

IV. SPECIALTY OCCUPATION WORKERS: TEMPORARY VISAS

§ 12:20 Temporary H-1B specialty occupation worker visas—Basic concepts

Research References

West's Key Number Digest, Aliens " 53.9
Federal Procedural Forms § 40:399

The H-1B has generally been the nonimmigrant visa category of choice for temporary professionals working in professional or "specialty occupation" positions. As with the L-1 visa, sponsoring employers must initially secure DHS approval of an H-1B petition. Following that approval, prospective employees residing outside of the United States must apply for an H-1B visa at the appropriate U.S. embassy or consulate, while those residing in the United States may simply change status to that of H-1B. While H-1B visa applicants must evidence an intent to enter the United States temporarily for the H-1B employment, they are not required to

⁵8 C.F.R. § 204.5(j).

⁶8 C.F.R. § 204.5(j).

⁷8 U.S.C.A. § 1153(b)(1)(C).

⁸8 C.F.R. § 204.5(j)(3)(B).

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¹One files Form I-129 Petition for Nonimmigrant Worker with H Supplement, along with a Form I-129W H-1B Data Collection & Filing Fee Exemption and an approved Labor Condition Application. The first of these forms is accessible at <http://uscis.gov/graphics/formsfee/forms/index.htm>, while the Labor Condition Application may be submitted online at <http://www.lca.doleta.gov>.

maintain a residence abroad, and they are permitted to seek U.S. permanent residence while in H-1B status.²

As a general rule, the entire period of authorized admission for H-1B nonimmigrants may not exceed six years.³ The initial petition may be granted for up to three years and extended for three additional years.⁴ Foreign nationals may begin a new six-year period after living outside the United States for at least one year.⁵ The six-year limit does not apply to foreign nationals whose H-1B stays are intermittent or which last less than six months a year.⁶ Similar to the “recapture rule” for L-1 visa holders, H-1B workers may also recapture all time spent outside of the United States regardless of whether it is considered “meaningfully interruptive.” Like L-1B workers, H-1B workers must demonstrate that they were in fact outside of the United States for the stated period of time.⁷ Spouses and minor children of a principal alien who recaptures H-1B periods may receive periods of H-4 stay coextensive with that of the principal alien.^{7.50}

H-1B nonimmigrants whose six year period of H-1B eligibility is about to expire may obtain one-year extensions of their H-1B status on an annual basis if an application for labor certification or a Form I-140 employment-based immigrant visa petition was filed on their behalf at least 365 days before the request for such an extension.⁸ The DHS will continue to grant these H-1B status extensions so long as a final negative decision has not been issued in connection with the application for labor certification, Form I-140 employment-

²8 U.S.C.A. § 1184(b), (h); 8 C.F.R. § 214.2(l)(16). DHS regulations also provide that an H-1B nonimmigrant with a pending application to adjust status to that of permanent resident does not require advance parole from the DHS to travel outside the United States, so long as the foreign national remains in valid H-1B status and possesses a current H-1B visa. 8 C.F.R. § 245.2(a)(4)(ii)(C).

³8 C.F.R. § 214.2(h)(15)(ii)(B).

⁴8 C.F.R. § 214.2(h)(15)(ii)(B).

⁵8 C.F.R. § 214.2(h)(13)(iii)(A).

⁶8 C.F.R. § 214.2(h)(13)(v).

⁷Memorandum of USCIS Acting Associate Director for Domestic Operations Michael Aytes, “Procedures for Calculating Maximum Periods of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants,” (Oct. 21, 2005). See also Matter of IT Ascent, EAC# 0404753189 (serving as binding policy guidance on USCIS as designated by Acting Deputy Director Robert Divine on Oct. 18, 2005).

