

CONSIDERATIONS ON H1-B VISA FOR 2007

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This explanation will provide a brief overview of the H-1B visa category and the steps necessary to obtain an H-1B visa before the quota for this year is exhausted.

The H1B visa program is utilized by some US businesses to employ foreign workers in specialty occupations that require theoretical or technical expertise in a specialized field, such as scientists, engineers or computer programmers. Congress created the H1B program more than 50 years ago and established an annual cap of 65,000 in 1990. "Specialty Occupation" is almost identical to the definition of "professional". This is established by presenting the position as an occupation that requires theoretical and practical application of a body of highly specialized knowledge such as engineering, social, sciences, medicine, education, business specialties, law and so on.

The specialty occupation is typically available to those individuals who have obtained at least a Bachelor's degree from a United States university or its equivalent from a foreign university. In addition, the position offered to the individual must be that which requires a bachelor's degree as a minimum requirement for entry into the position. Individuals who do not possess a university degree but who have extensive professional experience may be candidates for credentials evaluations. Also, the credentials evaluations may be substituted for the bachelor's degree in certain cases.

There are three major components the employer must establish to obtain an H-1B visa on behalf of his employee: the position being offered is a "specialty occupation"; the alien meets the requirements to engage in the specialty occupation; and the employer has the ability to pay at least the prevailing wage for the specialty occupation.

U.S. employers may begin filing quota-subject H-1B petitions from April 1, 2007, for a start date on or after October 1, 2007. It is likely that the quota again will be met very quickly for this upcoming fiscal year, and any delay in filing H-1B petitions may mean that another quota year is missed. The H-1B quota has been a major issue in immigration since it was reduced in fiscal year 2004 to the quota levels of the pre-technology era. With the rush expected in April 2007, it is anticipated that the H-1B quota will be reached very early, perhaps even before the new fiscal year begins in October 2007. This is very likely with a relatively strong economy and low unemployment rates in the U.S. In light of this, I would like to offer the following suggestions to employers and employees who need to file H-1B petitions for the upcoming fiscal year which will begin October 1, 2007.

It is important for the U.S. employer, who has not been able to fill positions with U.S. workers and who anticipates filing an H-1B visa on behalf of a foreign national this year, to start interviewing potential H-1B candidates without delay. H-1B petitions should be ready to file so they can reach the USCIS as close to April 1, 2007 as possible. U.S. employers should consult with their attorneys to assess whether prospective job candidates are qualified for the H1B positions in January and February 2007. This way, H-1B petitions can be prepared and completed by March and filed with the United States Citizenship and Immigration Services (USCIS) in the last day of March 2007. U.S.

employers should remember that the job candidates must have bachelors' degrees or the equivalent at the time of filing. A candidate may not be eligible to file under the H-1B visa quota if s/he will not have the credentials or qualification on the filing date, by April 1, 2007.

Because H-1B visas are subject to a quota, there is a lot at stake with the preparation of H-1B cases. They must be properly prepared and filed or they run the risk of rejection or denial by the USCIS. The reasons are sometimes as simple as failure to include the proper fees or sign in the correct places on the forms. Mistakes of this nature generally cause a case to be rejected entirely by the mailroom at the USCIS, resulting in the whole filing being returned to the attorney or U.S. employer. There is generally no time to correct mistakes and re-file those cases because of the quota issue. Therefore, I strongly suggest using a qualified, experienced immigration attorney to prepare and file H-1B cases.

If an H-1B application is properly and timely filed and approved, the USCIS will then approve the petition and forward it to the prospective employee's home country. The individual must then present himself at the nearest United States Embassy abroad and request that an H-1B visa be placed in his passport. If the individual is presently in the United States, an application may be made with USCIS requesting that the individual's status be changed from one category to another. The H-1B petition may originally be approved for a period of up to three years and can be extended for an additional period of three years. At the end of the six year period, it is required that the individual leave the United States for one year before applying for a new visa.

During the time the H-1B visa petition is valid, the individual may only work for the petitioning organization and may not change employment unless a new application is filed with the USCIS. The U.S. employer is under no obligation to continue the services of the individual during the period of time the H-1B visa is valid. If the U.S. employer decides not to retain the individual at any time, it should contact the USCIS and inform them of that fact.

My advice to U.S. employers and foreign nationals who wish to apply for H-1B visas is to begin the process of building a strong H-1B visa case as soon as possible in order to ensure the approval of the case on a timely fashion and avoid the risk of the quota being exhausted.

Finally, it is important to note that H-1B employees may apply for a labor certification for purposes of acquiring permanent residence based on a job offer. This is an attractive option that allows temporary workers to work for the U.S. employer indefinitely.