

IMMIGRATION FACT SHEET

Making the Transition from F-1 to H-1B

This fact sheet is designed to address issues commonly encountered by F-1 students working under optional practical training (OPT) card who are beginning the H-1B petition process. It is important for F-1 students making the transition to H-1B status to understand both the H-1B process and all of the special issues that accompany the H-1B visa classification. Please carefully review the information contained in this fact sheet and contact one of the attorneys in our immigration practice if you have further questions.

Overview of H-1B Classification

H-1B Requirements: The H-1B visa is used by professionals who work in jobs that require at least a bachelor's degree or the equivalent in a specialized field. A credential evaluation, which involves the review of educational documents, training certificates and experience letters from past employers, is sometimes required to prove that your education and experience are related to the job. Employers who submit H-1B petitions must agree to pay the prevailing wage and are required to post a notice called a Labor Condition Application ("LCA") at the work site. If you are assigned to multiple worksites, the LCA must be posted at each site. You will be provided with a copy of the LCA during the H-1B process.

Validity Period: The H-1B is normally approved for a three year period and can be extended for a total of six years. Shorter approval periods are sometimes given due to licensing limitations. Time spent outside the U.S. does not count toward the six year limit as long as the time spent abroad can be documented. In some cases, a person with a U.S. permanent resident application on file can extend H-1B status beyond the normal six year limit.

Quota Exempt Employers and Beneficiaries: The U.S. government has set a quota for the number of new H-1B visas that can be approved each year. Some institutions (e.g. universities, non-profit research institutions, and non-profit organizations affiliated with universities) are exempt from the H-1B numerical limitations and are not affected by the H-1B quota system outlined below. Generally speaking, individuals who have applied for H-1B status and been counted under the quota in the past six years are not subject to the H-1B quota. However, if you previously held H-1B status but were not counted against the H-1B numerical limitations because you were employed by a cap exempt employer as described above, you will be counted against the H-1B cap unless you are eligible for another exemption.

H-1B Quota: 65,000 H-1B visas are available during each USCIS fiscal year which runs from October 1st to September 30th. An additional 20,000 visas are available for students who have earned a master's degree or

higher from a U.S. university. Special H-1B set-asides have been established for nationals of Chile and Singapore. Quota-subject employers may submit H-1B petitions as early as April 1 of each year for positions starting on October 1. Each fiscal year, employers can file H-1B petitions until the annual limit is exhausted. Depending on demand, in some years the H-1B quota can be exhausted very quickly.

Dependents: The status of immediate family members living in the U.S. does not automatically change when your H-1B petition is filed. If you have a spouse or child in F-2 status, you must make sure that their status is changed from F-2 to H-4. Please note that H-4 dependents are not authorized to work.

Sidley's Online Portal: Sidley's password-access web portal allows you to provide information and track the progress of your case. The portal can be found at: <https://ww4.welcomeclient.com> and is accessed by a unique user ID and password. You will be able to complete the H-1B questionnaire on-line and upload scanned copies of all required documents directly to the web portal.

H-1B Filing Process

The H-1B process involves a number of filings with various government agencies, including State Workforce Agencies (SWA), Department of Labor (DOL), U.S. Citizenship and Immigration Services (USCIS), and Department of State (DOS). For most casts, the timeline is as follows:

- 1 Sidley e-mails you with log-in details
- 2 You complete on-line questionnaire
- 3 You upload documents
- 4 Sidley submits LCA to DOL and upon approval forwards copy of the LCA to you via e-mail
(LCA approval takes 7 days)
- 5 Sidley files H-1B with USCIS
- 6 Sidley receives H-1B receipt notice and posts information on website
- 7 Sidley receives H-1B approval
(USCIS will issue a request for additional evidence (RFE) if more information is needed to approve the case)
- 8 Sidley sends the H-1B approval and copy of petition to you or your employer
- 9 You obtain visa stamp abroad at U.S. consulate during travel abroad

Documents Required

From Employee: Our website provides a complete list of documents we need to draft your H-1B petition, but generally speaking you need to provide the following:

- ⊗ passport (copy of each page, even if it is blank)
- ⊗ I-94 Electronic Record (available at www.I94.cbp.dhs.gov)
- ⊗ All I-20 Forms issued by the school
- ⊗ Copy of any I-766 Employment Authorization Documents (EAD)
- ⊗ license or professional certification (if applicable)
- ⊗ detailed resume
- ⊗ degrees and transcripts (or other acceptable documentation if the diploma is not available)
- ⊗ passport and I-94 card for any immediate family members
- ⊗ marriage and birth certificates (marriage certificate required if you are filing an H-4 application for a spouse and birth certificates for any children)

Unless we request an original document, you will only need to send us a copy. You can provide the documents by uploading them to the online system, scanning and emailing or sending copies via an express courier. Please do not fax documents because the copies often are too dark or not clear enough for submission to USCIS.

