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**2. The H-1B Visa/ The H-1B Cap**

The H-1B visa is one of the non-immigrant visas utilized by prospective employers seeking to employ a non-U.S. Citizen or non-resident of the United States. The position must require at least a four-year college degree. The individual must have obtained the degree in the United States or possess a degree issued outside the United States that is the educational equivalent of at least a Bachelor's degree issued from a US university. The individual must utilize that educational background in the position offered. For example, an accounting major can be employed as an accountant or a related field requiring said degree. Three years of experience may be evaluated to establish equivalency to one year of college education. An independent evaluation is required of foreign degrees, and experience.

The United States Citizenship and Immigration Service (USCIS), is authorized to approve 65,000 new H-1B petitions per year and another 20,000 for graduates of US Masters Degree programs. Exemptions from the 65,000 cap are available for certain facilities. Physicians entering residency programs at most not for profit teaching hospitals have been recognized as being exempt from the H-1B cap. Exemptions from the “H-1B cap” are discussed in a subsequent section.

As of mid-April 2013, the H-1B cap has been reached. Once the “Cap” has been reached, unless an employer is exempt from the cap, or the beneficiary was previously counted against the cap and is extending their H status, or was granted a J – 1waiver for employment in a federal shortage area or underserved area, the H petition will not be accepted by USCIS. Petitions will be accepted by USCIS, from non-cap exempt employers, on April 1. However, they will have to list an October 1 start date. A petition cannot be filed more than six months before the date of employment.

Once the H-1B cap is reached, USCIS should not accept an H-1B petition by an employer who is not exempt from the cap, unless the employee has been previously counted against the cap based upon previous employment with a non-cap exempt employer. So, if you are employed as a PGY at a cap exempt facility and switching to a non-cap exempt employer, then the H petition should not be accepted if the cap has been reached, unless you qualify for the “employed at” exception as discussed in detail in another memo. If the cap has not been reached, then the start date on the Petition should be no earlier then October 1st.

In order to employ an individual in H-1B status, the prospective employer must agree to pay the employee the higher of the actual wage level paid by the employer to other individuals with similar experience and credentials for that position, or the prevailing wage level in the area of employment. The employer must document the survey that is being utilized to determine the prevailing wage. Alternatively, the employer can request a prevailing wage determination from the Department of Labor. Please see the Labor Condition Application Memo for more details.

Once the prevailing wage is determined and the employer agrees to pay that salary, and the Notice of Filing of the Labor Condition Application requirements have been met, the LCA is filed with the Department of Labor.

Attorney’s fees and expenses related to the preparation of the H-1B petition and Labor Condition Application cannot be paid by the prospective employee. Please see the memo herein for more details.

**The employer generally does not have to establish the unavailability of qualified U.S. workers for the position in order to process an H-1B petition. Exceptions to this rule are contained in the Labor Condition Application memo.**

The petition and letter that are submitted to USCIS as part of the H-1B process, describe the employer, the position and the employee's qualifications for the position. The form also requires the prospective employer to represent that if the employee is terminated prior to the expiration of the H-1B petition, the employer will pay the employee their return airfare. USCIS does not appear to have any enforcement procedure for this clause. The employee may have to sue the employer to enforce this clause. However, the Department of Labor and US Courts have enforced this clause. Additionally, an employee may not be deemed terminated unless they have been offered their return transportation, in addition to cancelling the H petition with USCIS. If the H is not cancelled and if the return transportation is not offered then the employer may be liable for back wages.

Some employers have utilized various methods to circumvent this clause. For example, employees have been required to sign an agreement waiving this provision, or the employer retains the employee's first two weeks pay to cover this contingency. These steps are probably not legal. An employer can reduce the risk of this clause by limiting the duration of the H-1B status.

The H-1B petition can be approved initially for any duration up to three years. The H-1B status can be extended for up to six years. USCIS may extend the H-1B petition beyond the sixth year, if an individual has filed an application for Alien Employment Certification or an I-140 Petition for an Immigrant Worker, at least 365 days prior to requesting the seventh year extension. The H-1B status can be extended, until a final decision is rendered on the matter. If the I-140 petition is approved in the 6th year of H status, the H status can also be extended. Additionally, any time spent outside the US while in H-1B status can be “recaptured” and added back to the 6 years.

The H-1B beneficiary can only work for the employer and location specified on the H-1B petition. A separate petition is required for each employer, even if two different corporate entities have the same owners. If an employer plans to place employee at different locations, they must be listed on the H – 1B petition and Labor Condition Application.. If these additional locations are determined subsequent to filing the petition, a new LCA must be submitted listing these locations and an amended H1B petition might be required

The employer must withhold taxes from the H-1B beneficiary. The individual must be receiving a W-2 and not a 1099. The beneficiary cannot be employed as an independent contractor.

If an individual is presently employed in H-1B status and an H-1B petition is submitted by a different employer, or if an extension of status or change of position is filed by the same employer, the individual can commence employment with the new employer assuming the start date on the petition has been reached, or continue employment with the same employer, upon the filing of the petition at USCIS,. However, the H-1B petition must be filed prior to the expiration of the prior petition. The individual must not have violated their immigration status in any manner, including by being employed by any employer who did not petition on behalf of the beneficiary for H-1B status. The employer should require proof of filing, before allowing employment to commence. Employment pursuant to an Employment Authorization Card for a different employer while being in H-1B status should not affect one’s H-1B status. Please discuss same with an attorney.

