



D A V I S

B R O W N

L A W F I R M

H-1B PROCESS AND CONSIDERATIONS

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DISCLAIMER

The following is general information and should not be considered legal advice.

H-1B

- H-1B is a temporary status for workers in “specialty occupations”
- It is a typical progression from F-1 OPT or STEM OPT
- It is in some ways the most useful status and in some ways the most complicated status

Always Consider Alternatives

- **TN, H-1B1, E-3:** Nationals of a country with country-specific temporary visa categories can often avoid using H-1Bs:
 - Canada, Mexico (TN)
 - Chile, Singapore (H-1B1)
 - Australia (E-3)
 - **O-1**

Some People Can Skip H-1B

- No waiting line applies to your country of chargeability
- The job is hard to fill
- The employer is willing

More Later

- We will circle back to alternatives

Meanwhile . . .

Back to H-1B

- The job must require a degree in a particular field
- The beneficiary must have the required degree or equivalent
- The wage required in the regulations must be paid to the beneficiary in H-1B status
- The beneficiary cannot be hired to undercut the working conditions for U.S. workers
- The employer must comply with notice and document retention requirements

H-1B “Cap”

- Because of the limited number of new “cap subject” H-1Bs that may be approved each fiscal year, most people changing status from F-1 to H-1B (or coming directly from abroad) must file the H-1B according to special USCIS rules.
- 65,000 “regular” H-1Bs
- 20,000 for people with U.S. master’s degrees

Cap-Exemptions

- Not all new H-1Bs are counted in the H-1B Cap. Exemptions include:
 - Jobs *with* a non-profit institution of higher education or a non-profit affiliate
 - Jobs *with* government or non-profit research organizations
 - Jobs *at* (physically located on the premises of) a non-profit institution of higher education or a non-profit affiliate
 - Physicians with J-1 waivers

H-1B “Cap”

- A lottery system determines who will be granted a “cap” H-1B.
- This year, a new system is being implemented.

Old System

- All H-1B petitions were filed in the first 5 business days of April (6 months before the start of the new federal government fiscal year October 1).
- U.S. Citizenship & Immigration Service (USCIS) randomly selected the “winners”.
- Others were sent back, including a refund of the filing fees.
- “Cap gap” while waiting for a decision (we’ll talk about this more later).

New System

- Employer registers with USCIS from March 1 – 20 for each H-1B desired.
- USCIS chooses the “winners” and notifies them to file the full H-1B packet.
- No less than 90 days provided to file.
- “Cap gap” only after filing the packet

Process Detail

- Agencies involved
- LCA
- Timing
- Cap Gap

Agencies Involved

- Two federal agencies are involved in the H-1B process:
 - DOL (Dept. of Labor) certifies the LCA (labor condition application) in which the employer attests to offering the correct wage, posting a notice of filing, and maintaining working conditions for U.S. workers
 - USCIS (United States Citizenship & Immigration Service) approves or denies the application.

LCA

- The LCA is a form that is filed electronically with DOL to show that the H-1B is not hurting the U.S. workforce.
- It shows the prevailing wage, the wage (or wage range) being paid
- The employer attests to certain facts
- The employer posts a notice of filing (or otherwise notifies other workers about the filing)
- The employer keeps a file with certain information available for inspection

Prevailing Wage

- DOL surveys employers in geographic areas to determine the “prevailing wage” for jobs.
- Not all jobs are covered.
- No adjustment for employer size or most non-profits.
- Different wage survey for colleges and universities and certain affiliates.

Determining the Wage

- Prevailing wages are posted on-line. The employer may make its own selection of category and level (I-IV depending on education and experience required for the position)
- DOL can determine the wage (this takes several months)
- The employer can use an independent wage survey that meets certain statistical requirements.

Timing

- The LCA must be certified before an H-1B can be filed.
- Certification takes 7 – 10 days.
- It is completely electronic.

Timing

- The registration must be completed in the timeframe (March 1 – 20 as of now).
- If selected, the H-1B petition must be filed within the allotted timeframe (no less than 90 days).
- If seeking “cap gap”, the petition must be received before the OPT expires.

