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 cap

- 65,000 annual cap
- 20,000 U.S. master’s cap (does job need to require a master’s degree?)
- 10,500 E-3 Australia nationals
- 6,800 Chile and Singapore FTAs
- U.S. government fiscal year October-September
- April 1 filing date, October 1 start date
- OPT STEM extensions (24 months)
- OPT cap gap measures
- Cap exemption
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 and no automatic employment authorization while extensions pending)
- H-4 time no longer counts against H-1B time and vice versa
- Separately maintain H-4 status
CAP EXEMPT?

- Previous cap-subject H-1B + haven’t left the U.S. for more than one year
- 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-1B employer to another ("H-1B transfer")
  - Cap-exempt to cap-subject
  - Can start when new petition is received
- H-1B dependency
- Changes in job and/or work location may require an amended petition (a raise or promotion is fine)
Filing procedure

- **Prevailing Wage**
- **Labor Condition Application**
- **Petition and Fees**
- **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