^{7.50}Memorandum of USCIS Acting Associate Director for Domestic Operations Michael Aytes, “Procedures for Calculating Maximum Periods of Stay Regarding the Limitations on Admission for H-1B and L-1 Nonimmigrants,” (Oct. 21, 2005). See also Matter of IT Ascent, EAC# 0404753189 (serving as binding policy guidance on USCIS as designated by Acting Deputy Director Robert Divine on Oct. 18, 2005).

⁸“Twenty-First Century Department of Justice Appropriations Authorization Act,” Pub. L. No. 107-272, H.R. 2215 (Nov. 2, 2002).

based immigrant visa petition, or application to adjust status to that of a permanent resident.⁹

Specialty Occupations

The INA defines a “specialty occupation” as one requiring:

- (A) the theoretical and practical application of a body of highly specialized knowledge; and
- (B) attainment of a bachelor’s or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.¹⁰

The pertinent regulations articulate additional standards for determining whether or not a job is, in fact, a specialty occupation. Such a position must meet at least one of the following criteria:

- (1) a baccalaureate or higher degree or its equivalent is normally the minimum entry requirement for the position;
- (2) the degree requirement is common in the industry or, in the alternative, the position is so complex or unique that it can be performed only by an individual with a degree;
- (3) the employer normally requires a degree or its equivalent for the position; or
- (4) the nature of the specific duties is so specialized and complex that the knowledge required to perform the duties is usually associated with attainment of a baccalaureate or higher degree.¹¹

The regulations go on to state that typical specialty occupations include engineering, mathematics, business specialties, accounting, and law.¹² Some occupations have been gradually transitioning from nonprofessional to professional status.¹³ These have included business managers, paralegals, and computer programmers. In cases involving these occupations, inconsistent adjudications are common.¹⁴ Where an occupation does not seem to constitute a “specialty” occupation at first glance, it is critical for the petitioner to be able to demonstrate that the position meets one of the above four criteria.

Specialty Occupation Workers

According to the INA and pertinent regulations, a qualifying specialty occupation worker must demonstrate one of the following:

⁹Pub. L. No. 107-272, H.R. 2215 (Nov. 2, 2002)

¹⁰8 U.S.C.A. § 1184(i)(1).

¹¹8 C.F.R. § 214.2(h)(4)(iii)(A).

¹²8 C.F.R. § 214.2(h)(4)(ii)(E).

¹³See 2 C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law and Procedure* § 20.08[3][b] (rev. ed. 2003).

¹⁴One such profession, computer programmer, may now meet the criteria for a specialty occupation so long as the position is not focused entirely on the entering or review of computer code. See 78 Interpreter Releases 725, 726 (Apr. 4, 2001).

- (1) a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
- (2) a foreign degree equivalent to the United States baccalaureate or higher degree;
- (3) a state license, registration, or certification which authorizes practicing the specialty occupation in the state of intended employment; or
- (4) education, specialized training, and/or progressively responsible experience equivalent to completion of the degree and recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.¹⁵

The equivalency of schooling, training, and work experience to a baccalaureate degree can be shown by one of the following ways:

- (1) evaluation by a college official authorized to grant credit for training and/or experience;
- (2) results of a college level equivalency examination or special credit program;
- (3) certification or registration from nationally recognized professional associations for the specialty; or
- (4) application of the DHS “three for one” rule by which three years of specialized training and/or work experience substitute for one year of required college level training.¹⁶

Although schooling short of a degree, specialized training, and/or work experience may substitute for a bachelor’s degree, they cannot substitute for a master’s or doctorate degree. The regulations state that equivalence to a master’s degree must include a bachelor’s degree followed by at least five years of experience in the specialty field. If the specialty requires a Ph.D., foreign nationals must hold a doctorate or its foreign equivalent.¹⁷

§ 12:21 The labor condition application

Research References

West’s Key Number Digest, Aliens ⇨46 to 51
Federal Procedural Forms § 40:399

Prior to submitting an H-1B petition to the DHS, employers must submit a labor condition application (LCA) for certification by the

¹⁵8 C.F.R. § 214.2(h)(4)(iii)(C).

