

H-1B Visa Employer Obligations

1) What are the employer obligations when sponsoring an H1b visa petition?

The H1B visa is popular among foreign nationals working in professional and technical positions. This visa enables a beneficiary to stay in the U.S. for up to six years and apply for permanent residency in the interim. Because this visa permits a foreign national to have "dual intent", there is no conflict when an H1B temporary worker applies for a green card. As part of the H1B petition, the employing company, serving as the petitioner of the H1B visa petition, must make a number of attestations. It is important that the employer familiarize his/herself with the statements it's agreeing to so as to avoid future inadvertent noncompliance and possible penalties.

Part of the H-1B process involves submitting a Labor Condition Application (LCA) to the Department of Labor (Form ETA 9035). **The LCA contains a number of important attestations that the employer agrees to. They are the following:**

The "actual" versus the "prevailing" wage:

Here, the actual wage is the wage that the company's compensation department has set for the position for all employees with similar experience and skill. Usually, the prevailing wage is a figure provided by the state's employment agency, which it thinks is an accurate reflection of what other employers are paying for that position. The employer must agree to pay the higher of the two wages.

Working conditions:

The employer must state that employing the foreign national will not adversely affect the working conditions of other similarly employed workers. Therefore, an employer who increased working hours and decreased vacation periods as a result of hiring foreign nationals would not be in compliance with this attestation.

Strikes, lockouts, and work stoppages:

If any of these develop after the Labor Condition Application is filed with the Department of Labor, the petitioning employer must inform the Department of Labor.

Notice regarding the LCA:

Employers must provide notice of the LCA to its employees through posting the LCA on the premises for at least ten business days. The posting must be done in two different conspicuous locations.

Public access file:

H1B regulations require that the employer maintain a public access file, which is to be made available for public inspection. The file must contain documentation showing that the employer is complying with the aforementioned requirements.

Additional requirements for H1B dependent employers:

Employers are considered to be H1B dependent if they have less than 25 workers and more than 7 H1B workers; between 26 to 50 workers and more than 12 H1b workers; or more than 50 workers with 15% or more of them being H-1B foreign nationals. In this case, H1B dependent employer must fulfill 2 additional requirements.

Displacement of U.S. workers:

An H-1B dependent employer must attest that by hiring a H-1B worker, it is not displacing any U.S. worker for a similar position within 90 days before or after filing a H1B petition.

Recruitment efforts:

The H1B dependent employer must also attest to making good faith attempts to recruit U.S. workers and offering prevailing wages for this position. When hiring an H1B worker, it is important for employers to recognize the attendant responsibilities that they must shoulder. Although the requirements are not excessively burdensome, the employer is required to maintain some paperwork to demonstrate its compliance with the law. A clear understanding and fulfillment of these requirements will minimize possible civil penalties and ensure that the employer will be permitted to petition for future H-1B workers.

Payment of Employees:

A “benched” employee, is someone who is currently between work projects, and typically refers to someone who is sponsored/employed by a consulting firm/agency who then sub-contracts their services out to an 'end' client.

In the eyes of the law, the company who petitioned the INS to grant the H1B Visa is considered the 'employer' (the company that 'sponsors' the employees Visa).

- 1) When a foreign national is benched because there is no immediate work available, they are still entitled to receive compensation.
- 2) The employer is bound to pay the foreign national as attested on the labor condition application. The employer may NOT withhold payment claiming that the employee is not entitled to it because the employee did not work.
- 3) Should the employer fail to pay the H1B employee, the employer will be in violation of 'federal regulations' and will have to pay any monies owed in salary. Also, the employer risks incurring possible penalties for failure to comply with the employer requirements of H1B visa sponsorship.

4) When an H1B employee takes time off from working for personal reasons (e.g. vacation / illness / leave of absence etc), generally, the employer does NOT have to compensate the employee for this temporary period of time. However, the employer will have to provide compensation if it was contractually agreed OR if they 'normally' do and normally make this available to its employees.

5) Employers are also bound to pay their H1B employees even when the employer experiences a temporary shut down in its operations (i.e. if the employer shuts down the company for a period of 10 days during the holiday season, it must continue to pay its H1B employees during this period, even if the employer is not compensating the U.S. workers).

