

Hello and Welcome:

We have designed this handout to help you understand H-1 visas better. We receive many phone calls every day from people with questions and thought we could consolidate the information to help everybody. Should you decide you would like to hire a law firm to conduct your case, feel free to call us at 877-223-4684; if you are out of country call 214-764-3462. We (not our phones) operate 24 hours a day so we are equipped to handle your emergency cases. Students and military personnel always receive a discount at our firm.

Your Team at

Steven Riznyk & Company LLC

"If we can't win your case, it probably can't be won"™ TM

THE H-1B VISA: WHO QUALIFIES

Briefly, the H-1B, also called the H-1 or H1 (we will use these terms interchangeably in this article so you become familiar with them) visa is for people in a Specialty Occupation, which is defined as one that requires a 4-year degree or equivalent. In other words, the only way to obtain an H-1 visa is to have a 4-year degree or the equivalent. Every 3 years' experience in the industry equates to 1 year of college education.

It also includes fashion models of distinguished merit and ability, as well as someone providing a service related to the DOD (Department of Defense) cooperative research and development or co-production project.

TEMPORARY AND DUAL INTENT OF THE H-1

As with other visas, you must be entering the United States temporarily and not for

permanent work. However, the H1b visa is part of a group of visas that allow for 'dual intent'. In other words, you can enter on a temporary basis with the visa and at the same time have the same employer or a different one apply for a Green Card on your behalf, which, when completed, would allow you to live in the US permanently. Unlike most other visas, this visa does not require you to maintain a foreign residence.

The dual intent situation is quite unique in that you must enter with the intent of working in the United States for a temporary period of time. However, that time period, which is a maximum of 6 years, can be extended if you filed a case for a Green Card/labor certification that has been pending for 365 days or more or if you have an approved I-140 petition for alien worker. So, in reality, many clients enter and don't ever leave, as they apply for a Green Card. Moreover, many people enter as students under the F1 student visa and then during OPT or Optional Practical Training (a period during which you are allowed to work for a US employer) locate an H-1B sponsoring employer, and then an employer willing to sponsor for the Green Card. A common question people ask is whether their H-1 sponsoring company must also sponsor the Green Card and the answer is no; they can be two different companies and often are.

SELF PETITIONING H-1 VISAS

Although a person who owns a company cannot file a Green Card case on their own behalf, this is not the case with an H-1 visa case. Although these cases are harder to win than a non-self-petitioning case, they are possible. However, there are technical rules with respect to these types of cases that must be considered.

H-1 FILING FEES 2010

There are 3 sets of filing fees the employer must pay for the H-1b visa case: The I129 fee is \$320. Additionally, there is the \$750 ACWIA training fee if the company has no more than 25 employees or \$1500 if more than 25. This fee is only paid

once. Third, there is a fraud prevention and detection fee of \$500. Fourth, if the employee is abroad, there are consulate fees, which are minor compared to these (but additional). The money orders are to be made out to the Department of Homeland Security. The fraud prevention fee has to be separate; the others can be combined. Certain educational institutions are exempt from the \$1500 fee. Nonprofits must still pay the fee; spouses and children do not have to.

Additionally, if you want a rapid answer on the approval or denial, you can pay the \$1,000 Premium Processing fee to the government and you will receive a response in 15 calendar days.

LABOR CONDITION ATTESTATION

When an LCA [Labor Condition Attestation] (see below) is prepared, it will inform us of the 'Prevailing Wage' for the county in which the worker will work. The person must be paid 100% of that wage determination. In other words, for an H-1 visa case, the worker must be paid what others are paid for that type of work in the county in which they live. An employer cannot simply make up the wage the company wishes to pay.

LCAs are required of all applicants, including doctors, fashion models, and all other workers.

PART-TIME H1B VISA

This is often a consideration, especially where the company is smaller in size. Often, employers are not prepared for the fees involved in an H-1 visa case, let alone the wages. If the wages are much more than an employer is prepared for, an alternative is to simply hire the worker for less hours per week. A very handy feature of the H1 visa is that a person can work part-time. Something to be careful of here is that if the wages are too low, the case may not be approved as the worker may not make enough money to afford the cost of living in a particular city.

This is more of an issue where the position is one of low wages than of higher ones. In other words, if someone makes \$15.00 an hour but only works 20 hours a week, it's more of a challenge than a person who makes \$90,000 a year but only works half-time, so he or she is still earning \$45,000.

H1- ANNUAL CAP

As you many know by now, there is an annual cap of 65,000 visas, less the ones for Chile and Singapore. As a result, there are only 52,800 H1b visas. There are an additional 20,000 available for people who have a Master's degree or higher from a U.S. institution of higher education. The good news is that anyone who received a visa in the past 6 years cannot be counted against this numerical H1 visa cap.

H1-B APPLICATION DEADLINE 2010

The application deadline is, for all purposes, April 1st, 2010. This is for people who want to work as of October 1st of this year. If you haven't followed the H1b visa trail lately, the application period begins on April 1st, but on that day two years ago they received so many applications that the quota was met in a day. This is where the term H-1 lottery arose. They had to choose a certain number of H-1 visa applications from the pool of available applicants.

