

H-1B at a Glance

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Here are a few of many questions I receive from companies and individuals alike regarding the H-1B Visa:

1. What is an H-1B Visa?
2. When are applications accepted?
3. What happens if employment ends during H-1B status?
4. For how long is H-1B status valid?

What is an H-1B?

The Department of State states the H-1B visa “requires the theoretical and practical application of a body of highly specialized knowledge requiring completion of a specific course of higher education.” Some occupation specialty areas include sciences, medicine and health care, education, biotechnology, and various business specialties. You will note the key is “specialized.” The H-1B differs from other H category visas in that it can be difficult to qualify, given the specialization and degree/experience requirements.

Benefits

Often times, H-1B candidates are seeking a path towards permanent residence. While the H-1B specifically is not a path to such, periods of stay are usually three years with the ability to renew the visa for another three years. This enables the employer to take the time to petition for permanent residence for the H-1B employee, if that employee qualifies. Also, given the longer period of stay, it may give the employee time for an immediate relative, such as a recently married U.S. citizen spouse, to file a petition for permanent residence, which in most cases would enable the employee to continue working.

Furthermore, some TN visa holders (specialized employees from Mexico and Canada) may qualify for an H-1B, enabling them to qualify for lengthier visas—three years, rather than one year increments. While not required, TN visa holders often travel to their home country each year to re-enter in TN status. The H-1B status would keep the employee from having to do this, and also keep the employer from having to file a new petition each year.

Application Procedure

Due to the specialized nature of the work the employee will perform, the H-1B visa requires a Labor Condition Application (LCA). This process is required to ensure U.S. workers are given an opportunity to apply for the position, if they qualify, and it also ensures the intending immigrant receives a fair wage, as prescribed by the “prevailing

wage” requirement. The employer then files the LCA with supporting documentation to USCIS, while maintaining documentation of all steps.

H-1B applications may be filed on April 1 or thereafter, to begin work no earlier than the beginning of the new fiscal year, October 1. There is a cap of 65,000 of the issuance of H-1B visas, though some H-1B petitions do not count toward the cap, including renewals of H-1Bs, the employer is a university or nonprofit research organization, and beneficiaries who hold a master’s degree or higher from a U.S. university. For several years, the 65,000 cap was reached within a few days of April 1. However, in 2009, the cap was not reached until late December, presumably because of the poor economy and restrictions on recipients of TARP money. It’s anybody’s guess when the cap will be reached in 2010 but it is advisable to file on the first available day in order to avoid any cap issues.

H-1B Holders

H-1B holders can remain in the U.S. as long as the petitioning company remains the employer. Upon expiration of the final period of employment (e.g. after six years), the employee must remain outside of the U.S. for one year before he or she can apply for another H-1B.

Unlike employment-based permanent residents, employees’ work is limited to the petitioning company. However, if such employment ends, the H-1B holder may work for another employer *if* a new application is immediately filed, if that employee previously entered lawfully, and if that employee has not worked without authorization.

Looking Ahead

Whether you know you want to hire an H-1B employee, or you are thinking about the process, now is the time to secure legal counsel, as the April 1 deadline is fast-approaching, and you will need time to gather the required materials and take the necessary steps. Employers have found the H-1B affords them a solution to their needs in anything from nursing to graphic design. USCIS has stepped up its efforts to audit the H-1B application process; thus a reputable immigration attorney is integral to the application process. I always advise employers and employees alike to seek the guidance of an immigration attorney, whether it be through my office or another, as I’m confident the process will be smoother. Please feel free to call me with your H-1B questions, or any other immigration related matters.