

## **Filing For H-1Bs Workers**

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The April 1st H-1B filing date is approaching fast. As discussed in our previous articles, the H-1B visa is subject to an annual cap of 65,000. An additional 20,000 H1B visas are allocated to alien workers who obtained their master's degree in the U.S. For the last several years the demand for H-1Bs exceeded the quota available, leading to a historical and unprecedented exhaustion of H-1B numbers. Despite the economic downturn and wave of layoffs in the U.S., the cap was reached last year and many petitions were denied after the cap was reached. Since the volume of petitions this year is expected to be greater due to the recovering economy, we again advise all employers to file H-1B visa petitions for prospective employees on April 1, 2010 or as early as possible.

All H-1B petitions require a Labor Condition Application (LCA) from the U.S. Department of Labor (DOL), which determines the prevailing wage and other issues. Because of delays in LCA approvals, advance planning for H-1B filings is required. Instead of being able to obtain a certified LCA instantly under the old system, employers now need to wait up to seven days for a certification to be issued. Uncertified LCAs may be used under very limited conditions. In addition, further delay may occur and add to the seven-day processing time when resubmission becomes necessary which is not uncommon. Employers and alien beneficiaries are advised to plan accordingly to ensure that they are on track for the earliest filing possible.

Some frequently asked questions we have received about the H-1B visas:

### **1. What are the minimum qualifications for an H-1B visa?**

H-1B visas are only issued to foreign nationals employed in a "specialty occupation" or as a fashion model of distinguished merit and ability. The regulations define "specialty occupation" as an occupation that requires theoretical and practical application of a body of specialized knowledge and attainment of a bachelor's degree or higher in the specific specialty as a minimum qualification for entry into the U.S. Examples of H-1B occupations include teachers, physical therapists, accountants, computer programmers, and engineers.

### **2. What is the quota for H-1B visas?**

Under the immigration regulations, the earliest date that an employer can file an H-1B petition for the next fiscal year's cap is April 1, for an October 1 employment start date. As a result, foreign nationals in other nonimmigrant status such as B1/B2, F-1, L1, etc. who are the beneficiaries of approved H-1B petitions with an October 1 employment start date, but whose periods of authorized stay expire before October 1, are required to leave the United States, apply for an H-1B visa at a consular post abroad (usually in their home countries) and then seek readmission to the U.S. in H-1B status.

### **3. How does one apply for an H-1B visa?**

A foreign national physically present in the United States in other nonimmigrant visa status may apply for change of status to H-1B as long as s/he has not violated their current status. When the foreign national is abroad, a U.S. employer needs to file an H-1B petition with USCIS with a request to notify an American consulate where the beneficiary resides of the approval of the petition. The alien beneficiary may then apply for an H-1B visa and seek admission to the U.S.

### **4. Can an H-1B visa holder work for companies other than the petitioning employer?**

An H-1B status holder can only work for the petitioning employer in the position specified on the H-1B petition. Otherwise, it would be considered a violation of the status. In case the foreign worker wishes to change employers, the new employer must file a new H-1B petition for the alien worker prior to the expiration of the current H-1B and prior to the termination of the current employment. The alien worker may begin working as soon as the new employer files the H-1B change of employer petition with the USCIS and does not need to wait for the petition to be approved.

An H-1B worker may be employed by different employers concurrently as long as each employer has an approved H-1B petition on behalf of the H-1B worker.

### **5. Are there any wage requirements for H-1B visa holders?**

In order to maintain the H-1B status, the beneficiary must receive the “required wage”, defined as the greater of the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment at the place of employment or the prevailing wage for the occupation in the areas of employment.

### **6. What is the validity period of an H-1B petition?**

The normal approval of an H-1B petition is three years. A one-year H-1B will be issued where the only obstacle for an applicant to obtain a required state license is the social security number. The H-1B beneficiary must be eligible for licensing in all other respects. In order to extend the H-1B beyond the one-year time frame, the H-1B employee should have the appropriate state license at that point. Otherwise, the extension petition could be denied.

### **7. What if the H-1B worker is terminated prior to the H-1B expiration?**

The alien worker’s H-1B status ends upon termination of the H-1B position. In such cases, the foreign worker is no longer in valid status and must leave the U.S. unless s/he can obtain status in the U.S. in another way.

### **8. What is the maximum duration for H-1B visas?**

In most cases 6 years. H-1B holders who wish to continue working in the U.S. after 6 years must remain outside of the U.S. for one year before applying for another H-1B visa. H-1B holders may renew their H-1B status over the 6-year limitation in one or three-year increments in certain cases where they have initiated the permanent residency application process.

In addition, H-1B workers are allowed to add back or “recapture” the time they spent outside the U.S. during the validity of their H-1B status (on vacation for example).

As obtaining H-1B visas has become increasingly complex and timeliness of filing is critical, employers seeking to petition foreign workers on H-1Bs are urged to plan in advance and consult an experienced immigration law firm. For more information on H-1Bs, be sure to watch “The Immigration Experts”, Reeves & Associates’ new immigration-based television program. Episodes are available for viewing on KSCI-18 Television in Los Angeles, San Diego and San Bernardino and KTSF-26 in the San Francisco Bay Area on Sundays at 4:30 PM. Episodes are also available for viewing on [www.immigrationexperts.tv](http://www.immigrationexperts.tv) .