Loke Walsh
IMMIGRATION LAW, PC

881 ALMA REAL DRIVE, SUITE 118, PACIFIC PALISADES, CALIFORNIA 90272-5016
T. 310.454.7920 • F. 310.454.7940 • LOKEWALSH.COM • IMMIGRATION@LOKEWALSH.COM

The H-1B Specialty Occupation Visa

What is the H-1B Quota or H-1B Cap?

The fiscal year (FY) for USCIS starts on October 1st and ends on September 30th every year. There are 65,000 H-1B visas available per fiscal year. Out of the 65,000 H-1B visas, 1,400 are set aside for citizens of Chile and 5,400 are set aside for citizens of Singapore. An additional 20,000 H-1B visas are available to those who have earned Master's degrees or higher degrees from U.S. universities. This H-1B "cap" or "quota" only applies to private industry H-1Bs.

Who is exempt from the H-1B Cap?

Cap-exempt organizations are exempt from the H-1B cap and are not subject to the quota, which means they can apply for unlimited H-1B visas any time of the year. Cap-exempt organizations include the following:

- institutions of higher education (i.e. universities and colleges);
- non-profit organizations affiliated with institutions of higher education;
- non-profit research organizations; and
- government research organizations.

What fees must be paid when applying for an H-1B visa?

The government filing fees for H-1Bs are as follows:

- $1,500 ACWIA training fee (if company has 26 or more employees) OR $750 training fee (if company has 25 or fewer employees);
    - the ACWIA training fee only applies to new H-1Bs, change-of-employer H-1Bs and the first extension request by the same employer;
    - the ACWIA fee is only paid by private industry H-1Bs; cap-exempt organizations are exempt from paying the ACWIA training fee;
    - the H-1B employer must pay the ACWIA fee – no exceptions.
- $500 fraud prevention fee;
    - applies to all new H-1B petitions (both private industry and cap-exempt organizations) and change-of-employer petitions, but not to extension requests;
- $325 regular filing fee;
- $290 filing fee for spouse/children.

- Premium Processing: payment of an additional $1,225 fee guarantees that USCIS will adjudicate (issue an approval or request additional evidence) an H-1B application on an expedited basis within 15 calendar days of receipt. This fee is optional.

When can I file an H-1B visa application?

An H-1B petition may be filed up to six months prior to an employment start date. Since the USCIS fiscal year starts on October 1, virtually all private industry employers file H-1B petitions on April 1 (or during the limited filing period of approximately 1 week) requesting an October 1 start date. Even if approved before October 1, an H-1B worker cannot start working until on or after October 1.

How long is an H-1B visa valid for?

H-1B visas are issued in three-year increments and may be extended for another three years up to a maximum of six years. Any time spent outside of the United States on holiday or for business can be recaptured back.

Does an employer have any obligations or liabilities when filing for an H-1B visa?

- **Attestations:** all H-1B employers are required to make certain attestations to the Department of Labor on a **Labor Condition Application (LCA)** Form ETA 9035E:

  - Wages: an H-1B employer must pay at least the prevailing wage or the employer's actual wage, whichever is higher, for the occupation; this must be the actual wage and cannot include discretionary bonuses, commissions, benefits, etc.;
    - An H-1B employer must pay for non-productive time and cannot "bench" an H-1B worker for lack of work or economic hardship, etc.
  - Benefits: an H-1B employer must make benefits available to H-1B workers on the same basis and criteria in which benefits are offered to similarly situated U.S. workers;
  - Working Conditions: an H-1B employer must promise to provide working conditions for nonimmigrants which will not adversely affect the working conditions of workers similarly employed;
  - Strike, Lockout or Work Stoppage: an H-1B employer must attest that there is no strike, lock out or work stoppage in the named occupation at the place of employment;
  - Notice: notice to union or to workers has been or will be provided in the named occupation at the place of employment.

- The LCA must be posted in two conspicuous locations at the worksite, for ten business days.
- A copy of the LCA must be provided to the employee before or on the first day of employment.

Can consulting companies send their H-1B workers to work at an off-site or client location?

An employer assigning H-lB workers at an off-site location must comply with all statutory and regulatory requirements, including the mandatory posting requirements at all off-site locations.

What other obligations does an H-1B employer have?

- **ACWIA Training Fee:** depending on the size of the company, it is an employer's responsibility to pay the ACWIA training fee.
    - An employee cannot pay the ACWIA fee or reimburse the employer for this expense.
- **Payment for Nonproductive Time (Benching)**: employers are prohibited from placing H-1B workers in unpaid status due to lack of assigned work, economic hardship or lack of a license. However, H-1B workers may request unpaid leave as a result of conditions unrelated to employment, such as sabbaticals or maternity or paternity leave.
    - The obligation to put an H-1B employee on payroll begins no later than 30 days after admission into the United States if entering on the approved H-1B visa, or if already in the United States and granted a change-of-status, 60 days after the date a worker becomes eligible to work for the employer.
- **Termination of Employment or Lay Off:**
    - If terminated or laid off, an employer must offer the H-1B worker "reasonable costs of return transportation" to the H-1B employee's residence abroad.
    - If an H-1B worker voluntarily resigns, an employer is not required to offer "reasonable costs of transportation" to the H-1B worker.
    - H-1B employers must also notify USCIS of the termination and withdraw the H-1B petition and the LCA.
    - If an H-1B worker is terminated, laid off or voluntarily leaves employment, there is no grace period. The H-1B worker must immediately file a new petition to transfer the H-1B to a different employer or change to an alternative visa category or leave the United States.
- **H-lB Petition Expiration:** the employer is not liable for transportation costs if the H-1B employee's employment ends upon petition expiration.