Timing

- After filing, regular processing is typically several months.
- Premium processing may be offered to speed the decision. Cost is now \$1440 and the turn-around is 15 calendar days.
 - USCIS has proposed to increase the cost and slow to 15 *business* days.
 - Premium processing is not always available for H-1B caps or not immediately available.

Timing

- H-1B caps may not go into effect before October 1.
- If the OPT or other work authorization expires before the H-1B is approved and no “cap gap” applies, the beneficiary cannot work in the United States.

Cap Gap

- A beneficiary on OPT (or STEM OPT) whose registration is selected may continue to work while a **change of status** to H-1B is processing *up to October 1* IF the petition is received **BEFORE** the OPT expires.
- Operation of law, although a process exists for the ISSO to update SEVIS.
- Registration alone does not provide cap gap benefits.

Reserve Applications

- In the new process, like the old, USCIS is required to *approve* 85,000 new H-1Bs each fiscal year.
- Certain petitions will be held in reserve to fill in for those denied.
- If in the reserve category, no cap gap until the petition is filed. This is unlike the past in which cap gap was provided while the petition was held for the final result.

Change of Status

- The H-1B (or any application for a non-immigrant status) may be filed to request “change of status” or “consular processing”
- “Change of status” means that the beneficiary automatically goes from F-1, for example, to H-1B when the petition is approved and affective.

Consular Processing

- Rather than change of status, the petition may request consular processing.
- This means the H-1B (or any non-immigrant status) will not go into effect until the beneficiary exits the U.S. and returns with a visa (if required) to be in the new status.

How to Decide?

- Cap gap requires a change of status.
- If the OPT or STEM OPT is valid for a long time, consular processing would preserve that time and effectively extend the time available for H-1B status.
- If a violation of status has occurred, change of status cannot be filed.

International Travel

- International travel *always* involves the risk that you will not be allowed to re-enter.
- Always check status of “travel bans” and “entry suspensions”
- International travel during the H-1B cap process must be considered carefully.

International Travel

- If requesting a change of status, the beneficiary must be physically present on the date the petition is received.
- If the beneficiary leaves the U.S. while a change of status is pending, the COS aspect of the petition will be denied. This effectively turns it into a CP petition.

International Travel

- If a change of status is approved, international travel could happen during the period before Oct. 1 when the H-1B is effective if:
 - The F-1 visa is still valid
 - A new F-1 visa is granted
 - If in cap gap, the beneficiary returns before Oct. 1.

International Travel

- BE CAREFUL traveling during cap gap or applying for a new F-1 if the H-1B has been granted.
- While possible in theory, the visa or entry could be denied.
- This means waiting to receive an H-1B visa for re-entry (earliest would be 10 days before Oct. 1).

Filing Fees

- As of now:
 - \$460 base fee
 - \$1500/\$750 training fee depending on number of employees at the sponsoring company
 - \$500 anti-fraud fee
 - Optional premium processing \$1440
- The employer should pay these fees.

Master's Cap

- 20,000 new H-1B cap approvals are reserved for those holding U.S. master's degrees.
- The degree must have been earned by the time of the H-1B filing.
- The decision about whether a petition will be master's cap is made at the time of registration.
- If you register for master's cap and don't have the master's, the petition will be denied.

Eligibility

- The most common reasons an H-1B is denied are:
 - The job is not a “specialty occupation”
 - The beneficiary is not qualified for the job (degree and/or experience does not match the job requirements)

Specialty Occupation

- Bachelor's or higher degree or its equivalent is normally the minimum entry requirement for the position
- The degree requirement for the job is common to the industry or 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
- 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.

Requests for Evidence

- Requests for Evidence (RFEs) allow the petitioner to supplement the petition to answer questions from USCIS.
- 87 days provided for the response.

