

H-1B employment- based nonimmigrant status

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SO YOU WANT TO GET AN H-1B...

INA 101(a)(15)(H)(iii), 8 CFR 214.2(h)

SPECIALTY OCCUPATION

- ◆ Job is too complex to be performed without a minimum of a 4-year bachelor's degree or its equivalent (duties are all professional)
- ◆ You hold a bachelor's or higher degree or its equivalent in a field directly related to the job
- ◆ If the position requires a license (e.g., teacher, pharmacist), you must hold a valid license

H-1B AND H-4 BASICS

- ◆ Issued for maximum of 3 years. Extensions available for maximum of 6 years total
- ◆ Can buy 6 more years if outside the U.S. for 1+ years, but will again be subject to cap, if applicable
- ◆ Time in L status counts against H status and vice versa
- ◆ Seasonal or intermittent H-1Bs
- ◆ Can recapture time spent outside the U.S.
- ◆ 7 year + extensions
- ◆ H-4 status for dependents
- ◆ No employment until I-140 approval for H-1B holder (in this instance, must file I-765)
- ◆ H-4 time does not count against H-1B time and vice versa
- ◆ Separately maintain H-4 status

H-1B cap (lottery)

- ◆ 65,000 annual cap
- ◆ 20,000 U.S. master's cap
 - ◆ Job does not need to require a master's degree
- ◆ 10,500 E-3 Australia nationals + 6,800 H-1B1 Chile and Singapore FTAs
- ◆ U.S. government fiscal year October-September
- ◆ As of FY2021 - employer registration system (employers register early in year, selections start mid-March, 90 day filing window assigned - exact dates vary year-to-year)
- ◆ Lottery selection does not equal H-1B approval - selection means your employer can file an H-1B petition for you
- ◆ October 1 earliest start date (first day of government fiscal year)
- ◆ OPT STEM extensions (24 months) - Employer must participate in EVerify
- ◆ OPT cap gap measures
- ◆ Cap exemption (later slide)

CAP EXEMPT?

Previous cap-subject H-1B + haven't left the U.S. for more than one year (change of employer)

Institution of higher education or nonprofits related to institutions of higher education

Nonprofit research or government research institution

Not all nonprofits are cap exempt!

Filing procedure

PW

- Prevailing Wage

LCA

- Labor Condition Application

I-129

- Petition and Fees

VISA

- Visa Processing (only necessary for travel)

LABOR CONDITION APPLICATION (LCA)

EMPLOYER ATTEST TO DEPARTMENT OF LABOR (DOL):

Employer is offering at least the prevailing wage for the position

The position is not impacted by a strike or lockout

U.S. workers have been notified of the filing of an LCA via internal posting or notice to the bargaining representative (if a union position)

Sponsored worker is offered the same benefits and working conditions as other workers in the same work location

BE CAREFUL...

- ◆ Portability from one H-1B employer to another (“H-1B transfer”)
 - ◆ Cap-exempt to cap-subject
 - ◆ Can start when new petition is received
- ◆ Changes in job and/or work location may require an amended petition (a raise or promotion in same job family is fine)
- ◆ Adding work-from-home flexibility might require the filing of a new petition
- ◆ Start-ups

ODDS AND ENDS

- ◆ Employer-specific
- ◆ Dual intent
- ◆ Multiple concurrent H-1Bs
- ◆ What if you are fired or laid off?
 - ◆ Presumptive (discretionary) grace period of 60 days to find new job or file change of status if laid off, terminated, or resign
 - ◆ Employer pays cost of return transportation if they terminate prior to petition expiration (does not apply to dependents)



Extensions and changes of status

Extensions of status

- ◆ Must be filed prior to current status expiration
- ◆ Can work beyond current expiration of stay for the same employer in the same status for 240 days or until decision is made if the extension is timely filed
- ◆ Okay to travel while extension of status is pending as long as current status/visa are valid for reentry.

Change of status

- ◆ Traveling outside the U.S. with a change of status pending constitutes an abandonment of the change of status request (underlying petition may still be approved)
- ◆ Don't work after the expiration of current status if waiting for a change of status unless cap gap OPT work authorization applies (consider premium processing if applicable)

Final thoughts



Do you need a lawyer?

Who will the lawyer represent?

American Immigration Lawyers
Association (AILA) www.aila.org