H-1B Visa Petition Process: General Legal Information
Cap Subject Petitions

Summary

The H-1B is a temporary United States work status, valid for an initial period of up to three-years. It may be extended to a maximum of six years, with limited exceptions. To qualify, a foreign national must seek to perform services in a "specialty occupation" for a U.S. employer. "Specialty occupation" is generally defined as one that requires the attainment of at least a bachelor's degree in a specific field (or its equivalent), as a minimum requirement for entry into that occupation. For those candidates who do not have an actual university degree, they may be able to demonstrate degree equivalence.

H-1B employment authorization is tied specifically to the sponsoring employer. The employer is called the Petitioner, and the foreign national employee is the Beneficiary of the visa petition. H-1B employment authorization is only valid for the specific petitioning entity, defined by its Federal Employment Identification Number (FEIN) assigned by IRS. The employee may not be transferred to an affiliated company with a different FEIN without filing a successor H-1B petition by the affiliated company. This is the case even if there is no change in the position or worksite.

Pre-Registration

On December 6, 2019, U.S. Citizenship and Immigration Services (USCIS) announced a Pre-registration requirement for employers seeking to file H-1B cap subject petitions. Employers will be required to first electronically register and pay the associated $10 H-1B registration fee before filing a petition for the fiscal year 2021 H-1B cap.

USCIS will open an initial registration period from March 1 through March 20, 2020.

During this initial registration period, prospective petitioners or their authorized representatives must electronically submit a separate registration naming each alien for whom they seek to file an H-1B cap-subject petition.

Luck-based Selection Lottery

If a sufficient number of registrations are received, USCIS will randomly select the number of registrations projected as needed to reach the H-1B numerical allocations after the initial registration period closes and no later than March 31, 2020.

Prospective petitioners with selected registrations will be eligible to file a cap-subject petition only for the alien named in the registration.

For applications filed in 2020, the agency will not consider a cap-subject petition properly filed unless it is based on a valid registration selection for the same beneficiary. Additionally, although

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petitioners can register multiple aliens during a single online submission, duplicate registrations for the same beneficiary in the same fiscal year will be discarded.

In the past few years, the annual quota of 85,000 new H-1B visas was exhausted by the end of the filing window. The annual quota includes 20,000 set aside for foreign workers who have completed a Masters degree at a U.S. non-profit university.

Premium Processing

Each year, the USCIS determines if Premium Processing will be available to H-1B cap filings.

When available, many employers file H-1B Cap petitions with Premium Processing, which assures that USCIS will act on the petition within 15 days. This can take the form of a decision or a request for additional evidence. The filing fee for Premium Processing is $1,440.

Main Factors Affecting Approval

Obtaining a new H-1B visa petition approval is somewhat predictable, based on several factors. But such approval is never assured, given the federal government's anti-immigrant attitude and the current state of affairs at USCIS. A filing that is selected but not approved will not receive a refund of fees from USCIS nor the law firm. We try to make a fair assessment of the odds of approval in advance of taking on the representation.

The main factors affecting approval are:

- **The position offered.** Does the position require someone with at least a bachelor's degree in a specific field? For example, even if someone has a PhD, that person would not qualify for an H-1B visa for work as a waiter. Similarly, a position that requires a general liberal arts degree or any degree without a specific field of study would also likely be challenged by USCIS as not a "specialty occupation." USCIS is now challenging even mainstream occupations clearly requiring a degree, including Computer Systems Analysts, Market Research Analysts, QA Engineers and others, claiming they are not "specialty occupations."

- **The person.** Does the H-1B beneficiary have a degree (or equivalent) which closely matches the company's requirements and specific position offered? This has been an area of contention. USCIS has been requiring occupation-specific majors, while the law clearly supports the granting of visas to applicants with degrees in multiple disciplines, as long as it reasonably qualifies the applicant to perform the work. For example, occupation-specific degrees are required in law or medicine. But for marketing or IT positions, there are usually a number of academic disciplines which are acceptable by employers. The key to determining eligibility often lies in a review of the academic transcripts to be sure that the coursework completed has prepared the beneficiary to perform the day-to-day tasks of the position.

