Attorneys' Guide to H-1B Visas

By Alice M. Yardum-Hunter

THIS IS THE TIME OF THE YEAR WHEN applicants for nonimmigrant (temporary) employment status prepare applications for filing at the U.S. Citizenship and Immigration Services (CIS). H-1B status is available typically to college graduates who secure three-year offers of employment in the United States after studying as foreign students. They have attained higher education degrees in areas such as computer science and engineering. They usually lack close family petitioners to keep them in the United States Therefore, the H-1B, relatively easy for a foreign student to qualify for, is coveted in the job market. Employers of H-1B workers are motivated too. They bemoan the lack of sufficiently educated U.S. workers and must pay required filing fees, if not all fees and costs.[1]

Since the tech boom in the 1990s, H-1B has gained much media attention. There was demand for high tech workers necessary to develop the hardware and software found everywhere today, while universities in the United States were not able to (and continue to fail to) graduate sufficient number of American students in the sciences. As a result of the lack of qualified U.S. specialists, Congress increased the number of H-1B visas available for a few short years gradually from 65,000 to 195,000 annually until the quota returned to 65,000.[2] Today, there are an additional 20,000 H-1Bs for foreign nationals with Master Degrees issued by U.S. universities.[3]

The increase in H-1B foreign nationals threatened the U.S. engineering community and the tug of war in the media and in Congress has kept the H-1B quota low despite economic growth since 1990 when the quota went into effect.[4] When the economy is poor, the incentive to allow greater numbers of foreign workers is politically impossible. As the economy improves, the political incentive returns. The improving economy today, plus increased attention on immigration reform, may result in a larger H-1B quota again.

The procedure for filing an H-1 petition includes several steps: verification of the employer's tax ID number, certification of a Labor Condition Application (LCA) through the U.S. Department of Labor (DOL) and approval of an I-129 Petition for a Nonimmigrant Worker filed with the CIS.[5] Aliens in the United States change and extend their status; those abroad apply for visas with the Department of State (DOS) at an embassy or consulate. The visa is the passport stamp that permits entry under a particular status.

Petitions for H-1B status are filed annually as early as April 1 for employment to begin October 1.[6] Feverishly, in the weeks before April 1, employers and applicants prepare their cases hoping for earlier approval by CIS without dreaded Requests for Evidence (RFE). RFEs were rare pre-9/11, but have now become common. Some RFEs are simple; some are complex substantive challenges. Eighty-seven days are provided for response. Without a response, the petition is denied. If a petition clearly doesn't qualify for H-1B status, the petition will be denied without an RFE. The best practice is to avoid RFEs.

Filing on April 1 becomes more important during times of economic strength. When more than the quota of petitions is received on April 1, CIS creates a random lottery to decide which petitions to accept for processing. When the numerical cap is reached after April 1, subsequent petitions are rejected. Applicants have to wait in a different, authorized status (almost always not authorized for employment) and try again the following year, or depart when they don't qualify to stay and wait. Some of them never return due to problematic timing issues. Concomitantly, the United States loses that specialist worker.

Under the Immigration and Nationality Act, H-1B status is accorded to specialists who hold a baccalaureate degree or the equivalent in a field of "specialized knowledge" petitioned by an employer to occupy a "specialty occupation."[7] The use of "special" and its variants to describe the foreign national, their field of study, the job offered, and what's required of the job all seem the same, but they are not.

The Code of Federal Regulations defines specialty occupation as:

> …. an occupation which requires theoretical and practical application of a body of highly specialized knowledge in fields of human endeavor including, but not limited to, architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts, and which requires the attainment of a bachelor's degree or higher in the specific specialty, or its equivalent, as a minimum for entry into the occupation in the United States.[8]

More specifically, a position can be a specialty occupation by meeting one or more of four requirements:

- A minimum baccalaureate degree is normally required to enter the particular position.

- The degree requirement is common to the industry in parallel positions or, an employer may show that a particular position is particularly complex or unique.

- The employer normally requires a degree for the position.

- The nature of the specific duties is particularly specialized and complex.[9]

From a practical perspective, though the regulations require one of the above, the best practice is to include as many as possible.

Recent interpretations by CIS of the above two sets of requirements are that they must both be met, rather than the second set defining the first. The result has been more H-1B denials and federal court litigation.

