Presentation to Wayne State University

H-1B, Temporary Worker

October 5, 2018

Aaf Vicky Farah

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Law Offices of Aaf Vicky Farah
201 E. Liberty Street
Ann Arbor, MI 48104
Tel: 734-663-9813
Fax: 734-663-2920
avfesq@aol.com
www.vickyfarah.com
I. Introduction

A. Does there continue to be a need for foreign national employees to work in the United States?

B. Immigrant status (permanent residency) versus nonimmigrant status.

C. Competing philosophies/interests in the development of immigration and nationality laws.

   1. Most dramatic changes in all aspects of immigration and nationality law reflected in two major pieces of legislation in 1990 and 1996 that amended the Immigration and Nationality Act (INA) of 1952.


D. Different responsibilities/roles of various agencies: Citizenship and Immigration Services (CIS), Department of Labor (DOL), and Department of State (DOS).

E. Presidential Executive Orders and USCIS Memoranda.

II. Selected Nonimmigrant Categories Allowing Temporary Employment in United States

A. Brief descriptions.

   1. H-1B, temporary worker.

   2. H1B1--similar to H-1B but for citizens of Chile and Singapore only.

   3. E-3--similar to H-1B but for citizens of Australia only.

   4. TN (NAFTA)--for Canadian and Mexican citizens only.

   5. O-1, extraordinary ability.

III. H-1B, temporary worker (INA §101(a)(15)(H))

A. In the past, for "aliens of distinguished merit and ability" coming to the United States to perform services of an exceptional nature requiring such merit and ability. Now, "an alien who is coming to perform services in a specialty occupation."

B. Degree requirement.

1. Generally, individual should have at least a Bachelor's degree in a specific discipline, and the position must require the specific degree. Most obvious example: Position requires individual with Bachelor's degree in Mechanical Engineering; prospective employee has at least a Bachelor's degree in Mechanical Engineering.

2. If the individual has earned a university degree from a non-U.S./Canadian university, the degree should be evaluated to determine that it is the equivalent of a U.S. degree. There are agencies that, for a fee, will provide a credential evaluation.

C. Extensive professional experience may compensate for lack of university degree.

1. There are agencies that, for a fee, will provide an evaluation of the prospective employee's experience. These evaluations vary in price from $500 to $5,000. This type of evaluation requires extensive documentation.

D. Status initially granted for up to three years with possibility of a three-year extension.

1. Effective January 17, 2017, there is a 60-day grace period to remain in the United States after the authorized H-1B end date.

   a. This rule also applies if employment with the approved H-1B employer ceases before the authorized H-1B end date.

2. Possible to obtain H time after six-year maximum.

   a. Recapturing time spent physically out of the
United States during approved H-1B time periods.

b. If beneficiary is at certain stages in permanent residency procedures, may be able to obtain an additional one or three years of H-1B time after six-year cap.

c. If beneficiary does not spend more than 180 days per year physically present in the United States or works part-time in the United States, six-year maximum does not apply.

E. Restricted to specific employer.

F. H-1B visas are limited in number. Currently, 65,000 per federal fiscal year plus additional 20,000 for U.S. advanced degree holders.

1. The federal fiscal year begins October 1\textsuperscript{st}. The H-1B petition may be submitted six months in advance, i.e., April 1\textsuperscript{st}.

2. According to USCIS, approximately 199,000 petitions were filed in April 2018. Petitions were placed in a lottery because the number of petitions far exceeded available numbers.

3. Cap-exempt situations.

   a. H-1B extension provided extension being filed by same non-exempt employer.

   b. Change of H-1B employer provided beneficiary already once was counted against cap.

   c. Petitioner is an institution of higher education or a non-profit entity related to or affiliated with an institution of higher education or non-profit research institution or government research institution.

   d. Employed at a non-exempt employer working for the benefit of an exempt employer.

   e. Those counted against the cap within the past six years even though the person does not currently hold an H-1B status.

   f. If beneficiary is at certain stages in permanent residency procedures, may be able to
obtain an additional one or three years of H-1B time after six-year cap.

G. Changing H-1B employers.

1. A person currently holds an H-1B status to work with one company. He/she does not have permission to join a new employer until the new employer files an I-129 petition for the foreign national.

2. The foreign national must be maintaining his/her current H-1B status in order for a new employer to request an extension of the H-1B status so the foreign national may join the new employer.

H. An H-1B employer is liable for the reasonable cost of return transportation of the foreign national abroad, if the foreign national is dismissed from employment by the employer before the end of the period of authorized admission.

