

The Victorious Employer:

EMPLOYMENT AND LABOR NEWS FOR WINNING IN THE WORKPLACE

Employment Benefits of the H-1B VISA PROGRAM in a Competitive Labor Market

Many of our clients are struggling to recruit and retain employees in a job market where over 40 percent of U.S. workers are actively searching for a new job right now, or plan to soon, according to a new survey report from the Society for Human Resource Management (SHRM). That's twice the rate in 2019, said Alex Alonso, SHRM-SCP, chief knowledge officer for SHRM, who presented the research Sept. 11 at the SHRM Annual Conference & Expo 2021. In this regard, roughly 33 million Americans have quit their jobs since the spring of 2021. The COVID-19 pandemic has caused many in U.S. skilled labor to take a step back. As early retirements become more prevalent, entire employment sectors are left scrambling to find replacement talent.

Many employers are taking a second look at foreign labor and using the H-1B visa program to reinvigorate their skilled-talent pipelines. With "specialty occupations" requiring at least a job-related bachelor's degree—or the experiential equivalent—companies can source health care professionals, attorneys, engineers, chemists, computer systems analysts, computer software developers, researchers, and budget and data analysts from outside the U.S.

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We are pleased to present Issue Five of The Victorious Employer, our periodic employment law newsletter that covers a range of topics of interest to those with an interest in employer/employee interactions. This issue's article was written jointly by Jason D. Guinasso, Managing Partner of the Firm's Northern Nevada offices in Reno, and Astrid A. Perez, Associate.

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WHAT IS AN H-1B VISA?

An H-1B visa is a nonimmigrant visa that allows a United States employer to hire foreign individuals to fill a “specialty occupation.”¹ The specialty occupations include fields such as architecture, engineering, mathematics, among others.² To qualify as a specialty occupation, the position must require a bachelor’s degree or its equivalent and the visa holder must have attained the bachelor’s degree or equivalent in the field in which the visa holder will be performing its employment duties.³ Upon receipt of the visa, the H-1B visa holder may be admitted into the U.S. for a period of up to three years, plus one year extension.⁴ While some exceptions do apply, the visa cannot be extended beyond a total of six years.⁵

Employers play an active role in the application process for H-1B visa workers. Employers must first file and receive a Labor Certification from the Department of Labor.⁶ This certification allows the Department of Labor to ensure that foreign workers are not going to adversely affect U.S. workers for job opportunities, wages, and working conditions.⁷ The Department of Labor regulates the adverse effects on U.S. employees by prohibiting an employer from displacing a U.S. worker in its own workforce and requiring the employer to make a good faith effort to recruit and hire workers within the U.S. before looking to hire a foreign worker.⁸ The employer’s recruitment procedure for U.S. workers must meet industry standards and offer compensation that is “at least as great as” that required to be offered to the H-1B visa holders.⁹ Also, if a U.S. worker is equally or more qualified than a foreign worker, the job must first be offered to the U.S. worker.¹⁰

Once the Certification is approved, the employer must then start the immigration process with U.S. Citizenship and Immigration Services (“USCIS”). This requires the filing of a Petition for a Nonimmigrant worker, known as Form I-129.¹¹ The approved Labor Certification must be attached. The employee/prospective H-1B visa holder cannot begin their application process until after USCIS has approved the employer’s petition.

H-1B visas are capped by Congress with an annual numerical limit of 65,000 new visas each fiscal year.¹² However, certain petitions are not counted towards this cap, such as those made by prospective employees of an institution of higher education, petitions for prospective employees with a master’s degree or higher from a U.S. institution, and petitions from certain exempt territories and countries including Singapore.¹³

¹8 CFR § 214.2(h)(1)(iii)(B)(1); INA §101(a)(15)(H).

²H-1B Cap Season, USCIS, <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-1b-specialty-occupations-and-fashion-models/h-1b-cap-season> (last visited Mar. 22, 2022).

³H-1B Specialty Occupations, DOD Cooperative Research and Development Project Workers, and Fashion Models, USCIS, [https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-](https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations)

[occupations](https://www.uscis.gov/working-in-the-united-states/h-1b-specialty-occupations) (last visited Mar. 22, 2022).

⁴Id.

⁵8 CFR §214.2(h)(4)(iii)(C).