¹⁶8 C.F.R. § 214(2)(h)(4)(iii)(D).

¹⁷8 C.F.R. § 214(2)(h)(4)(iii)(D).

DOL.¹ Unless the DOL finds the LCA “incomplete” or “obviously inaccurate,” the agency is directed to provide the certification within seven days of the filing of the application.² The DOL interprets this deadline as seven business days.³

Labor Condition Applications (LCAs) for H-1B and H-1B1 visas must be filed electronically with the Department of Labor (DOL)⁴ unless an employer has a physical disability or lacks internet access.⁵ Employers with physical disabilities or those who lack internet access must submit a written request to DOL for permission to submit the LCA via U.S. mail, establishing why the employer is unable to file electronically.⁶ Under the electronic system, the acceptance or denial status of a submitted LCA is determined instantaneously. One significant difference with regard to electronic submission is that the LCA is signed after certification but before submission to the DHS as part of the H-1B Petition.

Content of the LCA

On the LCA, an employer must attest four statements, summarized as follows:

- (1) that it is offering foreign nationals the actual wage rate paid by the employer to all other individuals with similar experience and qualifications for the employment in question or at least 95% of the “prevailing wage” for the occupational classification in the area of intended employment, determined as of the time of the LCA’s filing—whichever is greater.⁷ Both the wage being offered to the H-1B employee and the prevailing wage must be reported on the LCA, including the source of the prevailing wage information utilized by the employer.⁸
- (2) that the working conditions provided to the H-1 B employee will not adversely affect the working conditions of other workers similarly employed.⁹
- (3) that on the date the LCA is submitted, there is not a strike, lockout, or work stoppage in the named occupation at the

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¹Form ETA 9035 Labor Condition Application for H-1 B Nonimmigrants, accessible at <http://www.lca.doleta.gov>.

²8 U.S.C.A. § 1182(n)(1)(D).

³20 C.F.R. § 655.740(a)(1); 57 Fed. Reg. 1332.

⁴See <http://www.lca.doleta.gov>.

⁵20 C.F.R. § 655.720(a), (b).

⁶20.C.F.R. § 655.720(c).

⁷20 C.F.R. §§ 655.731(a), (a)(1), (a)(2)(d)(4).

⁸20 C.F.R. § 655.731(a)(2).

⁹20 C.F.R. § 655.732.

place of employment.¹⁰ If a strike or lockout occurs subsequent to the filing of the LCA, the employer must notify DOL within three days of the occurrence.¹¹

- (4) that notice of the LCA has been provided to a relevant collective bargaining representative or, in the absence of such a representative, notice has been provided to workers employed in the same occupation at the place of employment.¹²

Employers must make LCAs available for public examination, and the Secretary of Labor is directed to disclose information to the public relating to filed LCAs.¹³

Notice of the Filing of the LCA

As mentioned above, unless there is a collective bargaining agreement in place, an employer must provide its employees with notice of the filing of an LCA.¹⁴ The notice must be posted in at least two conspicuous locations where the H-1B employee will work, or it must be provided to the employees electronically through email or on an electronic bulletin board.¹⁵ Unless notice is provided directly (such as through email), the notices must be posted for a total of 10 days.¹⁶ The normal mode of providing notice has been to simply post the filed LCAs on a wall. However, DOL regulations now require that postings include an additional statement directing employees to where they may file complaints and under what circumstances.¹⁷ If multiple work sites for the H-1B employees are contemplated at the time of the LCA filing, the employer must specify these work sites on the LCA and post notices of the LCA filing at each anticipated work site.¹⁸

Enforcement Procedure and Penalties

Employers are liable for misrepresentations made in LCAs or for failing to fulfill LCA-imposed conditions. Complaints regarding these employer failings must be filed with the DOL within 12 months of an employer's LCA submission.¹⁹ Complaints may be filed by "any aggrieved person or organization," such as the H-1B em-

¹⁰20 C.F.R. § 655.733(a).