- **The company.** Is the company financially viable and of a sufficient size and complexity to justify hiring the H-1B candidate? Factors considered by USCIS include the company's stage of development, organizational complexity, ability to pay the required wage, current number of employees, gross income, and funding. Evidence provided to document company operations varies widely.

H-1B Employer Obligations

- **"At will" employment permitted.** There is no requirement that an H-1B employee be retained through the validity period of H-1B status. " At will" employment is permitted.

- **Shortage of American workers is not required.** H-1B petitions do not require a test of the US labor market. Recruitment and disqualification of US workers is not required.

- **Protect wages in the region.** Employers must pay every H-1B worker a wage that is 100% of the Prevailing Wage, as determined by the DOL Department of Labor's federal salary survey. The Prevailing Wage is determined by the geographic location of the worksite and the DOL occupation that best matches the position. Private salary surveys can be used in limited circumstances.

- **Protect wages in the workplace.** Employers must pay every H-1B worker the same wage paid to other employees in the same position, with normal variability for experience, merit, skills, etc. This wage is referred to as the "Actual Wage."

- **Post the proposed salary.** Employers must post the prospective salary or the salary range for an H-1B position for 10 days at the worksite in two conspicuous locations.

- **Protect working conditions.** Employers cannot use H-1B workers to break a strike, and they must notify their U.S. workforce of the hiring of H-1B professionals, via posting.

- **Provide benefits equally.** Employers must provide benefits to H-1B employees in the same manner as provided to similar U.S. workers.

- **File a Labor Condition Application (LCA).** Employers must file a Labor Condition Application with the DOL attesting to the payment of the Prevailing Wage and the no-strike use of H-1B employees.

- **Pay the employee during benching.** Employers who "bench" employees during non-productive status must continue to pay full salary and benefits, as attested on the Labor Condition Application. Employers may not cease paying the H-1B worker the required salary based on an employer's circumstance, such as lack of work.

- **Be subject to penalties for failures.** Failure to comply with DOL regulations could result in civil penalties, a requirement to pay back wages, and even debarment from participating in key immigration programs. Audits are performed by US immigration authorities randomly or if notified of an issue by a complaint.

- **No discrimination in hiring.** The employer may decline employing any worker who is not legally eligible to work. Written offers should be contingent upon proof of eligibility to work for any employer in the U.S. If a candidate requests sponsorship for H-1B status, the company can decide to sponsor or not.

- **Return transportation.** If an employer terminates an H-1B employee before the end of that employee's period of authorized stay, the employer is liable for the "reasonable costs" of return transportation for the employee to his or her last country of residence. The employer's liability is limited to the reasonable cost of physically returning the H-1B employee, and does not extend to the cost of relocating family members or property.

- **Withdrawal of H-1B after termination.** Regulations require an H-1B employer to notify USCIS of "any material changes in the terms and conditions of employment" affecting an H-1B employee. USCIS policy is that a termination is such a "material change." Employers may satisfy this notification obligation by sending a letter explaining the change or termination to the USCIS office that approved the petition.

H-1B Employee Obligations

- **Inform Lawyer of Travel.** An employee who will be traveling in H-1B status should inform E&M Mayock in advance to make sure that all paperwork is in order and to ensure that H-1B status is still valid. He/she may need to set up an appointment at a US Embassy or Consulate abroad before returning to secure a visa.

- **Resignation from H-1B employment is allowed.** An employee may quit his/her employment in H-1B status at any time. He/she may be subject to contractual terms made specifically with the employer, outside the scope of the H-1B visa.

- **Lay-offs and leaving the U.S.** An employee who leaves his or her H-1B position, through voluntary or involuntary termination, is provided a 60-day grace period to find a new employer or leave the US. Employment is not authorized during this grace period.

Key Personnel and Agencies in the H-1B Process and Their Roles

- **Employer and Employee Dual Representation.** A dual attorney / client representation is created in the preparation of an H-1B petition, where E&M Mayock has the interests of both the US company petitioner and the foreign national employee in mind. We represent both parties together, to obtain the desired immigration status from the US government. This dual representation is permitted, so long as the employer and employee's interests do not conflict.