Changes in job conditions - when is an H-1B amendment required?

An H-1B amendment may be required in some of the following scenarios:

- Demotion or promotion or any kind of changes to an H-1B worker's job duties or job title;
- Change in physical location of an H-1B worker's worksite;
- Change in hours from full-time to part-time or from part-time to full-time;
- Merger, acquisition or any type of corporate restructuring;
- Reduction in salary.

Does an H-1B Employer have to advertise and recruit and show that it cannot find a qualified U.S. worker?

No, under the H-1B program, the employer is not required to advertise or show that it cannot hire a qualified U.S. worker.

Can I use the H-1B visa to work for any employer or multiple employers?

No, the H-1B, like virtually all nonimmigrant visas, is employer-specific, which means that one can only work for the company that sponsors/petitions for the H-1B visa.

Does the H-1B have to be for full-time employment?

No, an H-1B visa can be for part-time or full-time employment. There is no minimum number of hours required under the regulations to qualify for a part-time H-1B. Part-time employment is anything less than 35 hours. As a practical matter, an H-1B worker must make at least a living wage (i.e. can support himself/herself) or must be able to show that s/he has sufficient means to support himself/herself.

Can I work for multiple employers?

Concurrent employment allows an H-1B worker to work for multiple employers, but each employer must file a separate H-1B petition and pay all the required government filing fees. Part-time, concurrent H-1Bs are commonly used by health care professionals such as dentists, physical therapists, nurses, etc. which allows them to work for multiple employers.

How easy is it to change jobs while on an H-1B visa?

H-1B portability makes it easy to transfer an H-1B from one company to another. An H-1B worker may "port" or "transfer" his/her H-1B upon filing of a new H-1B petition with USCIS. The H-1B worker does not have to wait for the approval of the new H-1B petition to commence employment for the new employer. In order to qualify for H-1B portability, the H-1B worker

must have been lawfully admitted into the United States, previously been issued an H-1B visa, and must not have worked without USCIS authorization.

If I change jobs, am I subject to the H-1B cap again?

An H-1B worker is not subject to the H-1B cap when changing jobs if the H-1B worker has previously been "counted" towards the H-1B cap.

What if I went to work for a cap-exempt institution and now want to transition to private industry?

H-1B workers who are employed by cap-exempt organizations, such as universities cannot "port" to a private employer unless they have previously been "counted" towards the cap. Such H-1B workers may have to wait and file a new H-1B under the next fiscal year. In some limited situations, an H-1B worker may be able to work concurrently for the cap-exempt institution and the private industry employer.

What if voluntarily resign from my job?

If an H-lB employee voluntarily terminates employment, an employer is not required to offer "reasonable costs of return transportation" home, but must notify USCIS and DOL that the H-lB employee is no longer employed with the company and withdraw the H-lB petition and the Labor Condition Application filed.

Is there a grace period if I voluntarily resign or if I am laid off or terminated?

No, there is no grace period if an H-lB worker is terminated, laid off or voluntarily leaves employment. Prior to actual termination (i.e., the employee's last day of work), the H-lB worker must immediately file a petition for H-lB employment with a new employer or change status to an alternative visa category or leave the United States. Where possible, it is imperative that an H-1B employer gives the employee ample time prior to termination, to consider his/her options and make appropriate arrangements.

What if the H-1B quota has been reached, but I have previously held an H-1B visa?

Remainder Options – if you have previously held H-1B status and did not use the full six-year period, you may apply for an H-1B for the remaining unused time from the six-year period. Individuals in this situation are not subject to the H-1B cap because they have already been "counted." For example, someone who works for three years on an H-1B decides to go back to school as an F-1 student to obtain an MBA. After graduation, this person can apply for an H-1B for the remaining three years and is not subject to the cap and can apply at any time of the year.

If an individual on an H-1B leaves the United States and is physically abroad for at least one year, that person can either apply for a "new" cap-subject H-1B to obtain a "new" six-year

period, or that person can choose to apply for the "remainder" of unused time without being subject to the H-1B cap.

What visa will my family receive?

Spouses and minor children under the age of 21, are eligible for H-4 status. H-4 derivatives are allowed to attend school, but are not allowed to work. However, spouses may apply for their own work visa if they qualify under one of the other nonimmigrant visa categories.

What happens when I reach the H-1B six-year limit?

- Recapturing time: any time spent physically abroad for vacation or business, can be recaptured towards the six-year period.
- Pending Green Card applications can help!
    - If a labor certification or I-140 has been filed and pending for at least 365 days prior to his/her 6th-year cap date, one may obtain H-1B extensions in one-year increments;
    - If an I-140 has been approved but an H-1B worker is subject to retrogression, an H-1B may be extended in three-year increments, until the green card is approved.

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