From Employer: The information we need from the H-1B employer generally includes the following:

- ⊗ anticipated start date
- ⊗ salary
- ⊗ job title and detailed job description
- ⊗ worksite address(es)
- ⊗ contact information for signatory
- ⊗ company information, including year established, gross/net income, federal tax ID number, number of employees and annual report or a current audited financial statement.

Common Issues

H-1B “Cap-Gap” Provisions for Continued Employment Eligibility: If you have an Employment Authorization Document (EAD) that expires before October 1 you should contact your Designated School Official (DSO) for the issuance of a “cap-gap” I-20 Form. The automatic extension of your EAD terminates if USCIS rejects, denies or revokes the H-1B petition.

FICA Tax Exemption Ends with H-1B: Under the Internal Revenue Code, most students temporarily present in the United States on F-1 and J-1 visas are exempt from FICA (Medicare and Social Security) taxes. However, once your status changes from F-1 or J-1 status to H-1B, you become subject to FICA taxes. The employer must begin withholding FICA taxes upon the effective date of the change. For more information, please visit the IRS website at: www.irs.gov.

STEM Extensions of OPT: If you have completed a U.S. degree in science, technology, engineering, or mathematics (STEM) and you accept employment with an employer enrolled in E-Verify, a government employment verification program, you can extend your OPT for an additional 17 months. Note that you need to file the STEM extension before your OPT expires. If you qualify for a STEM extension, you should check with the foreign student advisor at your school to be sure that you follow all the necessary steps to extend your OPT. For more information, see the Supplemental Questions & Answers: Extension of Optional Training Program for Qualified Students published by USCIS. You can find this at www.uscis.gov under the “news” tab (through the search function).

Change of Status vs. Cable Notification of Approval: The employer and employee need to decide whether the H-1B petition should be filed as a change of status within the U.S. or whether it should request that the H-1B approval notice be cabled to a U.S. consulate abroad. If your OPT will expire before October 1, in most cases you will want your case filed as a change of status so you can be eligible for "cap gap" relief. Nonetheless, the determination should be made on a case-by-case basis, so please discuss this issue with your employer and the Sidley attorney handling your case.

Premium Processing: For an extra \$1225 processing fee, the USCIS will adjudicate an H-1B petition within 15 days. The employer is not obligated to pay the premium processing fee. Note that premium processing does not increase the likelihood of obtaining an H-1B number under the cap.

Travel Tips

Travel During Application Process: If you travel outside the U.S. while your F-1 to H-1B change of status application is pending, the USCIS may approve your H-1B classification but deny the change of status portion of your petition. As a result, you will have to depart the U.S. and reenter before your H-1B will take effect. Filing an application under premium processing is one way to shorten the period of time during which travel is restricted. You should discuss any international travel plans with your employer and the Sidley attorney handling your case.

Visa processing: Unless you are Canadian, the I-797 Approval Notice is not a travel document. If your H-1B petition is approved as a change of status, you do not have to immediately depart the U.S., but you need to obtain an H-1B visa stamp during your next trip abroad. If the petition was approved as a cable notification, you will need to apply for an H-1B visa stamp at an U.S. embassy or consulate prior to entry. For a list of U.S. consulates, you can visit the DOS website at www.usembassy.gov. Most U.S. consulates will allow you to book the appointment over the phone or on-line. When scheduling an appointment, you should include all family members applying with you in the process. A visa fact sheet and travel advisory with additional visa processing information will be included with your approval packet.

Automatic Revalidation of Expired Visas: After receiving a change of status from F-1 to H-1B, if you need to travel to Canada or Mexico for a period of less than 30 days, and you do not have enough time to obtain an H-1B visa stamp during your trip, you may be able to take advantage of a special rule known as "automatic revalidation" which permits you to reenter the U.S. without obtaining a new H-1B visa stamp. Not everyone

qualifies for this provision, so if you are considering traveling under the automatic revalidation rules, please contact a Sidley attorney to discuss the rules and restrictions. For more information, see the FAQ on the Immigration and Customs Enforcement (ICE) website, specifically questions 2E and 2F regarding automatic visa revalidation at: www.ice.gov/sevis/travel#_Toc81222014.

If you have any questions regarding this fact sheet, please contact the Sidley lawyer with whom you usually work.

[The Immigration Practice of Sidley Austin LLP](#)

Our Immigration Practice develops a comprehensive and cost-effective strategy to address the unique immigration needs of each client. The legal services we offer include assistance in obtaining temporary visas, permanent residence and U.S. citizenship. We also provide employees with immigration advice related to mergers and acquisitions, corporate law, international tax, I-9 compliance and other labor issues affecting the employment of foreign nationals. We routinely represent clients before The Department of Homeland Security, Department of Labor, Department of State and U.S. consular posts worldwide.



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