

FAQ About H-1B

QUESTION: What is H-1B status and who is eligible for it?

ANSWER: An H-1B is a temporary nonimmigrant status that provides work authorization for a particular employer. It is available to “specialty workers” working in a “specialized occupation.” A specialty worker generally is someone who has a minimum of a bachelor’s degree in a particular field. A specialty occupation generally is a position that requires a minimum of a bachelor’s degree in that same particular field.

QUESTION: Why is “October 1” used as the start date for so many H-1B petitions?

ANSWER: October is the first day of the federal government’s fiscal year, and the date when the supply of H-1B numbers for that fiscal year is available.

QUESTION: Why is “April 1” such an important date?

ANSWER: New H-1B numbers are available on the first day of each fiscal year, or on October 1. H-1B petitions can be filed up to 6 months before the effective date requested in the petition. So the earliest one can apply for H-1B status effective on the first day of the fiscal year is April 1.

QUESTION: What is the H-1B CAP?

ANSWER: Congress has imposed a limit of 65,000 H-1B’s per fiscal year (October 1 to September 30 each year). Of these, 6,800 H-1B’s go to individuals from Chile and Singapore. In addition, Congress has allocated 20,000 H-1B’s for individuals who have a U.S. master’s or higher degree.

QUESTION: What jobs are not subject to the CAP?

ANSWER: The following H-1B petitions are not subject to the CAP:

- Petitions filed by “institutions of higher education” (i.e., colleges and universities)
- Petitions filed by nonprofit entities affiliated with institutions of higher education
- Petitions filed by nonprofit research organizations
- Petitions filed by federal governmental research organizations
- Petitions filed on behalf of individuals who already have been counted against the H-1B quota
- Petitions filed on behalf of physicians who have received a waiver of the J-1 2-year home residency requirement based on their service in a shortage area
- Petitions filed by an otherwise “CAP subject” employer for concurrent employment on behalf of an individual who currently is working for a “CAP exempt” employer and will continue working concurrently for that “CAP exempt” employer.

QUESTION: Can I apply for a H-1B status or does my employer have to apply?

ANSWER: Only an employer can file an H-1B petition.

QUESTION: Why doesn't the US government add more H-1B visas to meet the demand?

ANSWER: This is a very good question! Unfortunately, there is no easy answer. Most members of Congress and officials in private industry recognize the need for more H-1B's. However, given the complexity of our immigration system and the political difficulties with immigration, it is very difficult to enact legislation to deal with one part of the immigration system, without addressing all issues. Thus far, Congress has been unable to construct a comprehensive immigration reform package that will pass through both Houses of the U.S. Congress.

If you want to tell Congress to increase H-1B numbers, go to <http://capwiz.com/aila2/issues/alert/?alertid=10518201>

QUESTION: Can I file for an H-1B on April 1 when I will not complete all requirements for the degree until after that date?

ANSWER: Certain officials of U.S. Citizenship and Immigration Services (USCIS) have stated that one must be qualified for H-1B status at the time of filing, and therefore must have completed all degree requirements at that time. However, in the past two years, the USCIS has approved H-1B petitions filed before the award of the degree. It is important to accurately state all facts relevant to the award of the degree with the filing. It is not known whether the USCIS will approve such cases filed in 2008.

QUESTION: I will graduate with my Master's degree in May. I have a job offer and my employer will file an H-1B Petition for me so that it is received by April 1 at the USCIS Processing Center. The H-1B will start October 1. Am I eligible for one of the 20,000 U.S. master's degree or higher H-1Bs?

ANSWER: As above, the statements of certain USCIS officials would indicate that you cannot file under the master's CAP because you will not have the degree at the time of filing. However, the USCIS has approved H-1B cases under the master's CAP for individuals who did not have the degree at the time of filing. Again, it is important to accurately represent the facts relevant to the award of the degree, and it is uncertain how the USCIS will handle such cases. Keep in mind that your employer can file for you under the regular CAP (as you have a bachelor's degree).

QUESTION: Will the USCIS do a random lottery selection if on April 1 they receive more qualified H-1B CAP-subject applications than available visas?