In addition to the position qualifying as a specialty occupation, the alien too must be a specialist through one of the following: possession of a bachelor's degree (U.S. or foreign); unrestricted license to practice in the field; or the equivalency of a bachelor's degree through education short of a degree, training or progressively complex experience and recognition[10]

A common problem area is when an alien does not possess the minimal degree and must rely on a combination of education, training and/or progressive experience. Under those circumstances, equivalence is possible by one or more of the following:

- An evaluation from a college official with authority to grant college-level credit in the field

- Positive results of recognized college-level equivalency examinations or special credit programs

- An evaluation of education by a reliable credentials evaluation service[11]

- Certification from or registration in a nationally-recognized professional association

- A determination by the CIS that the equivalence has been acquired through a combination of education, specialized training, and/or work experience and that the alien has achieved recognition of expertise in the specialty occupation. Recognition of expertise can be in the form of recognition by at least two recognized authorities in the field; membership in a recognized foreign or United States association; published material by or about the alien in mass media or field literature; licensure or registration; or achievements a recognized authority has determined to be significant.[12]

Three years of training and/or work experience must be demonstrated for each year of education lacking. Alien's training and/or work experience includes the theoretical and practical application of specialized knowledge gained while working with peers, supervisors, or subordinates, who have a degree or its equivalent in the specialty occupation.

A bachelor's degree does not alone qualify an individual for H-1B classification. The education must be in a "specialty" which would qualify an applicant to enter a specialty occupation. General baccalaureate degrees are not specialized enough. General liberal arts and business degrees without specialization are not H-1B caliber.

Similarly, for occupations requiring more than a bachelor's degree to enter the field, a bachelor's would not suffice. An obvious example is a pre-med Bachelor of Science degree in Biology which would not qualify one to be a physician absent the M.D. degree. Similarly, psychology bachelor-level graduates cannot provide psychological services without a minimum of a Master's degree and for those positions would not be H-1B caliber.[13] However, in limited circumstances, depending on the duties of a particular position, such a bachelor's degree might be sufficient.[14] For example, a job involving quantitative psychological analysis might be a specialty occupation and an applicant with a bachelor's in psychology, including course work in research and its quantitative aspects, could suffice.

Another area where issues arise is in fields in transition. When graphic design, purchasing management and computer analysis were not part of college curricula, no job could require a degree. However, as fields evolve and college level programs become common, ground breaking studies become mainstream, resulting in those jobs requiring degrees in time.

Over the decades, this simple immigration status has evolved to an ever more complex set of interpretations which change seemingly at whim and then become government policy. Today, RFEs are common in regard to meeting the above regulatory requirements. Common too are RFEs issued more frequently to small companies and start-ups which are viewed as more likely to be engaged in fraud. Depending on the needs of the economy and the political climate, the government's approach to H-1B adjudications might return to less restrictive times and with a larger quota.

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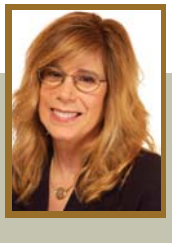
[1] A U.S. worker training fee of $750 or $1,500 must be paid by the employer, depending on number of employees. An employer must pay all fees (including attorney fees) and costs when deducted from the wage paid to the employee the remainder would fall below the required wage.
[2] American Competitiveness in the Twenty-First Century Act of 2000 (S. 2045), October 3, 2000 was too little too late.
[3] Title IV of P.L. 108-447 (H.R. 4818), the Consolidated Appropriations Act for FY2005
[4] The Immigration Act of 1990 (P.L. 101-649), November 29, 1990 5 The LCA contains employer attestations for protection of U.S. worker wages and working conditions.
[6] Six months before the start of the government's fiscal year on October 1
[7] Immigration and Nationality Act Section §214(i)(1), 8 USC §1184(i)(1)
[8] 8 Code of Federal Regulations §214.2(h)(4)(ii)
[9] Paraphrasing 8 Code of Federal Regulations §214.2(h)(4)(iii)(A)
[10] Paraphrasing 8 Code of Federal Regulations §214.2(h)(4)iii)(C)
[11] Of note is that reliable credentials evaluation services are not authorized by regulation to evaluate experience or training in lieu of education.
[12] 8 CFR 214.2(h)(4)(iii)(D)
[13] Dictated by state standards of professions involving patient care
[14] The O*NET program is the nation's primary source of occupational information, including all occupational job titles and duties recognized by the DOL for immigration purposes. See www.onetonline.org/



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