Last year, the quota lasted several months, much to the surprise of immigration lawyers and the public. This year, 2010, we don't know what will happen. The economy is a bit better, but many factors may have taken place in order to account for the longer availability last year. What happens this year, no one knows. However, if you are certain you want an H1 visa, then apply for it April 1st. There is no benefit in waiting. If you are not sure, then you can take your time, only you know how you feel about it and how important it is to you.

ONLY ONE H-1B PER PERSON

An employer is not able to file more than one petition for an H1B visa, even if one application is for the 20,000 for persons with a higher degree and one is in the category for people without that benefit. In other words, one H-1 visa application per person.

The employer must be a U.S. employer but does not have to be the one paying the person's salary.

H-1 PORTABILITY

The H-1b offers portability. In other words, an H1b candidate may work for a different H1 employer than the one who originally sponsored him or her. As long as the new employer and case are legitimate, filed before the expiration of stay previously authorized, and no illegal work has been conducted (ie without authorization). The person can work for the new employer as soon as the H1b application has been received by the USCIS (as it may take time for the case to be adjudicated). In order to port, or transfer your visa, you will have to file a completely new case for the new position.

If the applicant has a criminal record, a waiver may have to be filed. This would require a law firm's input as waivers are complex.

SPECIALTY OCCUPATION

An applicant for an H1B must be in a Specialty Occupation. A Specialty Occupation is defined as one that requires both a theoretical and practical application of a body of highly specialized knowledge and requires the person to have attained a Bachelor's degree or higher (or equivalent) OR the work is so complex and specialized that one can assume the knowledge needed to execute the job position that a degree is required. If the person has the equivalency and not a degree, or a combination, then

the person's information must be sent to a firm that evaluates the equivalency in a format accepted by the government.

TECHNICAL REQUIREMENTS

There are several technical requirements to an H-1B visa case. An LCA (Labor Condition Application) must be prepared and a wage survey must be completed. The government has set guidelines as to how much you should be paid, and each job title is dependent on the particular county in which you will work.

The LCA demands that an employer pay you at least what other people in a similar position are being paid. If your employer is highly dependent on H-1B's or is a willful violator, he or she or it must follow a different set of requirements when the LCA is filed. The amount you make is classified as wages in that they are labeled 'earnings' for income tax and FICA (Federal Insurance Contribution Act=Unemployment Insurance). Fringe benefits are not included within the wage rate. Also there cannot be a strike or lockout in progress, and this is attested to in the LCA.

A final important issue is that the employer must have a Federal Tax Identification number, which is basically a Social Security number for a business, in order to file. If your employer is a small or new business, you need to advise them to obtain this number as soon as possible; sometime they are able to get this number over the phone.

RESPONSIBILITY OF THE EMPLOYER

The employer has the responsibility to pay the costs of sending an employee home if that employee is let go prior to the expiration date of the visa petition. The employer must also pay the H-1 employee his or her wages within 30 days of when the person has entered the United States or 60 days from when the person files a Change of Status application. A Change of Status is what is filed if a person is in the US on a different visa.

CAP-GAP AND THE H-1B

If you apply for the H-1 visa and are approved, you may still have to leave the country. The way this works is that if your visa, for example, expires on July 14th as a visitor, even if you are approved to work on October 1st, you will be caught in this Gap...called the cap-gap because it is a gap of time between the time the cap is reached and the time your status expires.

CAP-GAP AND STUDENT VISAS

Students will not suffer being out of status when their F-1 stay expires, nor will F-2 visa holders. Not only will the stay of the student be extended, so will the person's work authorization. The student does not have to be in OPT status for this to occur. OPT is Optional Practical Training, the period during which a student is able to work. The person's status is extended to October 1st.

EMPLOYER CAN BE SOLE PROPRIETOR, CORPORATION, LLC, OR PARTNERSHIP

A lot of people think that only corporations can hire them, but that is not the case.

EMPLOYER MUST BE US COMPANY

The employer for an H-1 visa must be a US company, even if the salary is paid from abroad.

PERMANENT POSITION TEMPORARILY FILLED

An H-1B visa is very different from the H-2 visa, although they are both popular work visas. The H-2 visa is primarily used for people without a degree, The H-2 is for filling a temporary need whereas the H-1 is for temporarily filling a need for a permanent position.

WHAT TYPE OF POSITION CAN IT BE?

There are numerous positions that have been permitted and many other positions have cases to support them. This list is so large that it cannot possibly be reproduced here, but here are some of the most common positions that people ask about and are included:

Acupuncturist; Chiropractor; Dietician; Graphic Designer; Human Resource Manager, Industrial Engineer, Interior Designer, Journalist, and Medical Technologist. The standards do, of course, apply to positions such as teachers, lawyers, accountants, engineers, and so on, but listed above are some of the popular ones people ask about. Know though, that in some of these positions, you are required to be licensed in the specific state and that requirement must be met before applying.

Thanks for joining us and we hope we were of some help to you. Good luck with your dreams in the United States!

Your Team at

Steven Riznyk & Company LLC

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We also have a streaming site that covers all of immigration; that site is www.my-immigration-attorney.com/immigration-lawyer.html. The site offers US immigration law in sections such as worker, investor, student, relative, and visitor for \$15.95 and unlimited access for a month.