H-1B Specialty Workers

Business Immigration Lawyers for Foreign Specialty Workers

General Information About H-1B Nonimmigrant Visas

The H-1B work visa classification is designated for Specialty Occupations; that is, those occupations that require a theoretical and practical application of highly specialized knowledge normally associated with the attainment of at least a bachelor's degree (or foreign equivalent) in a relevant discipline and any state licensure required to work in the occupation. A combination of education, training and work experience may substitute for a bachelor's degree. In such cases, three years of specialized training and/or experience can substitute for one year of college study. For an employer's petition for "sponsorship" of an H-1B nonimmigrant to be approved, the specialty worker's credentials must match the needs of the position to be filled within the specialty occupation.

Step 1: Labor Condition Application (LCA)
Adjudicative agency: Department of Labor (DOL)

Attestation

Employer must list number of H-1B workers sought, as well as their occupational classification(s), wage rates and working conditions for such positions. Employers must also attest to the following:

- Employer agrees to pay the prevailing wage rate for the geographic area of employment;
- Working conditions of H-1B employee will not adversely affect similarly employed American workers;
- Place of employment is not experiencing a labor dispute involving a strike or lockout; and
- Notice of the filing of LCA was posted in place of employment or has been given to employee bargaining representative (if applicable).

Procedures/Conditions

- Employer through counsel files online LCA on Form ETA 9035 with DOL.
- DOL reviews LCA for completeness and certifies within the seven-day period, returning certified copy electronically to employer.
- LCA is valid for up to three year initial H-1B admission period (or any lesser period requested by employer).
- LCA may cover multiple workers in the same specialty occupation.
- Special restrictions apply for positions that require employees to work in more than one location.

Step 2: Petition (Form I-129)
Adjudicative agency: United States Citizenship and Immigration Services (USCIS)

Petition

- Employer files Form I-129, petition and accompanying documents with the USCIS Service Center having jurisdiction over place of employment. If the beneficiary is present in the U.S. under another classification, the same Form I-129 is also used to request change of status for the beneficiary from the current classification to H-1B.
- If petition is approvable and H-1B numbers are available for employment beginning when requested by the employer, USCIS mails approval to employer on Notice of Action (Form I-797).
- If H-1B petition is denied, it is appealable to the Administrative Appeals Office of the USCIS.
- If beneficiary is outside the United States, USCIS notifies the consulate listed in the petition and once approved, beneficiary brings Form I-797 approval notice and a complete copy of H-1B petition to the consulate to support an application for an H-1B Visa stamping.

Duration of Stay for H-1B specialty Workers

The maximum period of H-1B employment cannot exceed six years (unless a labor certification application is filed prior to the start of the 6th year;OR an I-140 petition has been approved and an immigrant visa number is not available to the foreign national). Approved H-1B nonimmigrants are initially admitted for the approved period or a maximum of three years. If employment is available for a longer period, a petition for extension of stay must be filed prior to expiration. In order to be readmitted as an H-1B specialty worker after working in the United States under the H-1B classification for the maximum period of six years, the alien worker must remain outside the United States for at least one year and the employer must then file a new petition. **NOTE**: Any time spent outside the United States does not count toward the six year period and may be "recaptured."

Terms and conditions of H-1B classification

- H-1B workers are entitled to maintain "dual intent," i.e., they are not presumed to be intending immigrants, not required to maintain foreign residence and are entitled to engage in temporary approved employment while pursuing permanent residence in the U.S (a green card).
- There is an annual cap on new H-1B classifications of 65,000 workers. Exempt from this cap are foreign nationals who have earned a Master's or higher degree from a United States institution of higher education. This exemption is capped at an additional 20,000 per fiscal year.
- The annual cap does not apply to H-1B petitions for extension of stay or change of employer.
- Work authorization for H-1B workers is employer-specific (limited to approved employer).
- If more than one employer will employ an H-1B nonimmigrant (i.e. the H-1B nonimmigrant will have two or more part-time H-1B positions), each employer must file a separate LCA and Form I-129.
- Employers must reimburse transportation costs for H-1B employees terminated prior to the end of approved period of employment.
- Employers should notify USCIS when H-1B workers are terminated prior to the end of approved period of employment.
- Family members may not be employed under the H-4 classification for H-1B dependents. They may only accept employment if authorized under another classification for which they qualify.

