



Foreign Health Care Workers and H-1B Classification

By Robert S. Whitehill and Catherine V. Wadhvani



Foreign-born health care workers play a critical role in our country's health care delivery system. A fundamental non-immigrant classification for foreign health care workers is the H-1B temporary worker visa.



This article gives a brief outline of this very valuable visa in part to demystify it and in part to encourage its use in securing skilled and indispensable workers who happen to be foreign born.

Limited Number of New H-1B Petition Filings

The H-1B is not limited to use by health care employers. In the past, it has been so popular that the annual supply has been exhausted before the fiscal year has begun. But not this year, or at least not yet, thanks to the down-turned economy. Of the 65,000 new cap-subject H-1Bs that are available annually, a very limited number were still available as of early December 2009.

Not all new H-1B petitions are subject to numerical limitation or "cap." If an individual is working for or at a qualifying nonprofit institution of higher learning or for or at a qualifying nonprofit entity affiliated with an institution of higher learning, his or her H-1B visa is cap exempt. In other words, there are no numerical limits when working for or at such an employer. So if a foreign physician is employed by a private practice, but is physically working at a nonprofit entity affiliated with an institution of higher learning, the H petition is cap exempt.

Basic H-1B Requirements

An H-1B petition has three basic components:

1. The foreign national must be offered a position (part- or full-time) that usually requires attainment of a bachelor's degree or higher level of education.
2. The foreign national must be qualified for the position by having earned at least a bachelor's degree or equivalent.
 - a. Extra Requirements for Physicians Engaged in Patient Care:
 - 1) USMLE steps 1, 2 and 3
 - 2) ECFMG certificate
 - 3) License or other legal authorization to perform the patient care duties of the position
 If the physician is recognized as renowned in the field, the USMLE and ECFMG requirements may be waived.
 - b. Extra Requirements for Nurses

To be qualified, a nurse must have credentials that had been evaluated and found to have been the U.S. equivalent (visa screen) by the CGFNS. The nurse must have passed the foreign nurses exam (NCLEX-RN) and similar to the physician, a nurse needs to be licensed. Unfortunately, as most nurse positions do not require a bachelor's level or equivalent education, it is difficult to secure an H-1B visa for a nurse.
 - c. Other Health Care Professionals

To qualify for H-1B classification, physical therapists, speech pathologists, medical technicians and other health care providers must have appropriate credentials for their occupation and

those credentials must have been evaluated as being the equivalent to the required U.S. credentials.

3. The foreign national must be offered compensation equal to the higher of the prevailing or actual wage. The prevailing wage is the amount that an individual will earn, on average, performing the job in the specific geographic area of his or her employment. The prevailing wage figure is calculated by the Department of Labor (DOL). The DOL provides two different wage calculations: one for employees of institutions of higher learning and another for all other employees. The actual wage is the amount that the employer pays similarly employed individuals.

The H-1B Petition Process

For an employer, the process of preparing an H-1B petition usually begins by providing to a competent immigration attorney a copy of the job description and the proposed compensation. This allows the attorney to determine whether the position will support an H-1B petition and whether the wage is at least adequate to satisfy the DOL's requirements. The employee must also provide the attorney with a copy of his or her immigration and credentials documents.

The DOL's certification of the Labor Condition Application (LCA) (discussed below) is a necessary pre-condition to filing the H-1B petition. The certified LCA identifies such things as the position, the level of compensation, work location(s) and duration of time that the employer will seek to employ the foreign worker.

An employer may seek petition approval for up to three years at one time. The status may be extended for another three years

and beyond the sixth year in limited circumstances.

The LCA is joined with a completed immigration form, the I-129, evidence of the employee's credentials and an employer support letter. The employer support letter describes the employer, the position and the offer of employment and represents that if the employer terminates the employee, the employer will offer to pay the individual's return transportation to her or his last residence abroad.

The H-1B classification is employer-specific. So, if an employee will have more than one payroll source, receiving more than one paycheck from more than one EIN number, he or she will need more than one approved H-1B petition. The application applies only to the petitioning employer, and the employee may not use one employer's petition approval to work for any other employer.

If the new alien worker is in the United States and is maintaining another legal status, then the employer may seek an in-country change of status to an H-1B or an in-country extension of the H petition.

The LCA, Employer Attestations and the Public Access File

To ensure that the employer will not undercut the U.S. labor market by offering lesser terms of employment to foreign workers, the employer must comply with an attestation process. The attestation form is known as the Labor Condition Application (LCA). While the name is similar to "alien labor certification," which is part of the permanent residence process, it is not the same. The LCA contains four employer attestations:

1. The employer will pay the alien worker the higher of the prevailing or actual wage;
2. The alien is not being hired during a strike or lockout;

3. Notice of the H-1B petition filing has been appropriately provided; and
4. Working conditions for the alien will not adversely affect working conditions of similarly situated workers.

DOL regulations also require employers to maintain a "Public Access File" for each H-1B worker. Among other things, this file contains a copy of the LCA documentation, an explanation of the system used by the employer to arrive at the wage to be paid and evidence that notice was given of the LCA.

Government Filing Fees

Not surprisingly, the law requires that the H-1B package be accompanied by several filing fees. There is an anti-fraud fee in the amount of \$500 that must be paid by the employer. There is a U.S. worker training fee of \$750 for employers with fewer than 25 employees and \$1500 for employers with more than 25 employees. This training fee is waived if the employer is an institution of higher learning. There is filing fee in the amount of \$320 that may be paid by employer or employee. The legal fees may be paid by either employer or employee, but if the employee pays the legal fee, it must not cause the employee's wage to fall below the required wage. There is an optional fee, known as a premium processing fee, which expedites processing and guarantees an adjudication within 15 business days. Premium processing requires an extra \$1000 government fee.

J-1 Waivered Physician

In the case of a physician whose J-1, two-year home-residence requirement has been waived, the employer must secure the physician's H-1B status within 90 days of the grant of an interested government agency waiver. The waived J-1 physician is obligated to work pursuant to the terms of the waiver for three years, usually in an underserved area, in H-1B status in order to

perfect the waiver of the two-year home residence requirement. Requirements imposed by a J-1 waiver are in addition to the terms of the H-1B status.

Portability

The H-1B classification is very versatile. After a person has secured the status, he or she may "port" to a new employer. Portability allows a person who is moving from one H-1B employer to another to begin working with the new employer when the new employer's non-frivolous petition is received by Immigration. Of course, it's not quite that simple, but for the person to whom it applies, portability is a real benefit allowing expeditious change in employers by needed health care workers.

U.S. Permanent Residence

The H-1B status can be used as a stepping-stone to permanent residence for valuable employees. It provides the employer with the opportunity to see the work and the value of the foreign worker before embarking on the permanent residence process.

Conclusion

While the application has many moving parts, H-1B classification can be obtained swiftly and smoothly in most cases. Of course, as readers know, each situation presents unique facts, needs and issues. The "H" in H-1B visa is not for "health care," but could be because of its usefulness for health care providers.

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