I. Procedure for obtaining an H-1B visa status involves three steps: Prevailing wage determination, Labor Condition Application, and I-129 petition.

1. Prevailing wage determination.
   a. H-1B beneficiary must be paid prevailing wage or actual wage whichever is higher.
   b. Prevailing wage determinations by the United States Department of Labor.
   c. May also use private agencies, recognized surveys, or Online Wage Library.
   d. Prevailing wage determination is valid for finite period of time.

2. Petitioner must then file a Labor Condition Application (often abbreviated LCA) with the United States Department of Labor. LCA is filed electronically. Previously, LCA was approved instantly. Effective June 30, 2009, Department of Labor established a new system. Currently taking approximately seven days to receive approval of LCA.
   a. Petitioner is required by law to give the beneficiary a copy of the LCA.
3. Once Labor Condition Application is approved, employer files I-129 petition and H Classification Supplement with Citizenship and Immigration Services having jurisdiction over the area where the job is to be performed.

4. Type of action is requested on form I-129, e.g., change of status, consulate or port-of-entry notification, extension, or amendment.
   a. If requesting change of status, i.e., F-1 to H-1B, absolutely may not leave United States while petition is pending.

5. If all goes well, Citizenship and Immigration Services issues Approval Notice, form I-797.
   a. Obtaining visa from United States Consulate, i.e., outside of the United States. Important to understand distinction between action taken by Citizenship and Immigration Services and issuance of visa by United States Consulate.
      i. There are often delays in visa issuance based on increased security checks.

6. Three possible outcomes:
   a. Petition is approved and Citizenship and Immigration Services issues Approval Notice, form I-797.
   b. Petition is denied. If the foreign national beneficiary is in the United States and has no valid nonimmigrant status, the foreign national beneficiary will be told to leave the United States.
   c. Citizenship and Immigration Services issues a Request for Evidence (RFE). Petitioner is given 87 days to respond. Petition will then either be approved or denied. There has been a dramatic increase in RFEs. Three major areas for RFEs:
      i. Position is not a specialty occupation. Particularly vulnerable are systems analyst, financial analyst, and market analyst positions.
      ii. Position will be paid “Level I” wage;
iii. Petitioner’s business and/or sufficient work to employ the foreign national beneficiary questioned.

7. Automatic visa revalidation available for citizens of all countries except Iran, North Korea, Syria, and Sudan. Very specific conditions must be met in order to use "automatic revalidation" provision to re-enter the United States without a valid visa from a trip to Canada or Mexico that lasted no more than 30 days.

a. Must have passport with old visa (and new passport if old one has expired), original I-94 (small white card) or printout from Customs and Border Protection website giving I-94 information, and form I-797 showing new or extended status.

b. Must have maintained nonimmigrant status.

c. Did not apply for a U.S. visa while in Canada or Mexico.

8. Changes in conditions of employment require employer to obtain new LCA and file amended petition.

J. H-1B has dual intent.

K. If your I-129 petition is not selected, what to do?

1. If an F-1, student on optional practical training, consider requesting a 24-month STEM extension.

2. If Canadian citizen, consider TN-1; if Mexican citizen, consider TN-2; if Australian citizen, consider E-3; if Chilean or Singaporean citizen, consider H-1B1.

3. If job offer is with a multinational corporation and the multinational corporation assigns you to a related company outside of the U.S. to work abroad for at least one year, consider L-1, intracompany transferee visa.

4. If employer is owned by a "treaty" country and you have the same nationality as the employer, i.e., you are a German citizen and being offered a job by Volkswagen in the United States, consider E-1 or E-
5. If you are interested in returning to school full-time, consider obtaining a new F-1.
   a. May be able to work using curricular practical training (CPT).
   b. May also consider on-campus employment under collaborative agreement with private employer.

6. If you are able to obtain an H-1B for a cap-exempt employer, consider concurrent H-1B for a non-exempt employer.

7. If you are really special, consider O-1, alien of extraordinary ability.

** May also try again for H-1B in the next federal fiscal year.

IV. Family Dependents

A. F, J, H, TN, L, E, and O categories allow the principal visa holder's dependents to accompany the principal to the United States or change his/her status along with the principal.

B. Spouse and/or child are defined in the INA.
   1. Spouse must be legally married.
   2. Child is legally defined as unmarried and less than 21.
      a. The term "child" is specifically defined by INA and includes biological, adopted, and stepchildren.
         i. Adopted child definition can be problematic.
      a. Employment authorization for certain H-4 spouses is likely to be abolished soon.
   4. Spouses and minor children of TNs and Os may not work in the United States.
5. Spouses of Ls, Es, and Js may work in the U.S. when specifically granted permission by Citizenship and Immigration Services.


