

Temporary Worker Visas: Questions & Answers from CIS Ombudsman's Teleconference

These are a compilation of questions callers posed during an April 2007 CIS Ombudsman Community Call-in Teleconference on Temporary Worker Visas (H, L, O, and P), as well as selected follow-up questions received by email. Some questions include USCIS' responses.

1. Basic Company Qualifications for L - A caller indicated that there is nothing on the USCIS website to indicate what qualifies a company to file for this visa on behalf of someone, e.g., how big, revenue, etc.

- Response: We will look into the feasibility of posting this to the web.

2. H-2B Visas. New Workers Not Under Exemption - A caller said that her company uses 300 international workers each year - 280 on H-2B visas, including 160 returning this year. The question is what changes might result from the exemption next year, i.e., new workers not under exemption. She was trying to figure out her company's strategy for next year. She received conflicting info from different sites for second year returning/working individuals.

- Response: We do not know whether Congress will renew the returning worker provision.

3. Reactivation of Bi-specialization for I-129s - The caller mentioned concerns about differences in adjudication at different SCs.

- Response: One of the key goals of the bi-specialization initiative is to improve consistency in adjudication within the bi-specialized pairing handling the particular case type. Where specific differences have been brought to our attention, we have worked directly with the centers to address them and will continue to do so.

4. Mail Pick-up - The caller asked if there will be someone at the SCs to collect mail this Saturday, if the mail is sent overnight on Friday, or whether it would be in the queue for Monday. **Recommendation** - We recommend that USCIS put something on their website to clarify this.

- Response: We have answered this question with AILA and ACIP, etc. and been clear that no mail will be collected on the weekend. The upcoming H-1B press release will again contain this information.

5. Travel for H-1B Cap Cases – A caller mentioned the situation where there is travel by people on F or L status who might be traveling overseas during the pendency of their H-1B adjudication, or after that and Oct 1. This raises the issue of pre-conceived intent from F1 students. If the employer files the H-1B to take effect on Oct 1, unless they do premium

processing, they will be tied to the U.S. It would be helpful if USCIS could provide guidance on this. (see also questions below)

- **Response:** We are not sure what is being asked here. Travel during the pendency of a Change of Status application constitutes abandonment of the request to change status but has no bearing on eligibility for the underlying petition to be approved. Also, premium processing has nothing to do with this as even if the case is approved prior to October 1 no new H-1B visas or status can be made available until October 1. Finally, if the H-1B beneficiary/COS applicant is in another NI status and that status ends before October 1, he or she must leave the US and consular process. Filing of a COS application, even if timely, does not allow the beneficiary/applicant to remain beyond the date on the 1-94.

6. Recent L Denials - The caller mentioned that USCIS is reading the regulation too narrowly on the definition of "managerial" at the VSC and CSC. USCIS is requiring managers to supervise other managers or professionals, but the language reads differently. She tried to clarify by putting regulation in L visa submitted, but it did not work.

- **Response:** There have been no policy changes in this area. If you have some specific examples we will review them.

7. Best practice - The decoupling of H1, H4, L1, and L2 visas has worked really well.

- **Response:** Thanks so much.

8. Recommendation:- The caller suggested that the H-4s have the possibility to work, as what happens in other countries.

- **Response:** H-4 work authorization would be a statutory change. USCIS cannot act on this unilaterally

9. Return of Applications on H-2B Filings - the caller asked how quickly applications will be returned on those for which the H-2B cap was already met. These are cases sent to the VSC. She wants to be able to file for cap exempt workers. Recommendation - the caller suggested USCIS use the Federal Express enveloped enclosed. USCIS should return the application no matter what the outcome via the enclosed envelope.

- **Response:** We use the prepaid FedEx or DHL envelopes where and when feasible.

10. Labor Cert Denials for H-2Bs - The caller indicated that there is a very high rate of labor cert denials from Atlanta and Philadelphia processing centers. The caller would like them to look at appeal petitions with a fresh look due to new DOL regulations, particularly at the CSC. This would be helpful to temporary employers. Best practice - USCIS is stepping up to the plate at VSC in trying to review appeal petitions.

- **Response:** The question is ambiguous as CSC has not been handling H-2Bs. VSC has been working closely with DOL to resolve labor cert. issues.

11. Bump Ups to AAOs - The caller mentioned that the VSC has been certifying H2Bs to the AAO on its own and without a USCIS decision. Would it be possible to explain this process? The caller mentioned that he filed several petitions for different positions, all seasonal- of the 13 filed, 8 had different responses - denials, approvals, RFEs, AAO, etc.