¹¹20 C.F.R. § 655.733(b).

¹²20 C.F.R. § 655.734.

¹³20 C.F.R. § 655.760.

¹⁴20 C.F.R. § 655.734.

¹⁵20 C.F.R. § 655.734.

¹⁶20 C.F.R. § 655.734.

¹⁷20 C.F.R. § 655.734.

¹⁸20 C.F.R. § 655.730(c)(2).

¹⁹8 U.S.C.A. § 1182(n)(2)(A).

ployee, a bargaining representative, or a governmental agency.²⁰ Moreover, any discrepancy regarding the LCA (e.g., location of foreign national's employment) detected by a consulate is forwarded to the DOL for investigation and possible invalidation of the LCA.²¹ If the DOL determines that there is a reasonable basis for a particular complaint, the agency holds a hearing in which the employer may defend its submission.²² In the event that an employer is found guilty of misrepresentation or failure to fulfill a condition, it may incur monetary penalties, be required to reimburse H-1B employees for back pay, or both.²³

Protections Against Employer Liability

Important DOL regulations protect employers from liability resulting from the most likely LCA complaint: that the wage offered to H-1B employees is less than the prevailing wage for the occupational classification in the area of employment. The DOL requires employers to determine the prevailing wage "on the best information as of the time of filing the [LCA]."²⁴ Furthermore, under DOL regulations, employers are "not required to use any specific methodology to determine the prevailing wage and may utilize a SWA (State Workforce Agency), an independent authoritative source, or other legitimate sources of data."²⁵

DOL regulations also establish the standards by which an employer's wage determinations are judged. The DOL will not investigate complaints based on an employer's wage determinations if a SWA confirms that the H-1B wage is at least equal to the prevailing wage.²⁶ Where employers base their prevailing wage decisions on a survey from an independent authoritative source, complaints against the employer will prevail only if the survey's prevailing wage "varies substantially" from the actual prevailing wage.²⁷ The SWAs garner their prevailing wage rates from the Department of Labor's Office of Workforce Security, which relies on the Bureau of Labor Statistics for its wage data. This same wage information is available to employers on the Internet.²⁸ While usage of this wage information for purposes of the LCA is not equal to a

²⁰20 C.F.R. § 655.806.

²¹September 30, 1993 Department of State Cable, 93-State-299060, reprinted in 70 Interpreter Releases 1330 (Oct. 8, 1993).

²²8 U.S.C.A. § 1182(n)(2)(B).

²³20 C.F.R. § 655.810(a).

²⁴20 C.F.R. § 655.731(a)(2).

²⁵20 C.F.R. § 655.731(a)(2).

²⁶20 C.F.R. § 655.731(a)(2).

²⁷20 C.F.R. § 655.731(d)(1).

²⁸<http://edc.dws.state.ut.us/owl.asp>.

SWA determination, it will almost certainly pass muster as an independent authoritative source if ever challenged. Conversely, where an employer bases a wage determination on another legitimate source of wage information rather than on a SWA determination or an independent authoritative survey, it is the employer's burden to show that the source "is in accordance with the regulatory criteria" in the event a complaint is filed.²⁹

§ 12:22 Additional employer responsibilities in the H-1B context

Research References

West's Key Number Digest, Aliens ☞53.9
Federal Procedural Forms § 40:399

Signing Bonuses

As a general rule, employment authorization and the ability to earn wages does not commence for H-1B candidates until the approval of an H-1B petition.¹ In the context of F-1 student or J-1 exchange visitor nonimmigrants whose transition to H-1B status cannot immediately be processed because of the H-1B statutory cap discussed below, the question arises as to whether or not those nonimmigrants can receive a signing bonus before the validity date of the H-1B petition. In fact, a signing bonus arguably does not represent a salary or a reimbursement for services rendered and, as a result, may be accepted.² Moreover, F-1 and J-1 nonimmigrants awaiting approval of an H-1B petition may receive monetary benefits, nonmonetary benefits (such as stock options), signing bonuses, and health benefits "so long as the bonus does not constitute reimbursement for services and is not made in expectation of future services."³ While these propositions specifically refer to F-1 and J-1 nonimmigrants awaiting H-1B status, the underlying logic may be applied to any foreign national awaiting approval of an H-1B petition.