Step 3: Consular visa (alternative to change of status in the U.S.)
Adjudicative entity: U.S. Consulate

Procedure

- Employee files Form DS-156 and DS-157 (if applicable) or DS-160 at U.S. Consulate abroad (Canadians are visa exempt).
- Consular issued H-1B visa allows employee to apply for USCIS admission to United States.

Terms and conditions

Visa issuance is subject to consular discretion. Consular officers apply standards to visa adjudications beyond the terms and conditions of the classification under which the alien seeks to enter the United States. In addition, they may deny visas in cases where they are aware that representations made in USCIS petitions are questionable or inaccurate. The duration of a visa generally depends upon reciprocity with home country and may provide, within that period of time, for single or multiple entries into the United States under the indicated visa classification. Where extension of stay under the H-1B classification is granted for a period beyond the expiration date of the consular H-1B visa, a new visa is needed in order to return to the United States from a trip abroad.

OTHER H-1B ISSUES

AMENDMENT OF H-1B PETITIONS

Change of Employer Name and/or Ownership Structure

USCIS' Aleinikoff policy memorandum (8-22-96) regarding amendment of H-1B petitions states that "changes in the ownership structure of the petitioning entity generally do not require the filing of a new or amended petition if the petitioning entity continues to remain the alien beneficiary's employer, provided the new owner(s) of the firm assumes the previous owner's duties and liabilities..." This has been interpreted by USCIS Adjudications to apply to acquisition of discrete functional components or divisions of companies.

Transfers of H-1B employees

USCIS' Hogan policy memorandum (10-22-92) regarding amendment of H petitions provides that when an H-1B employee is transferred from one employer to another, the new employer must file a new petition. A transfer from one branch office to another, in and of itself, does not require an amended petition because branches are considered to be part of the same parent entity. On the other hand, transfer of an H-1B employee to another worksite does require an amended petition unless the transfer is within the same Metropolitan Statistical Area set forth in the certified LCA.

Visa Portability

The visa portability provisions of the American Competitiveness Act of the 21st Century (AC21) allow a foreign national previously issued an H-1B visa or otherwise accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files a "nonfrivolous" H-1B petition for the alien. A "nonfrivolous" petition is one that is not without basis in law or fact.

The portability provisions described in AC21 relieve the foreign national from the need to await approval notification from USCIS before commencing new H-1B employment. In order to be eligible for the visa portability provisions: (1) the foreign national must have been lawfully admitted into the United States; (2) an employer must

have filed a nonfrivolous petition for new employment before the date of expiration of the period of stay authorized; and (3) the foreign national must not have accepted unauthorized employment subsequent to his/her admission and before the filing of the new petition.

An H-1B applicant for admission who is no longer working for the original petitioner employer is admissible at a Port of Entry, pursuant to portability provisions in AC21, as long as certain conditions listed below are met. If these conditions are met, the H-1B applicant is admissible to the validity date of the previous H-1B petition, plus 10 days. H-4 applicants for admission, who are dependants of H-1B aliens employed pursuant to visa portability provisions, must meet these same requirements.

- The applicant is otherwise admissible.
- The applicant, unless exempt under 8 CFR 212.1, is in possession of a valid, unexpired passport and visa (including a valid, unexpired visa endorsed with the name of the original petitioner).
- The applicant establishes to the satisfaction of the inspecting officer that he or she was previously admitted as an H-1B specialty worker or otherwise accorded H-1B status. If a visa exempt applicant is not in possession of the previously issued form I-94, Arrival/Departure Record, or a copy of the previously issued I-94, the applicant may present a copy of the Form I-797, Notice of Action, with the original petition's validity dates.
- The applicant presents evidence that a new petition was filed timely with the USCIS Service Center, in the form of a dated filing receipt (Form I-797) or other credible evidence of timely filing that is validated through a CLAIMS query. In order to be a timely filing, the petition must have been filed prior to the expiration of the H-1B worker's previous period of admission. It must be emphasized that the burden of proof remains with the foreign national to prove that he/she is admissible as an H-1B specialty worker and eligible for visa portability provisions described in AC21.