- Response: VSC has been certifying H-2B's to the AAO based upon our belief that DOL may have improperly denied the labor cert. We have decided to certify to the AAO based on the petitioner's requests for resolution where the petitioner has submitted countervailing evidence to support an affirmative decision.

12. O Visas - A caller mentioned that there are different opinions as to what works in different SCs. Can USCIS publish info on examples of cases they might approve?

- Response: All SC's follow the same regulations and policy.

13. RFEs - A caller said that RFEs are often boilerplate and it appears that nobody has read the application. She sent two identical Ls for the same company - one got approved and one got an RFE; they were identical.

- Response: Practitioners often complain about the perceived use of boilerplate RFE's, because we use standardized language. If you can provide some specific examples we can review them.

14. Best Practice - The caller mentioned that some officers pick up the phone and just call the person to ask them to provide information that was forgotten. This occurred particularly with officers at the NSC and TSC.

15. Additional Officers re Premium Processing? - A caller asked if extra officers are assigned to deal with premium processing re the April 1 deadline.

- Response: The CSC and VSC have a plan to handle the surge of H1-B's.

16. Concerns re Preferences Issued This Week - The caller asked if there are going to be issues with the mailroom this week, if applicants do not following stated preferences in submissions.

- Response: The CSC and VSC have a plan to handle the surge of H1-B's. USCIS has posted instruction and "helpful hints" , on the USCIS Website that will aid in filing. We encourage everyone to follow those instructions closely.

17. Numbers Without Premium - The caller asked if you could get a number for the cap without premium processing.

- Response: It is not necessary to file premium to obtain an H-1B cap slot. The date of receipt controls cap availability, not the date of adjudication.

18. L Visa Processing - The caller asked if USCIS has a provision to process L visas in 30 days and would the processing be affected by the H surge.

- Response: USCIS regulations require the processing of I-129 L petitions in 30 days. USCIS has plans to allocate resources to meet its processing obligations.

19. Questions from a participant: I had a question that I asked to be passed on to the USCIS concerning international travel for individuals applying for COS to H-1B with a 10/1/07 start date. Where the bene is on an F-1 with practical training and wants to travel, they will be reentering with intent to COS to H-1B on 10/1/07, which would be a problem for CBP, right? This means that the F-1 is relegated to consular processing, correct?

- Response: Travel during the pendency of a COS application is an abandonment of the application. For that reason the alien must consular process.

Questioner: With an H-1B cap bene, where he/she is in the USA on another visa classification (other than the H-1B visa) and is the beneficiary of a petition to change status from a non-H-1B classification to H-1B, he/she should not travel outside the USA until the petition is approved, which may take 3-6 months, or more. If international travel is necessary, we are recommending either filing the petition using "premium processing" or that the approval be cabled. Is there a way to soften the rules or clarify them so that the COS will not be abandoned if the international travel occurs while the COS is pending, as long as the return is prior to the start date (10/1/07).

- Response: No. the rule is the same for all COS applications, not just H-1B.

Questioner: If a foreign national employee is presently in the USA on a valid L-1 or TN visa and we are processing a change of status to H-1B visa that will take effect on 10/1/07, is it correct that the current USCIS rules (based on the Regs and Memos) state that if that person leaves the USA while the petition is pending with the CIS (prior to a decision being rendered), he/she automatically abandons the request for the change of status to the H-1B visa?

- Response: Yes, but not the petition.

Questioner: In these cases, and because the H-1B visa cannot take effect until 10/1/07, the individual would have to depart the USA again after the H-1B visa petition is approved (late September or after 10/1/07), make an appointment and go to an American Consulate overseas to have the H-1B visa stamped into his/her passport (if a Canadian citizen, would have to go to a port-of-entry), and re-enter the USA on the H-1B visa for him/her to be legally and properly in the USA, correct?

- Response: Correct. But they would have to do this the first time they travel outside the US anyway. The I-797 approval notice of the COS is not a visa and will not allow for admission.

Questioner: The other alternatives would be to advise the bene NOT to travel internationally until after 10/1/07 when they will have changed over to H-1B status; travel internationally and

get the H-1B visa stamped in their passports with a return date within 10 days prior to 10/1/07 or thereafter, right?

- Response: Correct.

Questioner: Am I correct in understanding that if they travel internationally, they cannot return on the NEW H-1B visa stamp until 10 days prior to October 1, 2007, at the earliest and would not be eligible to work on the H-1B until 10/1/07?

- Response: Unless there is a basis for admission in some other NIV category, yes.