIS of the termination.
- D. The USCIS filing fee for an H-1B case is \$2,325 (\$1,575 if the employer has 25 or fewer employees). The employer may pay an additional filing fee of \$1,000 in order to get expedited processing of the H-1B case within 2 weeks as opposed to the customary 3-4 months.

### **For more information...**

Should you have any questions concerning the H-1B Temporary Worker Visa, please contact:

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