MOST COMMON US VISAS

H-1B VISA

2022

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COMMON NON-IMMIGRANT VISAS

H-1B VISA

What does the Employer Do?

The employer must have a federal tax identification number. Foreign businesses not established in the United States cannot use this visa to bring employees here.

Obtain an Approved Labor Condition Application

The employer must prepare and file a Labor Condition Application (LCA) with the Department of Labor (DOL). The LCA is a form that must be carefully prepared and posted in two conspicuous places at the worksite. It requires the employer to describe the position and salary. The LCA also requires the employer to attest to complex facts concerning the wage, working conditions, labor conditions, and the giving of notice.

Once the LCA is approved, the employer files a petition with U.S. Citizenship and Immigration Services (USCIS), a part of the Department of Homeland Security. The employer must document that the position requires the service of a person in a "specialty occupation". This means a person who is working in a professional position that requires a minimum of a bachelor's degree or its equivalent in experience and/or education in a specific field related to the job. H-1B visas are limited to 65,000 with an additional 20,000 for applicants with advanced degrees. Applications may be filed up to 6 months prior to commencement date. Since more applicants apply for H-1B visas than are available, 6 months prior to October 1st (that is April 1st), USCIS chooses the 65,000 + 20,000 on a random basis. There are some exceptions to this CAP, however.

THE H-1B VISA may be used to bring a worker temporarily to the United States if the employee will work in a "specialty occupation" or a professional position. Legislation in 1990, 1998, 2000, and 2004 made significant changes in the employer's obligations with respect to obtaining and maintaining the H-1B visa, the forms used to apply for the visa, the application filing fees and procedures. The H-1B visa is also subject to caps, and the visa may not be available if the H-1B quota for any given fiscal year (October 1st to September 30th) has been reached.

What Are the Employer's Liabilities?

Completing the LCA is just the beginning. The employer must maintain a public access file containing information about the required wage paid to the H-1B worker and the posting of the notice. The employer must also maintain wage and hour records, as well as information concerning working conditions for all similarly situated employees. Upon request, these records must be provided to DOL's Wage and Hour Division.

If an employer does not document the wage, pay the required wage, or maintain the required records, the employer could be liable for substantial penalties, including back pay and fines up to $35,000 per violation. The employer could even lose the right to apply for H-1B workers as well as all other immigrant and nonimmigrant petitions for up to three years.

Employers are required to pay a fee for each H-1B application; check with your attorney to find out the current fee. If the employer terminates the services of the employee prior to the expiration of the H-1B status, the employer is responsible for paying the employee's return transportation to his or her last foreign residence.

What Must a Dependent Employer Do?

A "dependent employer" is one who has employed more than the specified percentage of H-1B workers relative to the workforce, determined by the size of the employer. Dependent employers are required to additionally attest that they have not displaced U.S. workers and have taken steps to recruit U.S. workers. The dependent employer may be exempt from these attestations, however depending on the salary and degree-requirement of the H-1B worker.

What Does the Employee Do?

The employee must prove that he or she is qualified for the specialty occupation and the specific job offered by the employer. The employee must be able to show that his or her foreign university degree and/or work experience is the equivalent of a U.S. degree. Workers in the United States who currently hold a valid nonimmigrant visa may apply in the United States for H-1B status. For example, if a worker is in lawful student status (an F-1 visa), he or she may seek a change from F-1 to H-1B. This change gives the person the ability to work in the United States for the sponsoring employer. However, the H-1B employee may change employers if the new employer files a petition on his or her behalf. If the worker needs to travel abroad, he or she will need to apply for an H-1B

visa at a U.S. Consulate. Workers not in lawful status in the United States or those residing abroad must apply for an H-1B visa at a U.S. consulate, and may not apply for H-1B Status in the United States.

What Are the Employee's Liabilities?

Under current law, a person who fails to maintain status (*e.g.*, by engaging in unauthorized employment, or by staying beyond the authorization period) may be required to depart the United States and may be ineligible to return, depending upon how long such failure to maintain status existed.

How Long Can the H-1B Employee Remain in the United States?

The H-1B is a temporary status with specific limitations on periods of stay in the United States. The initial petition may be approved for up to three years. After the initial period, three more years are available. The employer must update or refile the LCA and must file H-1B petition extensions. After six years, the worker must spend one year outside the United States before he or she is entitled to have another H-1B visa. Many workers on H-1B visas obtain permanent resident status (the "Green Card") during their initial stay in the United States. H-1B visa holders pursuing a Green Card may, in some cases, extend their stay beyond the six-year limit, the H-1B employee's spouse and unmarried children under 21 years old may be granted an H-4 visa. H-4 visa holders are not permitted to work in the United States. They may, however, attend school.