

# The H-1B Visa and You



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March 4, 2011

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# H-1B Visa Basics: What is it?



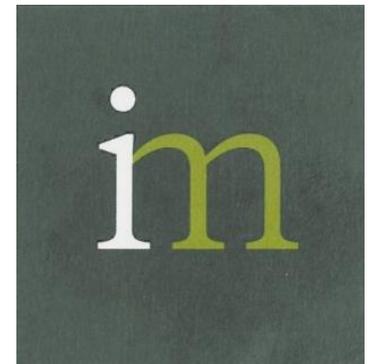
- Most common work visa used by foreign professionals
- Position must require a Bachelor's degree or equivalent in relevant field
- Certain occupations require state licensure and certain health care occupations require a Visa Screen Certificate (PTs & OTs for instance)
- Foreign national must possess a Bachelor's degree or equivalent in the field
- Must be paid the prevailing wage for the occupation
- Annual limit of 65,000 on the number of H-1B visas issued each year; 20,000 additional visas for U.S. Master's degree holders



# A U.S. Employer Must Sponsor you for H-1B Status

- Foreign national must find a U.S. employer willing to sponsor that person for the visa. Sponsorship involves:

- Offer of employment for a position that qualifies as a “specialty occupation”
- Providing requested information and documents to attorney, reviewing and signing petition forms, Labor Condition Application, letter in support and Public Access File docs as prepared by attorney
- Payment of mandatory employer training fee (\$750 or \$1,500); petition fees, fraud fee and attorney fee can be paid by FN or other third party (FN with certain exceptions)



# What is a Labor Condition Application (LCA)?

- **Document prepared and filed by attorney with Dept. of Labor that ensures employing a foreign national will not adversely affect the employment of U.S. workers on site and that s/he is paid 100% of the prevailing wage for the position.**



# What is the Duration of the H-1B?

- **Maximum of Six Years Generally**
  - Two three-year increments
  - Three years is the maximum for which an employer can petition at a time but can petition for shorter increments
- **Exceptions that allow for Extensions beyond the 6 Year Maximum!**
  - One-year extension available for H-1Bs whose employers have initiated the green card process and filed a PERM labor certification application with Dept. of Labor at least 365 days prior to the six-year max (for labor cert exempt positions such as Physical Therapists, the I-140 is filed at least 365 days prior to the six-year max)
  - Three-year extension available for H-1Bs who have an approved PERM labor cert. AND an approved I-140 on their behalf that are waiting for an immigrant visa or green card to become available for their employment-based category (for PTs, an approved I-140 and unavailability of immigrant visa/green card is all that is needed to qualify for the three-year extension beyond the six-year max)



# What is the H-1B Cap?

- **There is an annual limit of 65,000 H-1B visas**
- **Earliest possible date of filing for a cap-subject petition is April 1 for an October 1 start date (Oct. 1 is the earliest available start date for an H-1B cap case)**
- **20,000 additional H-1B visas for U.S. Master's degree holders (does not have to be in a field related to the offered job to be cap exempt !)**



# Which Employers are Cap-Exempt?

- **Higher Education Institutions**
- **Non-profit organizations affiliated with Higher Education Institutions**
- **Non-profit Research and Government Institutions**
- **Certain for-profit organizations that employ H-1Bs who will perform all or most of their duties on site at a qualifying organization listed above**
- **Employers who file H-1B transfer petitions for persons already on H-1B status and already subjected to cap**



# H-1B Processing Times

- **USCIS Service Centers can take 60 to 120 days to process petition from the date of filing**
- **This processing time increases if USCIS issues a Request For Evidence (RFE)**
- **If employer or foreign national is willing to pay an additional \$1,225 Premium Processing System fee, the petition will be decided within 15 calendar days unless USCIS issues an RFE**



# H-1B Cap Gap Rule for F-1s

- **For F-1s on Optional Practical Training (OPT), USCIS issued an H-1B Cap-Gap Rule which allows for an extension of OPT to October 1, 2011 if application is received and accepted by USCIS until a decision is made on that application**
- **Consult the school's Designated School Official (DSO) re: approval of OPT extension per the cap-gap rule and proper annotation of I-20 form**



# What if I can't find an H-1B sponsor?

- For F-1s that cannot find an H-1B employer sponsor, consult an immigration attorney to determine if any other work visa options are available
- One option is to enroll in another program of study at a higher level (Master's or higher) and pursue Curricular Practical Training (CPT) with DSO and the employer
- Try again for H-1B when employment offer is secured and visas are available



# H-1B Transfers: Change of Employer

- If foreign national is already on valid H-1B status and receives a job offer from a new employer
- Not subject to the annual H-1B visa cap as long as s/he is not transferring from a cap-exempt employer to a cap-subject employer
- The new employer must file with USCIS an new H-1B petition with all supporting documents
- Main Benefit: Employee may start work upon filing date instead of waiting for approval; best to wait until H-1B receipt notice is issued to meet I-9 requirements for hiring



# RFE Trends in H-1B Cases: The Dreaded Neufeld Memo!

- USCIS is scrutinizing employers who place H-1B workers off-site at third-party client site or otherwise
- Multiple page Requests for Evidence (RFE) being issued nationwide
- Very common scenario for health care staffing companies and IT staffing companies
- Focus is on whether a valid Employer-Employee Relationship exists

## **“Right to Control” Definition of Employment: 11 Questions to Consider and Address in the initial H-1B filing and in Response to a Request for Evidence (RFE)**

- 1. Does the petitioner supervise the beneficiary, and is the supervision off-site or on-site?**
- 2. If the supervision is off-site, how does the petitioner maintain such supervision, i.e., weekly calls, routine reports back to the main office, or site visits by the petitioner?**
- 3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?**
- 4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?**



- 5. Does the petitioner hire, pay and have the ability to fire the beneficiary?**
- 6. Does the petitioner evaluate the work product of the beneficiary, i.e., progress/performance reviews?**
- 7. Does the petitioner claim the beneficiary for tax purposes?**
- 8. Does the petitioner provide the beneficiary any type of employee benefits?**
- 9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?**
- 10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?**
- 11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?**



# Examples of Evidence Proving a Valid Employer–Employee Relationship Exists

- **Itinerary of services that specifies the dates of each service and names and addresses of the actual employers, and names and addresses where services will be performed**
- **Copy of a signed employment agreement between petitioner and beneficiary, setting forth the terms and conditions of employment**
- **Copy of employment letter that clearly describes the nature of the employer-employee relationship and the services to be performed by the beneficiary**
- **Copy of relevant portions of valid contracts between petitioner and client that still confirms petitioner’s right to control**



- **Copies of signed contracts, statements of work, work orders, service agreements, and letters between the petitioner and end-clients where work will be performed confirming terms of employment and petitioner's right to control work**
- **Company job description or other documents describing the skills required to perform the job, the source of the tools and resources necessary, the product or service in question, duration of the relationship between petitioner and beneficiary, petitioner's right to control terms of beneficiary's work, whether work is part of the regular business of petitioner, employee benefits provided by petitioner to beneficiary, and tax treatment of the beneficiary by petitioner**
- **Description of the performance review process**
- **Petitioner's organizational chart, demonstrating the beneficiary's supervisory chain**



# Questions?

- **We are here to assist you and the employer with each step in the process**
- **Over 15 years of experience assisting companies and foreign nationals with their H-1B and other immigration needs**
- **Reasonable flat rates for attorney fees**



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