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BUSINESS IMMIGRATION

H-1B Registration and Filing: Why Should You Plan Now?

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In early March of 2023, U.S. Citizenship and Immigration Services (USCIS) will start accepting registrations of H-1B petitions subject to fiscal year (FY) 2024 cap. Beneficiaries of selected and approved H-1B cap-subject petitions will be eligible to start working in the United States on October 1, 2023.

Last year, USCIS received 486,927 registrations for the FY2023 quota, an increase of approximately 57% over the prior year. We expect the competition for FY2024 H-1B numbers to remain high, due to continued worker shortages in many industries across the United States. Accordingly, there is no room for error, and employers who start planning for the FY 2024 H-1B season in advance will be better positioned to ensure the smooth and timely preparation and filing of their H-1B registrations and petitions.

What is the H-1B Visa Category?

The H-1B visa category is available for temporary non-immigrant employment of highly educated foreign professionals in "specialty occupations" which require at least a bachelor's degree or the equivalent.

H-1B Eligibility

In order to sponsor a foreign national for an H-1B visa, the employer must demonstrate that:

- The job meets the specialty occupation requirements (see "Specialty Occupation Defined" below);
- The foreign employee holds a bachelor's degree or its equivalent in a field related to the position and, if required by state law, an unrestricted state license, registration, or certification that authorizes the foreign worker to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment; and
- The employer obtained the certified labor condition application (LCA) from the U.S. Department of Labor, in which the employer represented, in particular, that it will pay the foreign employee the greater of either the actual or the prevailing wage.

Specialty Occupation Defined

To qualify as a specialty occupation, the position must meet one of the following criteria:

- Bachelor's degree or higher or its equivalent is normally the minimum entry requirement for the particular position;
- The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, the job is so complex or unique that it can be performed only by an individual with a degree;
- The employer normally requires a degree or its equivalent for the position; or
- The nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree.

H-1B Cap

The H-1B classification has an annual numerical limit (cap) of 65,000 new statuses/visas each fiscal year (beginning October 1 and ending September 30). An additional 20,000 H-1Bs are available to the H-1B beneficiaries with a U.S. master's degree or higher.

H-1B Cap-Exempt Cases

Some H-1B visa petitions are exempt from the annual cap. Exempt petitions include those requesting an extension or amendment of a previously approved cap-subject H-1B petition, or a petition filed by an institution of higher education or a related/affiliated nonprofit entity, a nonprofit research organization, or a governmental research organization.

H-1B Electronic Registration Process

Employers seeking to file an H-1B cap subject petition are required to complete an online registration for each foreign worker. The online registration usually opens in early March and closes in about 2-3 weeks. If USCIS receives more than 20,000 H-1B petitions towards the master's cap, a separate lottery process will take place. USCIS will apply the random selection process to the regular cap petitions prior to conducting the master's H-1B lottery. Any master's cap petitions not selected in the regular lottery will be eligible for selection in the master's H-1B lottery, effectively granting master's degree holders two opportunities at H-1B status. Petitioners selected in a computerized lottery will be afforded at least 90 days from the date of the selection notification to prepare and submit their H-1B petitions. It is possible that USCIS may run an additional lottery later in the year, if there are still visas available for the fiscal year, but given the high demand for H-1B numbers, the second lottery will be unlikely.

Labor Condition Application (LCA)

As noted above, prospective H-1B employers must obtain a certification of an LCA from the U.S. Department of Labor (DOL). This application requires certain attestations, a violation of which can result in fines, bars on sponsoring nonimmigrant or immigrant petitions, and other sanctions to the employer/agent.

The application also requires the employer to attest that it will comply with the following labor requirements:

- The employer will pay the H-1B worker a wage which is no less than the wage paid to similarly qualified workers or, if greater, the prevailing wage for the position in the geographic area in which the H-1B worker will be employed.
- The employer/agent will provide working conditions that will not adversely affect other similarly employed workers.
- At the time of the labor condition application there is no strike or lockout at the place of employment.
- Notice of the filing of the labor condition application with the DOL has been given to the union bargaining representative or has been posted at the place of employment.
- The H-1B worker has been provided a copy of the LCA.

H-1B Period of Stay

Initial H-1B petitions may be approved for up to three years, with subsequent extensions for up to another three years. Typically, the H-1B worker's total period of admission may not exceed six years, with exceptions available to some H-1B holders, including beneficiaries of pending labor certification applications or employment-based immigrant petitions.

Time is of the Essence

Advance planning is important to ensure on-time submission of the H-1B petition. Employees should compile all documents related to their immigration and travel history, education, experience, foreign credential evaluation, and other necessary documentation sufficiently in advance of the H-1B filing. All foreign language documents must be accompanied by a certified English translation. If employees intend to include dependents as derivatives with their H-1B petitions, they will need to ensure that all dependents' documents are also ready and up to date. Employers who miss the H-1B filing season in March of 2023 will get a chance to submit their H-1B petitions only in March of 2024 for the employment start date of October 1, 2024.

Applying for H-1B Visa

If you have any questions about the H-1B visa classification or need assistance with the H-1B application process, contact Anna Putintseva at the Bousquet Holstein Immigration Group. Anna Putintseva is an experienced business immigration attorney who regularly assists employers and employees with H-1B preparation and other business immigration issues.



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