If you have any issues regarding employer obligations... You should contact your local [Department of Labor \(DOL\)](#)

As discussed above, employers accept important responsibilities when choosing to sponsor a foreign national on a H1B. Employers should be careful to be aware of the requirements imposed on them to ensure that they are in compliance. Doing so minimizes potential violations and ensures that the employer can continue participating in the H1B visa program.

2) Top Four Issues to Consider When hiring a foreign national

1. When will the foreign national be able to work?

The foreign national may or may not be able to start work immediately. For certain visas like the TN visa, obtaining a visa authorizing work is not as time consuming as other visas and can be accomplished very quickly. However, other visas like the O-1 require a processing time of at least a few months. H1B visas have an estimated processing time of about 3 months AND are not available year-round because of the cap on the total number available each year. These potential delays must be factored in a company's staffing plans especially with time-sensitive projects.

2. The foreign national will have a temporary period of work authorization:

A foreign national will have a limited temporary period of time to work in the U.S. After the expiration of his current visa status, he will have to seek an extension if available, change to a different temporary status, and have applied to adjust his status to permanent residency, or leave the country.

3. Costs associated with US immigration matters:

The employer will have to discuss with the foreign national whether the company or the applicant will be responsible for the INS filing fees, costs, and legal fees incurred when seeking a work visa or green card. Given that the expenses can be substantial, if the employer is considering offering to pay for these expenses, the employer must weigh the value that the foreign national will provide to the company versus the financial commitment.

4. Restrictions:

Certain visas require that the employer comply with specific requirements. For example, institutions sponsoring J-1 visa holders will need to make sure that these foreign nationals purchase the federally mandated health care and repatriation insurance. J-1 sponsors also need to prepare an annual report summarizing their J-1 program.

3) New H1B Laws Affects an Employers Hiring Decisions

Over the past several years, the numerical restrictions placed on H1B have hampered the quick deployment of these professionals. Once the H1B allocation had been exhausted, companies were forced to wait until the next fiscal year for the next batch of work visas. For those who had available H1B visas, lengthy INS processing times made it difficult to predict when a foreign national could be employed.

Last year, legislation was introduced in Congress to ameliorate these issues. On October 17, 2000, President Clinton has signed into law both S. 2045 and H.R. 5362. S. 2045 made significant improvements to H1B regulations while H.R. 5362 sought to benefit the American workforce by increasing the fee employers must pay to hire an H-1B worker. The following is a summary of the major changes to the H1B visa category and how it impacts employers and their efforts to recruit foreign national skilled workers.

H1B Visa Cap:

The cap for 2004 has now been reduced to 65,000. For fiscal years 2001, 2002, and 2003, the total number of H1B visas available each year was 195,000.

Exemption from the H1B Cap:

H1B applicants who will be employed at nonprofit research, university, or government institutions will not be counted toward the cap. Therefore, hiring departments at these organizations no longer need to be concerned about the limited availability of H1B's. Timing the submission of an H1B petition to the INS will also be less of a factor.

Portability of H1B visa Status:

Under previous H-1B regulations, an H1 employee seeking to work for another employer could not begin working for that employer until the INS processed and approved the transfer petition. This created significant delay for the transferring employer because it could take 3 months before the employee could actually commence work.

The new regulations permit the H1 employee to begin working for the new employer upon the filing of the transfer H-1B petition with the INS. H1 applicants who currently have a transfer petition pending with the INS can begin working for the new employer immediately. These changes will significantly enhance hiring decisions and facilitate bringing in much needed skills for time-sensitive projects. H1 visa employees can utilize this provision so long as he or she was in lawful status at the time of filing the H1B petition and provided that the employee has not engaged in any unauthorized employment since last entering the U.S.

Extensions beyond Six Years for H1B visa holders who are awaiting Green Cards:

H1B non-immigrants will be permitted to apply for one-year extensions beyond the six-year maximum provided that they have either filed an I-140 immigration application or an I-485 adjustment of status application AND that one year or more has passed since the filing of labor certification or the I-140. This important development enables H-1B workers who have reached the six-year maximum to stay and continue working in the U.S. while waiting for their green cards. Prior to this, such individuals were forced to leave the U.S. if they had not received their green card in time.

***For more information on Employer Obligations, please visit the website:**

<http://www.h1base.com/page.asp?id=148>

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