⁶INA § 212(n); H-1B, H-1B1 and E-3 Specialty (Professional) Workers, DEP’T OF LABOR, <https://www.dol.gov/agencies/eta/foreign-labor/programs/h-1b>

⁷INA § 212(n).

⁸20 CFR 655.738(c)-(d); 20 CFR 655.731(a); 20 CFR 655.739.

⁹INA § 212(n);

¹⁰Id.

¹¹See Direct Filing Addresses for Form I-129, Petition for a Nonimmigrant Worker, USCIS, <https://www.uscis.gov/i-129-addresses>.

¹²Supra, note 2.

¹³Id.



WHAT BENEFITS DO H-1B VISA HOLDERS QUALIFY FOR?

Upon filing for a Labor Certification, an employer is agreeing to provide their prospective foreign employee with the same employment benefits they provide to their U.S. employees, including wages and working conditions, among others.



WAGES

Employers agree to pay their H-1B visa employees at least the prevailing wage for the occupational classification in the area of employment or the employer's actual wage paid to those with similar experience and qualifications, whichever is higher.¹⁴ This wage is determined by the best available information at the time of completion of the Labor Certification Application.¹⁵ The employer also must offer their H-1B visa employees with the benefits on the same basis as they do for their U.S. employees. These benefits can include "health, life, disability and other insurance plans; retirement savings plans, cash bonuses, and non-cash compensation."¹⁶

An employer is required to cover the costs for this process, including those related to the preparation and filing of the Labor Certification and cannot attempt to recuperate the money from the employee through a deduction in their pay.¹⁷

¹⁴INA § 212(n)(1)(A)(i)(I)-(II).

¹⁵INA § 212(n)(1)(A).

¹⁶Wage and Hour Division, Fact Sheet #62L: What benefits must be offered to H-1B workers?, De DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/fact-sheets/62l-h1b-benefits> (last visited Mar. 22, 2022).

¹⁷20 CFR 655.731



WORKING CONDITIONS

The employer is required to provide working conditions for the H-1B visa holders that will not adversely affect the working conditions of those similarly employed.¹⁸ They must also ensure that the working conditions are extended to the length of the employment as allowed by the Labor Certification or by the time which the employee is employed with the employer, whichever is longer.¹⁹

¹⁸INA § 212(n).

¹⁹20 CFR 655.732



WHAT ARE THE CONSEQUENCES OF NOT PROVIDING H-1B VISA HOLDERS BENEFITS?

The U.S. Department of Labor does not only regulate the Labor Certification process to ensure foreign workers don't adversely affect U.S. workers, it also works to enforce the labor protection laws for those working in the country, regardless of their immigration status through their Wage and Hour Division. Among the laws they administer and enforce are the immigration policies for H-1B visas. The Wage and Hour Division ensures that employers are meeting the required wage and working condition requirements and administer punishments accordingly.

Those who violate the provisions established by the H-1B visa may be investigated, and if there is final action by the agency, it can result in fines and disqualification from approval of their petitions. For those who have been disqualified, the Department of Labor maintains a list available for public review which provides the company name and the period of disbarment.²⁰ The Department of Labor may also designate someone as a "willful violator," that is "an employer who committed either a willful failure or a misrepresentation of a material fact on the Labor Certification."²¹ Those who are determined to be willful violators are subject to random investigations by the Department of Labor for violations for up to five years.²²

EMPLOYERS MUST ACT NOW

When considering the relatively low cost of sponsoring a foreign national for the H-1B cap lottery, and the ongoing shortage of available and qualified U.S. workers, more large employers should consider using the H-1B visa as a tool for recruiting highly skilled professional workers who bring innovative ideas and in-demand knowledge of the latest trends and processes to the job. As the March registration period for the fiscal year 2023 cap lottery is quickly approaching, interested employers should act now to learn more about the H-1B visa process.

For more assistance with helping your company participate in the H-1B visa program, please contact the Firm. Our Employment and Labor practice group at Hutchison & Steffen is ready to help you win in today's competitive job market.

²⁰Wage and Hour Division, H-1B Debarred/Disqualified List of Employers, DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/immigration/h1b/debarment>

²¹Wage and Hour Division, Fact Sheet #62S: What is a Willful violator Employer?, DEP'T OF LABOR, <https://www.dol.gov/agencies/whd/fact-sheets/62s-h1b-willful-violators>

²²Id.



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