A. USCIS extended this eligibility for employment authorization to H-4 dependent spouses of H-1B nonimmigrants who are seeking employment-based lawful permanent resident status.

B. Eligible individuals include H-4 dependent spouses of H-1B nonimmigrants when the H-1B nonimmigrant is:

1. The principal beneficiary of an approved I-140 petition; or

2. The H-1B has been granted an extension of the H-1B status after the six-year limit based on §106(a) and (b) of the American Competitiveness in the 21st Century Act (AC21).

C. Under the rule, eligible H-4 dependent spouses must file form I-765, Application for Employment Authorization, with supporting evidence.

1. H-4 employment is not automatic. Form I-765 must be approved and the employment authorization document (EAD) issued before he/she may begin working in the United States.

2. Processing of I-765 applications has been very quick. I-765s have been approved in approximately 60 days.

3. The employment authorization document is issued for the length of the H-4’s approved H-4 status.
H-1B, Temporary Worker Basic Procedures Flow Sheet

### Wage Determination
Based on job title, job duties, and job requirements, employer obtains wage.

**Time:** 1 day-4 months, depending on wage source

Note:
Wage offered to foreign national must be 100% of the prevailing wage or the actual wage offered by the employer, whichever is higher.

### Labor Condition Application
Once prevailing wage is obtained, employer submits Labor Condition Application (LCA) electronically to the U.S. Department of Labor. Certified Labor Condition Application is returned electronically to the employer.

**Time:** 7 days

Note:
Employer is required to give foreign national a copy of the certified LCA.

### H-1B Petition
Once employer has certified LCA, employer files I-129 petition, including supporting documents with U.S. Citizenship and Immigration Services.

**Time:** 2 weeks w/Premium Processing Service (PPS), 6-7 months w/o PPS

Note:
A J-1, exchange visitor, who is subject to the two-year home residence requirement may not change status to H-1B unless he/she obtains a waiver by the U.S. Department of State or has returned to his/her home country for two years.
office of foreign labor certification
H-1B Temporary Specialty Occupations Labor Condition Program – Selected Statistics, FY 2018 YTD

### Applications Received

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<th>Q4</th>
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### Applications Processed

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### Review of Positions Certified FY 2018 YTD (% of total certified FY 2018 YTD)

- Software Developers, Applications: 170,633 (20.5%)
- Computer Systems Analysts: 132,491 (15.9%)
- Computer Occupations, All Others: 79,189 (9.5%)
- Accountants and Auditors: 40,999 (5.9%)
- Software Developers, System Software: 43,223 (5.2%)
- Computer Programmers: 34,607 (4.2%)
- Management Analysts: 33,031 (4.0%)
- Electronics Engineers, Except Computer: 27,624 (3.3%)
- Operations Research Analysts: 27,008 (3.3%)
- Financial Specialists, All Others: 20,462 (2.5%)

### Top 10 Occupations (based on SOC Codes)

- California: 215,325 (25.9%)
- Texas: 77,075 (9.3%)
- New York: 66,582 (8.0%)
- New Jersey: 46,340 (5.6%)
- Illinois: 38,211 (4.6%)
- Washington: 35,025 (4.2%)
- Massachusetts: 34,703 (4.2%)
- Pennsylvania: 34,322 (4.1%)
- Georgia: 29,149 (3.5%)
- Virginia: 28,118 (3.4%)

### Top 10 States

- Ernst and Young: 140,708 (16.9%)
- Cognizant Technology Solutions, US Corp.: 38,205 (4.6%)
- Deloitte Consulting, LLP: 31,988 (3.9%)
- HCL America, Inc.: 23,812 (2.9%)
- Apple, Inc.: 20,168 (2.4%)
- Qualcomm Technologies, Inc.: 15,612 (1.9%)
- Tata Consultancy Services Limited: 15,581 (1.9%)
- Amazon Fulfillment Services, Inc.: 11,844 (1.4%)
- Kforce, Inc.: 10,553 (1.3%)
- Mphasis Corporation: 10,403 (1.3%)

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"Applications Received" is derived from data not publicly disclosed.

Data as of March 31, 2018. Data includes H-1B, H-1B1 and E-3 Specialty Occupations Labor Condition Programs. All figures are rounded and not audited.