If an individual is changing status to H-1B status, the individual cannot commence employment until the H-1B petition is approved with a change of status, or, if a change of status is not requested, then upon the admission into the United States in H-1B status, after obtaining an H-1B visa at a U.S. Consulate.

If the prospective employee is in a valid non-immigrant status in the United States at the time of filing the H-1B petition and the first day of employment is prior to expiration of the non-immigrant status and the H-1B cap is not an issue then, the H-1B petition can be approved with employment authorization.

If the prospective employee remained in the United States past the authorized time of stay, or if the effective date of employment is past the authorized time of stay, USCIS should approve the petition, but should deny a request to change status to H-1B and not grant employment authorization with the approved petition. The individual will have to apply for an H-1B visa at a US consulate outside the US. Upon entry into the United States with an H-1B visa, the individual can commence employment. There have been instances where USCIS has not followed this policy and has granted a change of status to individuals whose status expired between the date of filing and the start date listed on the H-1B petitions. This is contrary to law and logic. In a case reviewed by USCIS on April 28, 2003, and at seminars thereafter, USCIS has stated that a change of status cannot be granted if there is a gap between the end of an individual’s status and the start date listed on the H petition.

If your present status expires prior to the start date on the H-1B Petition and USCIS grants a change of status, this does not mean that USCIS will not at a later date determine that you have violated your status or that the approval was erroneous. For example, if you are in F1 status and your last date of being a student in good standing and 60 day grace period expires more than 60 days before the start date on the H-1B petition, you are urged to obtain a new I-20.

If you are in B-2 status or any other non-immigrant status which expires prior to the start date of the H-1B petition, if USCIS grants the change of status, they can later determine that the approval was erroneous and deem you out of status. It can also be raised when you file for Resident Alien Status and may affect getting the case approved, if USCIS questions your status between the expiration of your previous status and the start date on the H petition.

If the position requires a license, USCIS should deny the petition if the petition is filed without a license. Some states require permits for PGY positions. New York does not have that requirement. USCIS has denied petitions if the license or permit was issued subsequent to filing the petition If the license is pending at the time of filing, it is recommended that a letter be obtained from the licensing authority confirming that you qualify for the license at that date.

Approval of an H-1B petition with employment authorization and either a change of status or extension of status, does not guarantee re-admittance to the United States. All foreign nationals, except Canadian citizens, who leave the United States, must have a valid passport and H-1B visa in order to be readmitted to the United States. Canadian citizens are exempt from obtaining visas prior to admission to the United States. However, Landed Immigrants of Canada, even those previously exempt from obtaining a visa, must have a visa prior to returning to the United States.

An individual who has been granted a change of status to H-1B, may travel to Canada or Mexico for less then 30 days and be readmitted, without an H-1B visa, unless they had applied for a visa at a Consulate during that trip and were refused, travel to a 3rd country, or are from one of the countries where the applicability of this provision has been barred, including but not limited to, citizens of Iran, Iraq and Libya.

A visa can be obtained at the U.S. Consulate in your home country. You may be able to obtain a visa at consulate elsewhere. Applicants should discuss this option with their attorney, prior to departing the United States. You will not be readmitted to the United States without a valid H-1B visa, except for trips to Canada or Mexico, as mentioned above.

If you are outside the United States and US CIS has approved the H – 1B petition, you should apply for the H – 1B visa as soon as possible, due to uncertainty as to the processing time of visa applications, security clearance delays, unavailability of appointments due to demand and other unforeseen circumstances, especially if you are from one of the countries where extra security clearance is required. Please check the Consulate’s website for the procedure to schedule an appointment and documents required for the interview. If no appointments are available, keep checking the consulates website, as very often there are cancellations. Most consulates have an emergency procedure to schedule, if no appointments are available.

After issuance of the H-1B visa, you cannot enter the US more then ten (10) days prior to the start date listed on the H-1B petition. If you do enter early, the end date on your H-1B status will be limited to 3 years from your date of entry, if the petition was for a 3 year duration. However, on any subsequent entry, you should be admitted until the requested end date.

**The end date of your admission to the United States may be limited to the expiration date of your passport, if it expires prior to the end date of the H visa. Please check the I-94 for the end date and classification listed on the I-94 for accuracy and ask the officer to clarify any inconsistent information. Please notify your attorney as to any early end date, as you are considered out of status when the I-94 expires, even if the H petition and visa was for a longer duration. As per the earlier memo, please check the appropriate website to confirm your admission status and end date.**

If individuals remain in the United States for more than 180 days but less than one year after their authorized stay expired, they should not be issued a visa and should be barred from entering the United States for a minimum of three years. Unlawful presence for one year or more leads to a 10-year bar.

Although the regulations surrounding the H-1B petition may be cumbersome, specifically the Labor Condition Application, the H-1B category is the best and most expedient option available to employ a qualified international employee. For physicians, it does not have the “two year foreign residency requirement” that encumbers the J-1 status or the necessity of processing a J-1 Waiver Application, based upon a position in a “Health Professional Shortage Area.”

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