



The H-1B “Specialty Occupation” Visa

The H-1B nonimmigrant visa category is available to foreign workers who hold a U.S. bachelor's degree or its equivalent. The job in question must be in an industry that generally requires such a degree for entry level work. Known as a “specialty occupation” or “professional” visa, the H-1B is often used for systems analysts, engineers, architects, accountants, physicians, and numerous other professionals. Spouses and minor children of the H-1B worker are admitted in H-4 status, but cannot work.

In order to obtain an H-1B visa, the prospective employer in the U.S. must first file with the U.S. Department of Labor (“DOL”) a Labor Condition Application (“LCA”) in which the employer attests that, among other things, the wages and working conditions of the visa holder will be the same as those of similarly employed U.S. workers, that no U.S. workers will be adversely affected and that the employer has notified its other U.S. workers of the filing of the LCA. After the LCA has been certified by the DOL, the employer must then file a petition with the U.S. Citizenship and Immigration Services (“USCIS”). Only after that petition has been approved by the USCIS may the prospective employee actually apply for the visa. Currently, only 65,000 H-1B visas may be issued each Fiscal Year. The visa will generally authorize an initial stay of three years with one three-year extension. The H-1B visa will usually not allow a total stay in the U.S. in excess of six years. However, under certain circumstances H-1B status can be extended in one-year increments beyond the six-year maximum.

An annual quota limits the number of H-1B visas available in any given year. However, the quota applies only to new visas and not to “transfers.” (A transfer is an H-1B worker moving from one company to another.) For new H-1Bs, the prospective employee cannot join the employer until approval occurs. Until recently, even an H-1B transfer could not join the new

employer until the transfer was actually approved by the USCIS.

Exemption from the Quota:

Individuals employed at higher education institutions (and their related or affiliated nonprofit entities) and individuals employed by nonprofit research organizations or governmental research organizations are exempt from the H-1B cap. Also, H-1B physicians who have received a J-1 Conrad State 30 waiver of the two-year J-1 home residency requirement are exempt from the cap. Anyone exempt from the cap who subsequently changes employers to one that is not exempt is counted toward the cap in the year they change employers. (Note that prior law exempted the following types of H-1B petitions from the cap, all of which remain exempt under the new law as well: extensions of H-1B status; petitions for concurrent H-1B employment with company B, while the worker remains in H-1B status for company A; and petitions to change H-1B employers.)

Portability of H-1B Status:

H-1B transfers may now change jobs as soon as a transfer petition is filed by the new employer, so long as the individual is in lawful status at the time of filing and has not engaged in any unauthorized employment since his or her last lawful admission. If the petition is ultimately denied, the authorization will end at the time of the denial.

H-1B Dependency:

Companies with 51 or more full time employees are H-1B dependent if at least 15% of their employees hold H-1B status. Smaller companies with fewer than 25 full time employees are H-1B

dependent if more than 7 employees hold H-1B status. Similarly, employers with 26-50 full time employees are H-1B dependent only if they employ more than 12 H-1B workers. These employers must declare that no U.S. employee has been or will be displaced during the 90 days preceding or following the filing of an H-1B petition. They must also attest that they have taken good faith steps to recruit for the position using industry-wide standard practices and have offered the job to all U.S. applicants who are equally or better qualified than the H-1B worker. An H-1B dependent employer cannot place an H-1B worker with another company unless the employer also declares that, after inquiry, it has no knowledge that the other company has displaced or will displace a U.S. worker within the 90-day periods surrounding the placement. This requirement clearly focuses on the employee-leasing industry. The attestation provisions do not apply to a petition for an H-1B who holds at least a master's degree or its equivalent in a field related to the intended employment or who is paid at least \$60,000 per year, including cash bonuses or other similar compensation.

Strategies for H-1B Employee Recruitment and Retention:

IT specialists often insist upon immediate green card sponsorship as part of their temporary employment package. Yet, this offers the employer no guarantee of retaining that employee in the long term, since the foreign IT worker who has received a green card can then quit and go to work for any other U.S. company. Furthermore, employers are now prohibited from recovering the funds spent to obtain an H-1B temporary employee who leaves the company (usually for a competitor) prior to a contractually agreed date, if that recovery constitutes a "penalty" under applicable state law. Therefore, the employer who offers green card sponsorship to attract an H-1B employee gambles financially both short and long term. High tech employers, however, view this simply as the cost of staying competitive in today's marketplace.

Coupled with competitive compensation, the following retention tools may be used in combination to attract and retain foreign IT specialists:

- Seek H-1B "transfers" who possess substantial time remaining on their six-year visa limit or who are eligible for relief under the law.
- Sponsor H-1B workers for green cards early to discourage turnover.
- Hire quota-exempt TN Canadians or Mexicans under the North American Free Trade Agreement, especially when the H quota has been exhausted.
- "Float" H-1B employees abroad for one year, while green card processing continues after year six, if they are ineligible for further extensions or other relief under the law.
- Utilize H-1B fund recovery as a retention tool if allowable under state law.

As soon as an employer obtains an H-1B visa for any employee, new or transferred, an immediate assessment should be made as to what will be done after the sixth year of the worker's cumulative physical presence in the U.S. in H-1B status.

If, for any reason, the H-1B status expires before the green card is complete and the employee is ineligible for an extension or other relief, may the green card continue to be processed even after the employee departs the United States? Fortunately, the answer is yes.

Points to Consider:

- The E, L and TN categories offer attractive alternatives to the H-1B visa.
- An employer who terminates an H-1B worker early must pay the reasonable costs of return transportation to the worker's home country.
- No quota existed before 1990 for H-1B visas.
- For a flowchart showing the H-1B visa processing steps, please contact afmertens@sgrlaw.com.

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