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### H-1B Non-immigrant Work Visa

Foreign nationals who wish to work in the United States typically apply for H-1B non-immigrant work authorization from the United States Citizenship and Immigration Service (“USCIS”).

#### 1. “Specialty Occupation”

The H-1B enables the foreign national to work in a “specialty occupation” in the United States for up to six years. During the 6 year period, the foreign national can work with one employer or with a combination of employers. A “specialty occupation” is a position that requires at least a Bachelor’s degree (or the equivalent) in a specialty area, and the foreign national must have the specialized degree. So, for example, an architecture position requiring a degree in architecture would be an appropriate “specialty occupation”. A civil engineering position requiring a degree in engineering would also qualify. Other types of positions that are usually appropriate for H-1B visas include positions in finance, accounting, computer science and the hard sciences. The threshold question is whether the position requires the theoretical knowledge gained from bachelor’s level studies in a particular field, and whether the beneficiary has the required bachelor’s degree (or the equivalent). Positions that are “generalist” positions, such as sales jobs, data entry or simple computer programming positions, and administrative positions are often not eligible for H-1B work authorization. If the employer requires a Bachelor’s degree but **any** degree is acceptable (for example, a degree in liberal arts or a degree in business administration [without a particular major, such as finance or marketing], then the position is typically not appropriate for H-1B classification.

#### 2. Labor Condition Attestation

The H-1B petition is filed by the **employer** (not the employee). As part of the H-1B application process, the employer must submit a Labor Condition Attestation (LCA) to the Department of Labor (Form ETA 9035). The LCA contains a number of important employer attestations. They are the following:

- The employer will pay the foreign national employee the “actual wage” or the “prevailing wage” for the position, whichever is higher. The “actual wage” is the wage set by the employer for the position for employees with similar experience and skills. Usually, the “prevailing wage” is a figure provided by the state workforce agency, which it obtains from a Department of Labor database available on the internet at <http://flcdatabcenter.com> (although other prevailing wage sources are also be available). Again, the employer must agree to pay the higher of the two wages.

- The employer must affirm that employing the foreign national will not adversely affect the working conditions of other similarly employed workers. So, for example, it would not be permissible for an employer to hire foreign national employees without paid vacation and health insurance in order to justify a decision to not offer those benefits to US workers.
- The employer must inform the Department of Labor of any strikes, lockouts, or work stoppages if any of these develop after the Labor Condition Application is filed with the Department of Labor.
- The employer must provide notice of the LCA to its employees through posting the LCA on the premises for at least ten business days. The posting must be done in two different conspicuous locations.
- The employer must create a “public access file” which can be available for public inspection. The file must contain documentation showing that the employer is complying with the aforementioned requirements.

Employers who are considered to be H-1B dependent employers have additional requirements to those set forth above. Employers are considered to be H-1B dependent if they have less than 25 workers and more than 7 H-1B workers; between 26 to 50 workers and more than 12 H-1b workers; or more than 50 workers with 15% or more of them being H-1B foreign nationals. H-1B dependent employer must fulfill 2 additional requirements.

### **3. Filing Fees**

The filing fees for H-1B professionals are substantial. The employer is required to pay a \$1,500 training fee to the USCIS (this must be paid by the employer without reimbursement by the employee). There is an additional Anti-Fraud fee of \$500 (which in most cases can be paid by either the employer or the employee), and there is a \$190 basic filing fee for the petition. The Department of Labor, the agency that controls the prevailing wage requirement, takes the position that if payment of the legal fees and filing fees reduces the employee’s real salary to below the prevailing wage, then the employer should pay for all legal fees and all filing fees. While there is litigation in this regard, it is an important consideration for employers.

### **4. Termination of the employment relationship**

In the event the employer terminates the employee relationship before the end of the requested period of work authorization, then the employer must also agree to pay for a return plane ticket for the H-1B worker to their country of origin (assuming the H-1B employee does not quit or accept employment with another US employer in lieu of returning home).

### **5. H-1B numerical quota**

While university employees and affiliated entities are **not** subject to any numerical quotas (they are “cap exempt employers), the USCIS only issues 85,000 **new** H-1B’s in any year to “non-cap exempt” employers. Sometimes an employer will hire a foreign national employee who has work authorization pursuant to his or her student status in the United States. Typically, student work authorization (called “optional practical training” or “OPT”) is only valid for 12 months, and the employer must file an H-1B petition if a longer period of employment is desirable. Because the USCIS has run out of new H-1B visas early in the government’s fiscal year, the employer usually needs to file an H-1B petition for the foreign national employee well in advance of the work authorization expiration date in order to obtain one of the limited number of new H-1B visas. Timing can vary in any particular case, but non-university employers generally will need to file as close to **April 1st** as possible for an H-1B visa, which will have an **October 1st** start date (the government’s fiscal begins on October 1). Please note that the H-1B quota or “cap” **does not** apply to individuals **already** in H-1B status (for example, a employee needing an H-1B extension or where the H-1B visa holder is changing employers is not subject to the cap--unless the employee is moving from a university or other “cap exempt” employer to private industry).

## **6. When can the employee begin working?**

Because H-1B work authorization is employer specific, any time an H-1B visa holder changes employers, a new petition must be filed. If the individual is not presently in H-1B status with another employer, then the new employer’s petition must be **approved** before the individual can start working pursuant to H-1B status. Normal processing times are typically between 2-5 months, depending on USCIS workload. The USCIS will “premium process” a case in 15 calendar days for an additional \$1,000 filing fee, and this may be advisable for individuals who are changing to H-1B status and need to have their case approved before they can commence new employment. If an individual is already in H-1B status with another employer, the individual can start working when the new employer **files** the petition with the USCIS, (i.e. the individual does not have to wait for the approval in order to start working for a new employer when filing a “change of employer” petition). Sometimes individuals may be hired who are outside the United States. Those individuals must receive the H-1B approval and then secure an appointment at a US consulate abroad before they will be allowed to enter the United States in H-1B status. For individuals hired from abroad, employers can expect significant wait times (2-5 months for the petition approval, followed by 1-4 months for consular processing). Premium process is available in all cases which can reduce the wait time for the approval.

*(Note: this handout is intended to provide a high level overview of the H-1B requirements. It does not provide an exhaustive review of the H-1B process nor does it include all information that may be relevant to a particular H-1B employee. For additional information, please contact our office or another attorney specializing in immigration matters).*