



Applying for an H-1B Visa for Fiscal Year 2021

Syracuse, New York

November 2019

Background

The H-1B category is an attractive employment-based option for U.S. employers seeking to hire foreign nationals in specialty occupations. Generally, in order to qualify for an H-1B visa, the employer must demonstrate to the United States Citizenship and Immigration Services (the "USCIS") that the following requirements are met:

- i) the job is a specialty occupation, i.e. one that generally requires an employee holding at least a U.S. bachelor's degree or its foreign equivalent;
- ii) the foreign employee holds at least a bachelor's degree or its equivalent in a field related to the position; and
- iii) the employer obtained the certified labor condition application (the "LCA") from the U.S. Department of Labor, in which the employer represented, in particular, that it will pay the foreign employee the required wage (i.e., at least the same wages paid to similarly situated employees with that employer or the local prevailing wage in the respective geographic area, whichever is higher).

Annual Cap

There is an annual numerical limit of new H-1B approvals ("H-1B cap"). Congress set the current annual H-1B cap at 65,000 (the "regular cap") plus 20,000 for foreign nationals holding U.S. master's or higher degrees (the "advanced degree cap") for each fiscal year. The government's fiscal year runs from October 1 to September 30.

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.

Cap Exemption

There are some exceptions to the H-1B cap requirement. For instance, current H-1B holders who have been previously counted towards the cap are generally cap exempt. Therefore, when such H-1B holders seek to extend their status, amend terms of employment, transfer from one employer to another, or add concurrent H-1B employment, they can generally file their petitions with the USCIS any time. In addition, foreign workers seeking employment with institutions of higher education, related or affiliated nonprofit entities, nonprofit research organizations, or governmental organizations are also not subject to the annual cap.

Timing

An H-1B petition can be filed up to six months before the requested validity period. Once the H-1B cap is met, employers may only file new H-1B petitions six months before the next fiscal year begins. Since the fiscal year begins on October 1st, cap-subject H-1B petitions may be filed no earlier than the preceding April 1st (or the first business day of April).

Revised Filing Procedures for Cap-Subject Petitions

USCIS is scheduled to implement an online registration process for the fiscal year 2021 H-1B cap season, pending completed testing of the system. The online registration system requires employers seeking to file a cap-subject H-1B petition to electronically register their intended petitions with USCIS and pay a non-refundable \$10 fee for each submitted H-1B registration. USCIS will not consider an H-1B cap-subject petition properly filed, unless it is based on a valid registration selection for the applicable fiscal year. USCIS said it will announce the implementation timeframe and initial registration period once a formal decision has been made.

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Under the new procedure:

- The initial registration period must begin at least 14 calendar days before the first day of filing in each fiscal year, i.e., the first business day of April. As the first filing date for the upcoming fiscal year is on April 1, 2020, the registration period must be open no later than March 18, 2020.
- USCIS will announce the initial registration period on the USCIS website at least 30 days before the registration period opens, i.e., by February 17, 2020.
- Employers may submit only one registration for each foreign worker, and if selected, the employer may only submit a petition for the named foreign worker.
- Employers must pay a \$10 fee for each registration filed for a cap-subject H-1B petition.
- The registration process will require the petitioning employer to provide the following information: (i) employer's name, FEIN and address; (ii) employer's authorized representative's name, job title and contact information; (iii) beneficiary's full name, date of birth, country of citizenship, gender and passport number; (iv) if the beneficiary obtained a master's or higher degree from a U.S. institution; and (v) information regarding the employer's attorney.
- When the initial registration period ends, USCIS will determine whether it has received a sufficient number of registrations to satisfy the regular H-1B cap. In the unlikely event that USCIS received an insufficient number of H-1B regular cap registrations, USCIS will extend the initial registration period to continue accepting registrations until the day it has received enough registrations to satisfy the regular H-1B cap, randomly selecting from the valid entries the registrations needed to satisfy the regular cap.
- USCIS will then determine if it has received enough (previously unselected) registrations to satisfy the master's cap. If it has, USCIS will randomly select from valid registrations received during the initial registration period and not previously selected under the regular cap selection process to identify the registrations needed to satisfy the master's cap. If the number of the master's cap registrations is not sufficient, USCIS will continue accepting registrations until the day it has received enough registrations to satisfy the H-1B master's cap, randomly selecting from the valid entries the registrations needed to satisfy the master's cap.
- If a registrant is selected, USCIS will electronically notify the employer or its attorney (if applicable) that the employer is eligible to file an H-1B petition for the named foreign worker. The notice will include the filing location and the filing period during which the employer may submit its H-1B petition. Employers will be provided a period of at least 90 days to prepare and submit their H-1B petitions. The employers are not allowed to substitute beneficiaries.
- Most importantly, employers may now wait until they have been notified of selection before submitting an LCA to the U.S. Department of Labor and preparing the corresponding H-1B petition for the beneficiary named in the selected registration.

Foreign employees whose H-1B petitions will be approved can start their employment in the United States on October 1, 2021. While we cannot know exactly how the new registration process will impact the H-1B cap filing season in the future, many are optimistic that it will streamline the H-1B filing process. At the same time, the new system raises potential pitfalls. In particular, given the low registration fee and the limited information needed to enter the lottery, there are concerns that some employers will register positions that will not qualify for an H-1B or for beneficiaries who will abandon job opportunity, essentially reducing the chances of other qualified beneficiaries to receive an H-1B visa for that year.

Employers are encouraged to begin working with experienced immigration counsel early to determine the best strategy for their H-1B candidates. Our experienced immigration team provides comprehensive services to address our clients' needs regarding immigration benefits and compliance matters. Please contact:

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