Under the Clinton Administration, signing bonuses were permitted for foreign nationals awaiting approval of an H-1B petition^{3,30} as long as it was "common in the prospective H-1B employer's company

²⁹20 C.F.R. § 655.731(d)(1).

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¹One exception involves H-1B "portability."

²65 Fed. Reg. 15178, 15180 (Mar. 21, 2000).

³77 Interpreter Releases 850, 851 (June 26, 2000).

^{3,30}See 65 Fed. Reg. 15178 to 15180 (Mar. 21, 2000) ("An F-1 or J-1 nonimmigrant alien may receive a signing bonus before the validity date of the H-1B petition. A signing bonus does not represent a salary or a reimbursement for services rendered and, as a result, may be accepted by the alien"). This rule was

for signing bonuses to be paid to candidates selected for similar positions, without regard to immigration status.”^{3,70} There has not been no affirmation of the policy permitting signing bonuses under the Bush Administration, however, leaving the validity of this practice unclear.

Prohibition Against Benching H-1B Employees

The nonpayment of wages during times of unproductivity—“benching”—is impermissible when it comes to H-1B employees. If an H-1B nonimmigrant is in a nonproductive status and is not performing work for the employer due to a decision by the employer, the employer must still pay the H-1B employee the full wage listed on the LCA.⁴ Reasons for benching might include a lack of available work or the absence of a permit or license.⁵ This obligation commences no later than 30 days after the H-1B employee is admitted to the United States pursuant to the employer’s petition or 60 days after the H-1B employee, previously in the United States, becomes eligible to work for the employer.⁶ However, in those cases in which the employee enters a nonproductive status due to conditions unrelated to his or her employment (e.g., maternity or sick leave), the employer is not obligated to pay the required wage rate during that time.⁷

Return Travel Expenses

Under the INA, an employer who dismisses an H-1B employee before the end of his or her authorized admission period is liable for the reasonable costs of the employee’s return transportation abroad.⁸ The employer’s obligation applies in all dismissal cases regardless of the cause of the termination, except when the H-1B employee voluntarily terminates his or her employment.⁹ Neither the statute nor the regulations provide a specific penalty for employers who fail to furnish travel expenses. Complaints submitted to the DHS that allege noncompliance with this provision, however, may be

interpreted to cover all H-1B applicants, not just those changing status from J or F visa categories. Letter, Hernandez, Acting Branch Chief, Business and Trade Service (HQ 70/6.2.8) (May 3, 2000). See also ISD Teleconference Minutes posted on AILA InfoNet at Doc. No. 00041703 (Apr. 17, 2000) (“As long as the signing bonus is not salary, it is permissible for H-1B applicants no matter what their prior status may be”).

^{3,70}USCIS Questions & Answers: Fiscal Year 2000 H-1B Cap (March 28, 2000) available at <http://www.uscis.gov/graphics/publicaffairs/questsans/EGQA.htm>.

⁴20 C.F.R. § 655.731(b)(7)(i).

⁵20 C.F.R. § 655.731(b)(7)(i).

⁶20 C.F.R. § 655.731(b)(7)(i).

⁷20 C.F.R. § 655.731(b)(7)(ii).

⁸8 U.S.C.A. § 1184(c)(5).

