

How to Prepare for the 2017 H-1B Lottery

Presented by:



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What is an H-1B?

- Temporary work visa for individual working in specialty occupation
- A job that normally requires a specific college degree or the equivalent in experience
- Available for employment on October 1st or later
OR
- Employee is currently working on OPT EAD that expires after April 1, 2017

Why are we talking about H-1Bs now?

- United States Citizenship and Immigration Services (USCIS) can only approve 65,000 H-1B petitions for work to begin on October 1, 2017 for jobs that require a bachelor's degree and 20,000 petitions for jobs that require a U.S. master's degree
- The first day that H-1B petitions subject to the annual quota/cap can be filed is April 1, 2017

Why are we talking about H-1Bs now?

- For the past 5 years, enough H-1B petitions were filed in the first few days of April to use up the H-1B visas available
- Cap Gap → if H-1B petition is filed and accepted before the employee's OPT expires, the employee can continue to work on OPT until October 1, 2017
- OPT STEM Extension for up to 24 mos. (if employer registered with E-Verify)

Who is exempt from H-1B Annual Quota?

- Employees who have been granted an H-1B within the last six years and have not used up the max. six years
- Employees of a U.S. institution of higher education or a related or affiliated nonprofit entity
- Certain employees of health care providers (affiliated with educational institutions)

Registering with the Department of Labor

Department of Labor (DOL) must obtain documentation from the employer clearly showing the FEIN and the name of the employer associated with the unique identification number

- Documentation from IRS noting assignment of FEIN
- Federal or State tax return (only acceptable with a pre-printed label) or a pre-printed tax coupon
- Documentation from employer's financial institution showing employer's FEIN
- Articles of incorporation, business license, or other certifications of business existence
- Official and/or government documents
- Other documentation showing the FEIN and name of the employer

Labor Condition Application (LCA)

- USCIS and DOL require that employers submit an LCA to ensure that employment of H-1B visa holders does not adversely affect the wages and working conditions of U.S. workers.
- On the LCA, the employer affirms that:
 - employment of the noncitizen will not adversely affect the wages and working conditions of workers similarly employed in the area of intended employment.
 - the employer will pay the noncitizen the higher of the actual wage or the prevailing wage for the occupational classification in the area of intended employment.
 - the employer will notify employees that an LCA is being filed.
 - at the time the application is signed, there is no strike, lockout, or work stoppage related to a labor dispute in the occupation.

When to Submit the LCA

- Employer may submit LCA up to 6 months before start date of employment
- Submit LCA with DOL through online iCert portal
 - Need employer signatory, job description, job location (offsite?), offered wage, start date
 - Employer must post notice within one working day of submission of the LCA in at least two conspicuous locations at the employee's worksite for at least 10 days.

Public Access File: Creation and Access

The Public Access File (PAF) is the file that an employer must create and maintain for each H-1B employee.

- Must be available for public and DOL inspection, either at employer's principal place of business or the actual location of employment

Contents of the Public Access File

The PAF must contain:

- Copy of certified LCA (signed by employer)
- Evidence that copy of LCA provided to employee
- Explanation of system used by employer to set actual wage (memo or summary)
- Summary of benefits offered to workers in same occupational classification (which must be provided to H-1B employees)
- Proof of LCA posting signed by HR or authorized representative

Retention Requirements

- All current H-1B employees should have a Public Access File.
- Keep the PAF for a period of one year beyond the date of employment under the LCA.
- If no foreign national was employed under the LCA, the PAF must be kept for one year from the expiration of the LCA, or for one year from the withdrawal of the LCA.

Company Documents Needed

- Current audited financials or U.S. income tax returns that have enough income to pay the employee's salary.
- Annual Report, if public company
- If company has over 100 employees, a letter from the chief financial officer confirming ability to pay H-1B employee's salary
- General information on the company, such as website printouts
- Dunn & Bradstreet updated (VIBE)

Employee Documents and Information Needed

- Prospective employee's current resume
- Prospective employee's degree certificates and transcripts, licenses and certificates, along with translations
- Third party evaluation of any foreign degree and equivalent experience
- Are there any dependents of the prospective employee who need to have their status changed and/or extended?

Employee Information Needed

- Is a change of status in the U.S. possible and is it requested?
- Proof that H-1B employee has been in lawful status since arriving in the U.S.
- Copies of all previous Forms I-797 approval notices and I-20 forms, EADs, etc.
- Copy of the prospective employee's entire passport

Job Information Needed

- Detailed job description
- If specialty occupation issues, need percentages
- Organization chart showing proposed job and name, job title and degree held by those employees who have similar positions, immediate supervisor, and for any employees that will be reporting to the employee

Common Oversights

- What U.S. consulate and port of entry will the prospective employee use to obtain any necessary visa?
- Does employer need to comply with deemed import-export control laws?
- Is the employer's information current with Dunn and Bradstreet (VIBE)?

Offsite Employment

- In order to establish what third-party placement arrangements are legal under H-1B criteria, USCIS clearly defines the components of an employer-employee relationship.
- Employer must have “right to control over when, where, and how the beneficiary performs the job”

Offsite Employment - Documents Needed

- Itinerary of services or engagements with clients
- Copy of signed Employment Agreement
- Copy of Offer Letter
- W-4 and Employee Benefits package documentation
- Copies of signed contracts, statements of work, work orders, service agreements, and/or letters with third party clients
- Position description and any such documentation that describes the skills required to perform the job, instruments and tools needed to perform the job, product or service to be provided, and location where the employee will perform the duties.
- Description of the performance review process
- Copy of employer's organizational chart, demonstrating the beneficiary's supervisory chain.

H-1B Fees and Filing Requirements

- All H-1B fees and costs must be paid by employer
- Filing fees totaling \$460 (Form I-129), \$500 (anti-fraud) and \$1,500 (or \$750)(ACWIA training fee), plus \$1,225 for premium processing (optional)
- Is Premium Processing necessary?

What if not selected?

- Extend OPT, STEM 24 month extension (E-verify)
- Other non-immigrant options—where are they from?
 - NAFTA TN
 - Australian E-3
 - Student
 - O-1
- What is spouse's status?
 - L-2s/E/H-4 dependents can work
- From Chile (1400)/Singapore (5400)?
 - one-year period renewable indefinitely
- Can employee work for parent, subsidiary or affiliated company abroad for one year?
 - L-1A, L-1B
- Possible green card sponsorship?
- Is employee a U.S. citizen?

Conclusion

Thank you for joining us today! Please contact either of us with questions.

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February 22, 2017
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