Mergers and Acquisitions

An amendment (10/30/00) to INA sec.214 (c) provides that "[a]n amended H-1B petition shall not be required where the petitioning employer is involved in a corporate restructuring, including but not limited to a merger, acquisition, or consolidation, where a new corporate entity succeeds to the interests and obligations of the original petitioning employer and where the terms and conditions of employment remain the same but for the identity of the petitioner."

Change in Specialty Occupation

When an H-1B employee changes specialty occupation, an amended petition must be filed.

Effect of Requirement for Amended Petition on Continued Employment

USCIS policy acknowledges the business necessity of keeping aliens employed under changing circumstances and does not require an H-1B alien to wait for approval of an amended petition in order to work for the same entity.

UNLAWFUL PRESENCE

Nonimmigrant employees can suffer serious consequences from lapses or breaches of status. In the event of an overstay, the H-1B consular visa is automatically canceled, meaning that in most cases a foreign national who

needs to travel will have to return to his/her home country to obtain a new consular visa before re-entering the United States. As of the date of overstay, the foreign national will also begin to accrue time in unlawful presence. Unlawful presence also begins to accrue when an immigration judge makes a determination of breach of H-1B status or where a USCIS adjudicator denies an extension of stay, change of status or change of H-1B employment because of a lapse of status. If 180 days of unlawful presence accrue, the foreign national becomes inadmissible to the United States for three years; if one year of unlawful presence accrues, the foreign national becomes inadmissible to the United States for 10 years.

INCREASED FEE FOR SCHOLARSHIPS AND TRAINING

Effective December 8, 2004, a $1500 fee (over and above the regular filing fee) was imposed on petitioning employers to fund scholarship and training programs, for U.S. citizens, lawful residents and other U.S. workers to attend job training and receive low-income scholarships or grants for mathematics, engineering or science enrichment courses administered by the National Science Foundation and the DOL and to fund DOL administration and enforcement activities under the H-1B program. This fee must be paid by the employer and the employer may not seek reimbursement of this fee from the employee under any circumstances.

Petitioners who employ no more than 25 full-time equivalent employees, including any affiliate or subsidiary, are eligible to submit a reduced fee of $750. Certain types of petitions are exempt from the $1,500 and $750 fee. The $1,500 and $750 fees apply to any nonexempt petitions filed with USCIS after December 8, 2004.

In addition, the H-1B provisions of the Omnibus Appropriations Act created a Fraud Prevention and Detection Fee of $500 which must be paid by petitioners seeking a beneficiary's initial grant of H-1B nonimmigrant classification or those petitioners seeking to change a beneficiary's employer within such H-1B classification. Other than petitions to amend or extend stay filed by an existing H-1B employer, there are no exemptions from the $500 fee. The $500 fee applies to petitions filed with USCIS on or after March 8, 2005.

Please follow this link for additional information about the H-1B specialty worker visa classification

Our business immigration attorneys at Meyner and Landis LLP provide comprehensive representation to foreign specialty occupation workers seeking to gain admission to the United States. View some of our Recent Successes in Immigration Law to learn more about our knowledge, experience and skill in business immigration matters.

With offices in Newark, New Jersey, and New York, New York, the Immigration Law Group of Meyner and Landis LLP conveniently provides immigration services for businesses and individuals throughout the state of New Jersey. The firm's immigration practice, however, is national in scope, encompassing the representation of multinational Fortune 500 employers, businesses and individuals throughout the United States.

Contact our office to speak with a member of our Immigration Group.