

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
- ◆ Proposed changes: direct relationship between required degree field and duties of position (specific degree is *always* required) + 1 year maximum for employees at third-party worksite

H-1B cap

- ◆ 65,000 annual cap
- ◆ 20,000 U.S. master's cap
 - ◆ Order of selection
 - ◆ Does job 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
- ◆ FY2021 change – employer registration
- ◆ Proposed FY2022 change (pushed back to FY2023) – USCIS would first select registrations based on highest wage level that the offered wage equals or exceeds
- ◆ April 1 filing date, October 1 start date
- ◆ OPT STEM extensions (24 months) – Employer must participate in EVerify
- ◆ OPT cap gap measures
- ◆ Cap exemption (later slide)

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
- ◆ 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 no longer counts against H-1B time and vice versa
- ◆ Separately maintain H-4 status

CAP EXEMPT?

- ◆ Previous cap-subject H-1 B + 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!

BE CAREFUL...

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

Filing procedure

PW

- Prevailing Wage

LCA

- Labor Condition Application

I-129

- Petition and Fees

VISA

- Visa Processing

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

ODDS AND ENDS

- ◆ Employer specific
- ◆ Dual intent
- ◆ Multiple concurrent H-1Bs
- ◆ What if you are fired or laid off?
 - ◆ Grace period?
 - ◆ Cost of return transportation



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.

Changes 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