H-1B Visas

Craig J. Peterson, Attorney
petersonimmigration.com
612-351-8091
craig@petersonimmigration.com
H-1B Visa

- Temporary “specialty” worker
- 6-year maximum, 3 year maximum in one petition
- Government Agencies involved
  - US Citizenship & Immigration Services
  - US Department of Labor
  - US Department of State
Roles in Application

- Employer is the applicant
  - Responsible for content of application
  - Fines, other penalties apply to employer

- Employee is the beneficiary
  - Only employer or attorney may inquire about pending case
  - Must maintain employment to maintain status
Specialty Occupation

- Job must require a Bachelor’s degree as a minimum for entry into the field
- Employee must have required degree and any required licenses
- Job must relate directly to academic degree
H-1B Expenses

- Basic filing fee $460 anti-fraud fee $500; training fee $1500 ($750 for small employers – less than 25 employees)
  - Cap exempt employers don’t pay training fee
- Premium processing $1410 (if available)
- Attorneys fees
- Who pays fees/costs?
  - Prince George’s County public schools ordered to pay over $5 million in back wages/penalties for passing fees on to H-1B workers. April 4, 2011 Dept. of Labor news release.
Application Process

- Labor Condition Application
- I-129 petition to US Citizenship & Immigration Services
- Change/extension of status vs. consular processing
- Status vs. Visa
Employers must pay “prevailing” or “actual” wage, whichever is higher.

- **Prevailing** - Average wage paid to similar workers in same geographical area
- **Actual** - Wage paid by particular employer to similar employees

Benefits must be offered to H-1B employees on same basis as US workers.
Changing H-1B Employer

- Employment permitted upon filing of additional H-1B petition (prior to approval – but if petition later denied, stop work.)

- Must already have H-1B status

- H-1B entry visa remains valid (not employer specific)
Special H-1B Considerations

- Changes in employment, same employer
- No “benching”
  - bona fide leave ok
- Early employment termination
- US CIS “site visits” putting $500 anti-fraud fees to work
- Employer/Employee relationship issues
  - Self employment?
  - 3rd party worksites – who controls work?
H-1B Annual Cap

- 65,000 “new” H-1B’s under current law (20,000 exemptions for US advanced degrees)
  - Fiscal year is October 1 - September 30
  - File April 1 for October 1 start date (if cap-subject)

- Quotas met first week in April every year
  - April 1, 2016 (236,000 received)
  - April 1, 2017 (199,000 received)
  - April 1, 2018 (190,000 received - over half with US Master’s or higher)
Exemptions from Cap

- Colleges & Universities
- Non profit research institutions
- Government research institutions
- Organizations “affiliated with” colleges/universities (rules apply)
- Where employment occurs “at” exempt organization and related to exempt organizational mission
F-1 OPT and H-1B

- Automatic OPT extension through Sept. 30 if H-1B pending or approved
  - H-1B must be filed before grace period expires
  - If OPT expires before April 1: no OPT extension
  - H-1B pending past Oct. 1 = gap in work authorization

- Additional OPT extension for STEM graduates
  - OPT for additional 24 months
  - Numerous other requirements – E-verify, training plan, etc.

- Unemployment limited to 90 days (150 for STEM OPT) or loss of status results
Managing the Cap

- Alternatives to H-1B: TN, L-1, J-1
- Go home and return when able
- Work for multinational company – future L-1?
- Extend F-1 by enrolling in new academic program
- Apply for change to some other status
- Avoid H-1B altogether – F-1 to green card?
H-4 Dependents

- Change to H-4 or extension of H-4 requires additional US CIS form (I-539)
- No US CIS filing required if dependents outside the United States
- Need proof of relationship, i.e. marriage, birth certificates
- H-4 EAD eligibility likely to be revoked.
Dual Intent

- H-1B is temporary, non-immigrant visa
- No need to show residence abroad or non-immigrant intent, unlike F, J, B visas etc.
- Good choice for people intending to apply for permanent residence
- Travel and pending Adjustment of Status (I-485); advance parole not needed
Travel as H-1B

- Must have H-1B entry visa (except Canadian citizens)
- Carry I-797 Notice of Action (approval notice)
- Proof of job offer or ongoing employment - letter, pay statements etc.
- PIMS system verifies H-1B approval – can delay visa issuance
Travel to Canada/Mexico

- Entering US from Canada/Mexico is just like entering from any other country.

- Exception – “automatic revalidation” allows entry using expired visa or visa of different kind following change of status.
  - Important: do not apply for a visa while in Canada/Mexico if relying on automatic revalidation for re-entry.
J Visa 2-year Rule

- Some J visa holders have 2-year home residence requirement
- Gov’t financing, skills list, physicians
- Cannot have H visa or change status from J to other status, i.e. H-1B
- Cannot file I-485 permanent residence or immigrant visa applications
- Waivers sometimes available
Some crimes affect eligibility for a visa; some don’t

Driving while intoxicated is getting strong attention lately
   A single DWI arrest or conviction may result in cancellation of a visa or ineligibility for a visa for 12 months!
   Don’t drink and drive!

If a US consulate contacts you to travel from the US for a new interview, contact an attorney first.
New USCIS policy to address perceived high rate of overstay of F, J, M visa holders; August 9, 2018.

Unlawful presence begins:
- Day after individual no longer pursues course of study or other authorized activity, or
- Day after engaging in unauthorized activity (status violation – i.e. unauthorized employment.)
- Day after completing program plus grace period
- Day after IJ orders removal
Discussion about changing H-1B classification to favor higher salaries, higher levels of education, change definition of “specialty occupation.” No official change on this.

Changing how lottery operates – have employers pre-register for selection, run Master’s lottery first. This will go into effect next year (2020 filings.)