

The Jaffe Update

Legal News Delivered

A publication of Jaffe Raitt Heuer & Weiss

February, 2019

Time to file H-1B Petitions

High demand is expected, once again

Each year, the government limits the number of H-1B temporary work visas it will issue for professional workers. Again this year, 65,000 will be available (with an additional 20,000 available for those holding master's degrees from U.S. universities). April 1, 2019 marks the first day petitions can be filed, with an effective start date of October 1, 2019. If the U.S. Citizenship and Immigration Services receives more petitions than allowed under the cap, it conducts a lottery to select the petitions for processing. In 2018, nearly 190,000 petitions were filed the first week of April and a lottery was conducted. This year, the cap is again expected to be reached quickly (i.e., in the first week of April).

H-1B visas generally are used for professionals who hold at least a Bachelors degree or its equivalent. The degree must be relevant to the offered job. The 'prevailing wage' must be paid to the foreign national who can then be approved for an initial period of up to 3 years, renewable up to 6 years. (Additional technical details on the H-1B visa can be found on page 2 of this update).

A major rule change is being implemented by USCIS in this lottery. Holders of U.S. Master's Degrees will be counted more favorably, resulting in an anticipated 16% increase in the number of advanced degree winners in the lottery (to the detriment of B.S. degree applicants).

Government challenges to H-1B requests escalated dramatically in the past two years resulting in 40% more Requests for Evidence (RFE) than in previous years. Nearly 60% of all H-1B filings were challenged by USCIS. This new oppositional environment makes it more important than ever to have expert and thorough preparation of your H-1B.

Employers seeking H-1B status for current or potential employees should plan to have their petitions filed on April 1. But note that the prerequisite steps that must be completed before filing the H-1B petition can take several weeks. Preparation should begin no later than early-March to avoid missing the "cap season."

BUSINESS IMMIGRATION



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We strongly advise employers to finalize any H-1B sponsorship decisions before the end of February. The prerequisite for each petition is to obtain certification by the U.S. Department of Labor (DOL) of a Labor Condition Application (LCA). It can take up to seven business days to certify an LCA.

Our highly-experienced business immigration experts at Jaffe will work with you to file H-1B petitions until at least April 5th, as long as H-1B visas are available.

A brief outline of the H-1B requirements is as follows:

1. Relationship

A valid employer-employee relationship must exist with the petitioning U.S. employer. Such relationship is determined by whether the U.S. employer has a right to control when, where and how the beneficiary performs the job. Independent contractors are not considered employees as they are not claimed as employees for tax purposes and the scope of their work & schedules are not controlled by the petitioning U.S. employer.

2. Position

The position offered must qualify as a specialty occupation. Specialty occupation is defined, by statute and regulation, to require the theoretical and practical application of a body of highly specialized knowledge, AND the attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum entry into the occupation. This generic definition is further clarified by the regulations to require that the position must meet one of the following criteria:

- 1) Baccalaureate or higher degree or equivalent is normally the minimum requirement for entry into the particular position;
- 2) Degree requirement is common in the industry in parallel positions among similar organizations, or the particular position is so complex or unique that a degree is required;
- 3) Employer normally requires a degree or equivalent; or
- 4) Nature of specific duties is so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of degree.

Furthermore, a specialty occupation must require a degree in a specific field directly related to the offered position, rather than allowing generally a bachelor's degree in any field.

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3. Employee Qualifications

The employee must be qualified to perform the services in the specialty occupation as a result of having attained a bachelor's degree, or its equivalent, in the specialty occupation. If the employee does not hold at least a bachelor's degree in the field related to the specialty occupation, the employee may still qualify if the employee holds an equivalent combination of education and experience or has an unrestricted state license, registration or certification which authorizes the employee to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment.

4. Wage

The statute and the regulations require that the employee must be paid at least the actual or prevailing wage for the specific occupation, whichever is higher. The actual wage is the wage rate paid by the employer to all others with similar experience and qualifications for that position. The prevailing wage is the wage rate for the occupational classification in the geographic area of employment. The U.S. Department of Labor (DOL) maintains a database with applicable current prevailing wage levels based on occupation and work location.

Employers planning to hire new H-1B employees should start their preparations now in order to have their H-1B petitions filed by April 1, 2019.

To learn more, or to discuss your needs, contact our Business Immigration Attorneys **Eli Maroko, Kreuza Gjezi** or **Ilene Zaitouna**.

This summary is provided as an information service to our clients and friends. This summary is not intended, and should not be used, as legal advice or opinion.



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