ANSWER: USCIS has announced that, assuming it receives more petitions than available H-1B's, it will use a random lottery to select the cases to be adjudicated. It will

determine on which day it receives sufficient applications to fill the H-1B quota (“final receipt date”), and will use a random lottery from the cases received on that day to select the cases it will adjudicate. If the “final receipt date” falls within the first five business days for H-1B petition filings, it will consider all petitions received within that five business day period for the random lottery. Thus, if there are sufficient cases filed on April 1 this year to fill the CAP, if your case is received by USCIS at any time during the first five business days in April, it will be considered for the lottery.

QUESTION: Last year, the 20,000 H1-B visas available under the U.S. master’s degree or higher exemption did not run out until April 30. Will the same date be used this year?

ANSWER: No, this same date will not be used this year. The master’s CAP will run out when sufficient petitions are filed to fill the 20,000 available H-1B’s under that CAP. Each year, that CAP has been reached earlier and earlier. We expect the master’s CAP may be reached with filings made on April 1. As with the regular CAP, discussed above, if the “final receipt date” for cases received under the master’s CAP is within the first five business days of April, all cases received within that five-day period will be considered for the master’s CAP random lottery. The USCIS also has announced that any case filed under the master’s CAP that is not selected for adjudication under the master’s CAP will be placed into the lottery under the regular 65,000 CAP.

QUESTION: Can I file more than one H-1B petition on April 1?

ANSWER: The USCIS has issued a regulation prohibiting filing of multiple petitions for the same individual by the same employer. Different employers can file separate petitions for the same individual. Affiliated companies can file separate petitions for the same employee, as long as there is a legitimate business reason for filing by each affiliated company.

For employees with a graduate degree, an employer cannot file two petitions, one under each CAP. But a graduate degree holder can be considered under each of the CAPs. As is discussed above, if a case is not selected in the master’s CAP lottery, it will be placed into the regular CAP lottery.

QUESTION: Can I file before April 1 and request an effective date of October 1?

ANSWER: No, the USCIS will return any CAPf-subject H-1B petition received before April 1 for the coming fiscal year.

QUESTION: I will apply for Optional Practical Training. If I do not get approved for H-1B, I will still be able to work for 12 months. But my OPT will end in June. If my employer tries again to obtain an H-1B visa a year from now, the H-1B will start October 1. Can I work and /or stay in the United States between the time when my OPT ends and H-1B begins?

ANSWER: You cannot work between the time that your OPT ends and your H-1B work authorization begins. If there is a gap between the 60 day grace period after the expiration of your OPT and October 1, you will not be able to change your status to H-1B here in the United States, but will have to leave the United States before the end of your grace period, apply for an H-1B visa at a U.S. consulate abroad, and return to the United States in H-1B status.

QUESTION: Are there any concerns with traveling outside the United States once an H-1B application is filed for me?

ANSWER: If you are able to request a change of status in your H-1B petition (i.e., your F-1 status, including 60 day grace period, extends past October 1), you cannot leave the United States while that request to change your status is pending with the USCIS. If the H-1B petition and request to change status are approved before October 1, you can leave the United States after the petition is approved and return in F-1 status, as long as you have an unexpired F-1 visa, are either enrolled in school or approved for optional practical training and are able to return on that F-1 visa before October 1. Upon your return to the United States in F-1 status, you will need to have with you a letter from your employer confirming that you are employed or have been offered employment and stating your salary, your EAD card that authorizes OPT, several recent pay stubs if currently employed, and an I-20 with a travel signature on page 3 that will be less than six months old upon your return to the United States. On October 1, your status will change to H-1B.

If you are not able to return to the United States until after October 1, you will need to obtain an H-1B visa before returning.

If you do not have a currently valid F-1 visa in your passport, we do not recommend that you travel outside the United States if you want to return in F-1 status before the start date of the H-1B. There is too great a risk of visa denial.

If you are not able to request a change of status in your H-1B petition (i.e., there will be a gap between the 60 day period after the conclusion of your F-1 status and the October 1 effective date of your petition), then the filing of the H-1B should not affect your ability to travel in F-1 status. However, you will have to depart the United States at some point after your OPT ends and within the sixty day grace period, apply for a H-1B visa at a U.S. embassy or consulate abroad, and return no earlier than ten days before the start date on your H-1B petition, before you are able to work in the United States in H-1B status.

QUESTION: Where can I learn more about H-1B?

ANSWER: Miller Mayer Law Firm H-1B Fact Sheet

<http://www.millermayer.com/resources/nonimmigrant/h1fact.html>

US Citizenship and Immigration Services H-1B Portal Page

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?>

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