Moore&VanAllen

H-1B: TEMPORARY PROFESSIONAL WORKER

The H-1B visa category allows a U.S. employer to hire foreign professional workers to serve in "specialty occupations." Professionals are deemed as persons who hold at least a bachelor's degree (U.S. degree or the foreign academic equivalent) or the equivalent work experience in a specialized field of knowledge relating to their employment, where holding such a degree is ordinarily considered a prerequisite to entering that particular field.

In addition to the individual's qualifications, the job offered to the individual applicant must require the services of a professional (again, someone who holds a Bachelor's degree or higher). Examples of job classifications which may qualify for H-1B status are engineers, accountants, chemists, computer professionals, and certain business professionals.

There is a regulatory cap limiting the availability of H-1B visas each governmental fiscal year. The annual H-1B "cap" is set at 65,000, with an additional 20,000 visas available for individuals who have earned an advanced degree from an accredited U.S. educational institution.

Not every H-1B petition is subject to the cap. Cap-subject H-1B petitions are for individuals seeking H-1B status for the first time, such as recently graduated F-1 students or workers abroad seeking initial employment in the U.S. The cap does not impact petitions for the following individuals:

- Workers seeking extensions of H-1B status or changes such as an H-1B amendment to transfer to a new employer (i.e. those workers who have already been counted against the cap).
- Foreign nationals seeking employment with "cap exempt" employers, such as institutions of higher education, non-profit research organizations, or government research organizations.
- Nationals of Singapore and Chile, who are counted within their own specific numerical limitation of 6,800 H-1B visas.

The fiscal year runs from October 1st to September 30th, and USCIS begins accepting H-1B petitions 6 months in advance of the upcoming year's start date (April 1st). It is common for USCIS to reach and exceed the quota of petitions within the first week of April every year. When USCIS receives more petitions than the number allowable by the cap, a random lottery is conducted.

As the H-1B is the most likely visa option for foreign workers, employers are encouraged to identify potential H-1B employees and begin the process well in advance of the April 1st filing date. As the fiscal year does not begin until October 1st, any cap-subject applicant who is granted approval of an H-1B petition may not begin employment pursuant to the H-1B until October 1st.

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The process for any H-1B petition (whether cap-subject or not) begins with filing a Labor Condition Attestation ("LCA") with the U.S. Department of Labor (USDOL). By filing the LCA, the employer attests:

1. it will pay the foreign national (FN) the "required wage" (the higher of the prevailing wage or the actual wage paid to U.S. workers similarly employed);
2. the FN's employment will not adversely affect the working conditions of U.S. workers similarly employed;
3. there is no strike or lock-out which has necessitated the hiring of the FN; and
4. a notice of the hiring of the FN has been provided to the company's employees (via specified posting requirements).

Once the LCA is certified by USDOL, the I-129 Nonimmigrant Worker Petition can be filed with the appropriate USCIS Service Center. The approved LCA must be submitted with the I-129 along with documents to substantiate that the company has the ability to pay the proffered wage and that the employee has the educational background to qualify for H-1B status.

Processing times vary depending upon the Service's caseload, but it generally takes several months for an H-1B petition to be adjudicated. For petitioners seeking an expedited adjudication, premium 15-day processing may be requested for an additional fee of $1225.00.

Upon approval, if the FN is outside the United States, s/he can then apply for an H-1B visa at the appropriate U.S. Consulate. If the FN is in the United States (either in H-1B status for another employer or in another valid nonimmigrant status), they would be issued an approval notice showing the extension or change of their nonimmigrant status as requested on the I-129.

An individual may not remain in the U.S. in H-1B status for more than an aggregate period of 6 years, unless they have completed certain steps towards the permanent residency process as outlined in the American Competitiveness in the Twenty-first Century Act (AC21). An H-1B petition can be approved for a maximum initial period of stay of 3 years, and an extension of stay may be authorized in increments of no more than 3 years.

Family members of H-1B workers (spouses and children under age 21) may be granted H-4 visa status to accompany the H-1B worker to the U.S. Most H-4 dependents are not eligible to work in the U.S. H-4 dependent spouses of H-1B workers who have an approved I-140 Immigrant Worker Petition (as part of the permanent residency process) are eligible to apply for work authorization.

Also in accordance with AC21, the employer must offer H-1B non-immigrants benefits and eligibilities for benefits including participation in health, life, disability and other insurance plans, retirement and savings plans, bonuses and stock options, on the same basis and in accordance with the same criteria offered to U.S. workers.