⁹8 C.F.R. § 214.2(h)(4)(iii)(E).

considered by the DHS “when adjudicating future nonimmigrant visa petitions.”¹⁰

Corporate Restructurings/Successors-in-Interest

If an H-1B employer is involved in a corporate restructuring—including a merger, acquisition, or consolidation—that employer is not required to file amended H-1B petitions on behalf of its H-1B employees if the new corporate entity “succeeds to the interests and obligations of the original petitioning employer” and if the terms and conditions of employment otherwise remain the same for the H-1B employees.¹¹ Following such a restructuring, however, the “new” corporate entity must maintain a list of all transferred H-1B nonimmigrants and draft a “sworn statement” that it will assume all “obligations, liabilities and undertakings arising from or under attestations made in each certified and still effective LCA.”¹² The new corporate entity must file new LCAs and H-1B petitions only if it hires new H-1B nonimmigrants or if it seeks an extension of H-1B status for any of its current H-1B employees.¹³

An H-1B nonimmigrant working for the new corporate entity is admissible into the United States with the presentation of a letter from the employer stating that: (1) the new corporate entity has succeeded to the interests and obligations of the original H-1B petition employer; and (2) the terms and conditions of the H-1B’s employment remain the same.¹⁴

§ 12:23 The annual H-1B “cap”

Research References

West’s Key Number Digest, Aliens ☞53.9
Federal Procedural Forms § 40:399

The general rule is that the total number of foreign nationals who may be issued H-1B visas or H-1B nonimmigrant status during any fiscal year may not exceed 65,000.¹ If the statutory cap is reached within a fiscal year, subsequent petitions are returned by the DHS with a notice that they should be resubmitted in the fol-

¹⁰56 Fed. Reg. 61113 (Dec. 2, 1991).

¹¹8 U.S.C.A. § 1184(c)(10).

¹²20 C.F.R. § 655.730(e)(1)(iv).

¹³20 C.F.R. § 655.730(e)(2).

¹⁴78 Interpreter Releases 1108, 1117 (July 2, 2001).

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¹8 U.S.C.A. § 1184(g)(1)(A). Pursuant to free trade agreements entered into by the United States, which took effect on January 1, 2004, 6,800 of these slots are reserved for certain professional nonimmigrant workers who are nationals of Singapore and Chile. To the extent that not all of the 6,800 slots are taken by qualifying nationals of Singapore or Chile, the remainder become available to

lowing fiscal year; no backlog of petitions is created.² In recent years, the upper limit on the H-1B cap was substantially higher—195,000 for each of the fiscal years 2001, 2002, and 2003.³ Currently, however, for the fiscal year 2004, the H-1B cap has regressed to 65,000.⁴

The regression of the H-1B cap in 2004 from 195,000 back to 65,000 has had a considerable impact on the ability of highly skilled foreign workers to secure visas to work in the United States. Each year since the regression to 65,000, the annual cap has been met with increasing rapidity. In FY2004, the H-1B cap was reached within nine months of the date USCIS began accepting H-1B applications and within seven months in FY2005. In FY2006, the cap was met four and a half months after petitions were accepted by USCIS, that is in August 2005, prior to the commencement of the fiscal year beginning October 1, 2005. In FY2007, the cap was reached less than two months after petitions were accepted by USCIS, that is in May 2006, prior to commencement of the fiscal year beginning October 1, 2006.

Most approved H-1B petitions are counted in reaching the statutory cap number,⁵ although H-B renewals and H-4 requests (for spouses and dependents of H-1B holders) are not counted.⁶ Additionally, H-1B petitions approved for institutions of higher learning, affiliated research organizations, nonprofit research organizations, and governmental research organization are not considered for purposes of the cap nor are petitions filed on behalf of foreign nationals who previously held H-1B status in the six years prior to filing.⁷

There is a new exemption from the H-1B cap for aliens who have earned a Master's degree or higher from a U.S. institution of higher education.⁸ There is an annual limit of 20,000 on this exemption and any eligible visa petitions over 20,000 will be subject to the 65,000 H-1B cap unless the alien is eligible for another exemption for the H-1B cap. In reviewing H-1B petitions, USCIS adjudicators will first determine whether there is another basis to exempt an alien beneficiary from the 65,000 H-1B cap before considering the

H-1B beneficiaries of other countries. March 2004 Department of State Cable, UNCLAS STATE 053902.

