

MEMORANDUM

To: Clients

Re: The H-1B Specialty Occupation Visa

I. General Provisions of the H-1B Visa Category

A. General. The H-1B category is for foreign nationals (1) who seek to enter the US temporarily to perform services in a "specialty occupation," i.e., a professional position that requires at least a bachelors degree in a specific field, and (2) who possess the required degree or its equivalent. An H-1B position may be full-time or part-time.

B. Procedures. As a first step, the employer must apply to the US Department of Labor (DOL) for certification of a Labor Condition Application (LCA). By filing the LCA, the employer is making certain attestations designed to protect US workers, such as an attestation promising to pay the required wage. Detailed information about the LCA is in the next section. Once the LCA has been certified, the employer must file the H-1B petition with US Citizenship and Immigration Services ("USCIS") requesting H-1B classification. The petition consists of Form I-129 (Petition for a Nonimmigrant Worker) and H Supplement, a letter of support from the employer outlining the job duties and requirements, supporting documentation, including the alien's degree certificate and academic transcripts, experience evaluations, if necessary, and information about the employer. Upon petition approval, if the beneficiary is abroad, he or she must apply for the visa at a US consul and then for admission to the United States in H-1B status. If the beneficiary is in the United States in valid nonimmigrant status, with some exceptions, the petitioner can also request a change or extension of status on his or her behalf to the H-1B category. Employment may not begin until the USCIS approves the H-1B petition and the beneficiary acquires H-1B status (unless a timely filed petition requests an extension of status with the same employer or unless the H-1B portability provisions discussed below allow employment to begin earlier with a new employer).

C. H-1B Cap. The annual cap on H-1B visas is 65,000 in each fiscal year beginning October 1. Employees of higher education institutions, nonprofit research organizations, and government research organizations are exempt from the cap, as are persons presently in H-1B status (although a person who received H-1B status with a cap exempt employer will not be able to change to a cap-subject employer unless a visa number is available to him under the cap). An additional 20,000 H-1B visas are available for foreign workers with a master's or higher level degree from a US academic institution.

D. Increased Portability of H-1B Status. An H-1B nonimmigrant's work authorization is employer specific, i.e., authorizes employment for the petitioning employer only. However, certain persons can immediately accept employment upon the filing of an H-1B petition by a new employer.

This portability extends to a nonimmigrant who has been issued an H-1B visa or provided H-1B status, if he or she has been lawfully admitted to the United States and has not previously worked without authorization since the admission. Additionally, the new petition must have been filed before the expiration of authorized stay, usually as shown on the I-94 Arrival/Departure Record. Also, the nonimmigrant must have been counted against the cap or the new employer must be cap exempt.

E. Time Limits. The initial period of admission in H-1B status is three years, which can be extended to six. The six-year cap does not apply to an H-1B nonimmigrant for whom an I-140 employment-based immigrant visa petition (or an I-485 application for adjustment of status to permanent residence, i.e., green card), has been filed, if one year or more has elapsed since the filing of an application for labor certification, if applicable, or the filing of the I-140. USCIS can extend the H-1B stay of a person meeting these conditions in one-year increments beyond the six-year cap until a final decision is made on the application for permanent residence.

F. Portability Pending Application for Permanent Residence. An H-1B worker whose I-485 application to adjust status to lawful permanent residence has been pending for 180 days or more can change jobs or employers and can adjust based on the original underlying immigrant visa petition (and labor certification if applicable), as long as the underlying petition has been approved and the new job is in the same or a similar occupational classification.

G. Filing Fees. The USCIS filing fee for the H-1B petition is \$325. Employers with 26 or more full time equivalent (FTE) employees must pay a training fee of \$1500. Employers of not more than 25 FTE employees must pay a training fee of \$750. The training fee must be paid for the initial H-1B filing and the first extension for a particular worker, unless the employer meets one of the training fee exemptions. Employers seeking a foreign worker's initial grant of H-1B status or permission to allow a change of employers also must pay a \$500 fraud detection fee. For a fee of \$1,225, the petitioner can request "premium processing" in fifteen days.

H. Changes in Employment. Changes in wages, working conditions, characteristics of the employment or location of employment, including transfer to a new worksite, can affect H-1B eligibility and trigger certain obligations. Therefore, the employer should seek legal advice before making such a change. The employer also should obtain legal advice in advance of making any changes in the corporate structure or ownership of the employer or if any labor dispute occurs. Such changes trigger additional LCA obligations and can affect H1-B eligibility.