- **Employer and employee participation.** Both the US company Petitioner (employer) and foreign national Beneficiary (employee) supply essential information to complete the needed paperwork, submitted to US immigration authorities. Paperwork includes numbered immigration forms, letters, and supporting documentation. Employer signs the immigration forms and a critical support letter, which confirms the temporary offer of employment, and summarizes eligibility for the H-1B. Employer also follows instructions from our firm to ensure compliance with applicable law surrounding hiring H-1B workers, including posting and maintenance of Public Access Files. Employer must update the Public Access File with information about benefits, salary changes, etc.

- **Attorney analysis and preparation.** E&M Mayock obtains the initial paperwork on a candidate for employment and determines if H-1B status will be viable, based on information presented. E&M Mayock informs the employer about H-1B obligations and responsibilities. The attorney prepares the forms and files them with USCIS.

- **Department of Labor.** Reviews the Labor Condition Application (LCA) and certifies that the Prevailing Wage will be paid, based on the information provided. DOL also may perform random audits to see if employer requirements - in addition to the LCA disclosures - are being upheld.

- **US Citizenship & Immigration Services.** USCIS receives the filing, and determines that the job requirements, the employee's credentials and the employer's viability are all sufficient for approval.

- **Department of State: Interview for Visa at a US Embassy or Consulate abroad.** If the employee is abroad after receiving approval of the petition, or is granted consular approval (as opposed to a change or extension of status) the employee must apply for an H-1B visa at a US Embassy or Consulate abroad.

Additional H-1B Considerations

- **Spouses/Children (Dependents of H-1Bs).** Spouses and children may accompany the H-1B principal using H-4 visa status. Most are not work authorized. They are allowed to attend school and university classes. Spouses of H-1B visa holders may obtain employment authorization in limited circumstances after the green card application process for the Principal H-1B visa holder has begun.

- **Duration/Six Year Limit with Limited Exceptions.** H-1B status is good for an initial term of up to three years, and may be extended for a maximum of six years. After six years, the individual must leave the US for one year, unless he/she qualifies for an extension BEYOND six years, based on activities related to the green card application process.

➢ **Extensions of H-1B status beyond six years.** H-1B status may be extended beyond the 6-year limitation, in one-year increments, if a Labor Certification (commonly referred to as "PERM") has been filed with the DOL at least 365 days prior to the expiration the 6-year limitation. An H-1B may also be extended beyond the 6-year period, in three-year increments, for any person who is the beneficiary of an approved I-140 Immigrant Visa petition, but due to per country limitations is unable to file for or obtain an immigrant visa. Finally, time spent physically outside of the United States - beginning with the first date of H-1B status - may be re-captured to extend the 6-year validity period.

➢ **Timing of H-1B extensions.** The law allows an extension to be filed as late as the day before expiration, and H-1B status will be automatically extended for 240 days. An extension with the same employer should generally be started approximately 6 months before expiration, so that the individual is not stuck in the US waiting for approval prior to travel (after expiration of the old I-94 documentation of status) or without the ability to renew a driver's license. If the case needs to be quickly processed, the petition may be expedited with Premium Processing for an additional government filing fee, currently set at $1,410.

➢ **H-1B "portability" to new employment.** A person who holds H-1B status may begin new H-1B employment upon the filing of a new H-1B petition by the prospective new employer if: (1) s/he was lawfully admitted; (2) the new petition is not frivolous; (3) the new petition was filed before the date of expiration of the period of authorized stay (current I-94); and (4) subsequent to such lawful admission, the H-1B beneficiary has not been employed without authorization before the filing of such petition.

Additional H-1B Considerations for H-1B "Dependent" Employers

➢ **Impact of dependency.** Employers who are "dependent" must not displace U.S. workers at the worksite and must make good faith recruitment efforts. Even if an employer is H-1B Dependent, the employer may not need to make new attestations or advertise for any new H-1B workers who are exempt by virtue of (a) holding a Master's degree for the field of employment or (b) being paid $60,000 or more per year.

➢ **Ratios to calculate dependency.** Employers hiring 7 H-1B employees or fewer cannot be deemed H-1B dependent.

- 25 or fewer full-time equivalent employees: 8 or more H-1B employees means "dependent"
- 26 - 50 full-time employees: 13 or more H-1B employees means "dependent"
- 50 or more full-time employees: 15% or more are H-1B employees means "dependent"

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