²8 C.F.R. § 214.2(h)(8)(ii)(E).

³8 U.S.C.A. § 1184(g)(1)(A)(iv) to (vi).

⁴8 U.S.C.A. § 1184(g)(1)(A)(iv) to (vi).

⁵8 C.F.R. § 214.2(h)(8)(ii)(A).

⁶8 C.F.R. § 214.2(h)(8)(ii)(A).

⁷8 U.S.C.A. § 1184(g).

⁸The H-1B Visa Reform Act of 2004, INA § 214(g)(5)(c), implemented by USCIS rule in 70 Fed. Reg. 23775 (May 5, 2005).

master's or higher degree exemption, thereby freeing up potential exemptions from the 20,000 annual limit.⁹

§ 12:24 H-1B portability

Research References

West's Key Number Digest, Aliens ⇨53.9

Federal Procedural Forms § 40:399

Once a nonimmigrant has secured H-1B status, he or she can switch employers with relative ease. Utilizing what is called "H-1B portability," an H-1B employee can begin work for a new employer as soon as the new employer has filed an H-1B petition on the employee's behalf; one does not have to wait for the petition to be approved.¹ Of course, the employee's work authorization ceases if the new petition is ultimately denied.²

The portability provision applies to any nonimmigrant worker currently holding H-1B status: (1) who was lawfully admitted into the United States; (2) on whose behalf a nonfrivolous petition for new employment has been submitted before the date of expiration of the previous authorized period of stay; and (3) who has not, subsequent to admission into the United States, been employed without authorization.³

An H-1B employee who is no longer working for the original H-1B employer-petitioner but who has begun work with a new employer pursuant to the portability provision may be admitted into the United States through the validity date of his or her previous H-1B petition, plus 10 days, if the following requirements are met:

- (1) the employee is otherwise admissible;
- (2) the employee, unless exempt, is in possession of a valid, unexpired passport and visa;
- (3) the employee was previously admitted as an H-1B or otherwise accorded H-1B status; and
- (4) the employee presents evidence (in the form of a receipt notice or other credible evidence) that the new H-1B petition

⁹Memorandum of USCIS Acting Associate Director of Domestic Operations Michael Aytes, "AFM Update: Chapter 31: H-1B Cap Exemption for Aliens Holding a Master's or Higher Degree from a U.S. Institution," (May 2, 2006).

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¹8 U.S.C.A. § 1184(m).

²8 U.S.C.A. § 1184(m).

³8 U.S.C.A. § 1184(m).

was timely filed before the expiration of the validity date of his or her previously authorized period of stay.⁴

If the employee is unable to present evidence that the new H-1B petition has been timely filed, he or she is not admissible in H-1B status.⁵ Likewise, if the original H-1B petition has expired, the employee is not admissible in H-1B status until the new petition has been approved.⁶

⁴January 29, 2001 Memorandum of Michael A. Pearson, INS, reprinted in 78 Interpreter Releases 381-383 (Feb. 12, 2001).

⁵January 29, 2001 Memorandum of Michael A. Pearson, INS, reprinted in 78 Interpreter Releases 381-383 (Feb. 12, 2001).

⁶January 29, 2001 Memorandum of Michael A. Pearson, INS, reprinted in 78 Interpreter Releases 381-383 (Feb. 12, 2001).

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¹9 FAM § 41.53, n. 28.4(a). See also 8 U.S.C.A. § 1184(i)(1)(A),(B); 8 C.F.R. § 214.2 (providing the statutory and regulatory definition of “specialty occupation”).

²9 FAM § 41.53, n. 28.4(b).

³9 FAM § 41.53, n. 28.4(b).

⁴9 FAM § 41.53, n. 28.4(b).

⁵9 FAM § 41.53, n. 28.2.