I. Termination of Employment. The termination of H-1B employment has several important implications. First, the H-1B worker falls out of status upon termination (unless another petition has been filed in some cases). Second, the employer must pay the reasonable costs of return transportation to the worker's residence abroad if the worker leaves the employment before the end of the period of authorized stay for any reason except voluntarily. Third, the employer must send a letter to the USCIS with notice of the termination. The employer is subject to the LCA wage obligation until it does so and also until it sends the employee a letter confirming the termination and an offer to pay the cost of return transportation. The employer also should withdraw the LCA upon termination.

II. The LCA (Labor Condition Application)

A. Form ETA 9035. The LCA is filed with the Employment and Training Administration (ETA) of the DOL on Form ETA 9035 and can be approved for a maximum period of three (3) years. We will prepare and file this based on information provided by the employer.

B. The Attestations. By filing the LCA, the employer makes the following attestations:

1. Wages. The employer attests that it will pay the H-1B worker the *required* wage, which is the higher of the *prevailing* wage (set by certain wage surveys) and the *actual* wage (the wage paid to all other employees at the worksite with similar experience and qualifications for the specific position). It also must offer benefits (including cash bonuses, stock options, paid vacations, holidays, and insurance, retirement and savings plans) on the same basis as they are offered to US workers. The wage must be paid “cash in hand, free and clear when due” as shown on the payroll records as earnings. Only deductions authorized by law can reduce the cash wage below the level of the required wage. Deductions may not recoup a business expense of the employer (including H-1B attorney’s fees and costs) if the deduction causes the wage to drop below the required wage. DOL takes the position that H-1B legal fees and costs are business expenses that must be paid by the employer. Although we are unaware of any DOL enforcement actions on this basis, we strongly recommend that the employer should pay such fees and costs and not seek employee reimbursement. Under no circumstances may the employee pay the training fee. The employer may never deduct a penalty paid by the H-1B worker for ceasing employment before an agreed-upon date, but liquidated damages may be acceptable. The employer must pay the required wage if the H-1B worker lapses into nonproductive status due to a decision by the employer, e.g., lack of assigned work, permit or license, but not due to conditions that take the worker away from duties voluntarily. The employer must pay the required wage beginning on the date when the H-1B worker first makes himself available for work or otherwise comes under the employer’s control. Payment of wages is not required after there has been a bona fide termination of the employment relationship, provided the employer takes the steps described above in the paragraph on “Termination of Employment”.

2. Working Conditions. The employer attests that it will provide working conditions to the H-1B worker that will not adversely affect the working conditions of similarly employed US workers. These include hours, shifts, vacation periods, and fringe benefits.

3. Strike. The employer attests that there was no strike or lockout in the occupation as of the date the LCA is signed and submitted.

4. Notice. The employer attests that on or within 30 days before filing the LCA it has given notice to affected workers either by posting a hard copy in two places at the worksite(s) for ten consecutive business days or by electronic notification. The employer must complete and maintain a Declaration of Posting, which we will provide, recording the dates and places of posting, and which must be kept with the notices that were posted. The employer must post notice of filing the LCA, and in many cases, an amended H-1B petition, before transferring an H-1B worker to a new location.

C. Special Attestations of H-1B Dependent Employers and Willful Violators. H-1B “dependent employers” and “willful violators” are subject to additional restrictions and requirements. An employer will be considered H-1B dependent if it has:

1. 25 or fewer full time equivalent (“FTE”) employees in the US and more than 7 H-1B workers;
2. 26-50 FTE employees in the US and more than 12 H-1B workers; or,
3. at least 51 FTE employees in the US and employs H-1B workers in a number equal to at least 15% of the number of FTE employees.

A willful violator is an employer who is found in enforcement proceedings by the government either to have committed a willful failure to meet a condition of the LCA or to have made a misrepresentation of material fact on the LCA during the five-year period preceding the filing of the LCA. Please let us know immediately if either is applicable.

III. LCA Documentation Requirements.

The employer must prepare and maintain certain documents that support the attestations made in the LCA. It must make certain documents available for government inspection (a DOL Inspection File) and certain documents available for public access (a Public Access File). We will assist you in preparing these at the time of filing.

IV. Risks Associated with Filing an LCA

A. Penalties. Anyone can complain to DOL about an alleged LCA violation. If DOL finds a violation, it may impose fines ranging from \$1,000 to \$5,000 per violation and higher for willful violations. The DOL can order the employer to pay back wages and benefits, and a finding of violation can bar the employer from obtaining future visas. A material misrepresentation on the LCA can also subject the employer to penalties for perjury, including fines and incarceration.

B. Termination of Employment. Once the LCA has been certified, the employer should obtain legal advice if the H-1B worker does not begin, or prematurely leaves, employment. Unless the certified LCA and/or the H-1B petition is formally withdrawn, the employer may continue to be bound by the wages, working conditions, strike/lockout, and notice statements in the LCA and continued exposure to liability for LCA violations.