Requests for Evidence

- Common RFEs:
 - Level I wage (sometimes Level II)
 - More than one degree could meet the job duties
 - *Occupational Outlook Handbook* does not classify the job
 - Degree appears to be unrelated to the job

Approvals

- Keep original I-797 approval notice
 - Needed for proof of status
 - Needed for re-entry
 - Not technically needed for visa application

I-94

- The I-797 for a change of status will include an I-94 at the bottom of the approval notice
- After international travel (and a new visa if required), you must print the new I-94 (<https://i94.cbp.dhs.gov/I94/#/home>)
- Always check after entry for mistakes in the I-94. **THE I-94 CONTROLS!**
- 10-day grace period

I-94



U.S. Customs and Border Protection
Securing America's Borders

Get I-94 Number I-94 FAQ

Admission (I-94) Number Retrieval

Admission (I-94) Record Number: 69000888062

Admit Until Date (MM/DD/YYYY): 10/10/2012

Details provided on Admission(I-94) form:

Family Name:	LI
First (Given) Name:	LYDIA
Birth Date (MM/DD/YYYY):	01/01/1990
Passport Number:	P123123213
Passport Country of Issuance:	Mexico
Date of Entry (MM/DD/YYYY):	04/11/2012
Class of Admission:	B1

Individuals can visit www.cbp.gov/I94 to retrieve a copy of their electronic Form I-94.

Maintaining Status

- Any material change could trigger the need for an amendment
 - Salary increases or in-line promotions may not
 - 50% difference in job duties
- Additions or changes in “worksite” require amendments or LCA postings (in limited situations)

Extensions

- Automatic 240-day extension of status if the I-129 is filed (received by USCIS) before the current status expires.
 - Not valid for international travel
 - May not be valid for a driver's license

H-1B Transfers

- Once H-1B cap petition is approved for one employer, the beneficiary may transfer to other employers by them obtaining an H-1B approval. No cap application is needed.
- If the beneficiary was not counted in the cap (cap-exempt), then a new cap petition is needed to change to a non-cap-exempt employer

Exempt-to-Cap Transfers

- Exception if the employment is concurrent with cap-exempt employment.
- Timing is a problem because the cap-subject employment cannot start until October 1.

Portability

- Once a transfer application has been filed, the beneficiary may begin working for the new employer. This is called “portability”.
- Be sure the transfer petition is approvable.
- Wait for the receipt
- Consider premium processing instead.

Alternatives - NIV

- TN: Mexico and Canada only
 - Occupations must be on the list under the treaty
 - 3-year increments
 - Not **dual intent**

Dual Intent

- “Non-immigrant” status/visa requires that the beneficiary intent to return to her home country after the status ends.
- Dual intent categories allow the beneficiary to have two intentions: to stay and also to go
- Dual intent makes it impossible to deny a visa because of suspected intent to immigrate
- H-1B and others have dual intent.

Alternatives - NIV

- E-3: Australia only
- Basically like H-1B
- No prior petition approval required
(apply at the U.S. consulate)
- Some differences from H-1B

Alternative to H-1B

- H-1B1: Chile and Singapore only
- A certain number allotted – more than enough.
- Basically like H-1B but no dual intent.
- No prior petition required (apply at the consulate)

Alternatives to H-1B

- O-1 for people with “extraordinary ability”
- 3-years and then 1-year increments
- Dual intent
- Lower standard than EB1

Alternatives to H-1B

- Day One CPT.
- Be sure the program is legitimate
- Be sure the program relates to the job
- No OPT if 12 months CPT utilized
- If at the same level, concern about USCIS denial of change of status later – status violation

Alternatives to H-1B - IV

- Gaining permanent residence can be possible during OPT (and especially during STEM OPT) timeframe if beneficiary is from a non-waiting line country (India and China are the main waiting line countries usually).
- Waiting lines can develop at any time for any country

Alternatives to H-1B - IV

- Job must be one for which it is unlikely that a US citizen will apply (shortage job)

OR

- Beneficiary qualifies for EB1 (extraordinary ability, outstanding researcher, international manager)

Alternatives to H-1B - IV

- Process is much more expensive than H-1B. The employer must pay for much of the process (not EB1).
- Employers want to be assured that beneficiary will not leave after “green card”
- No dual intent on F-1 so international travel timing must be carefully considered.

STEM OPT

- I-983s should be reviewed and kept for later.
- Be sure the job relates to the degree.
- Material changes must be reported.

Status Violations

- USCIS tried to change guidance regarding “duration of status” and status violations.
- Rule has been stopped for now.
- Best practice is to contact an attorney if you are aware of a status violation.

Questions?



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