

The Top 5 Mistakes Employers Make When Preparing H-1B Petitions

Labor & Employment Law Update

By Jacqueline Lentini McCullough on January 26, 2023

The H-1B season is off and running! Though United States Citizenship and Immigrations Services (USCIS) has not specified the dates the online lottery will be open this year, we know it will occur in March. I recommend that all petitions be ready for submission by March 1.

Please know USCIS has proposed a rule that would raise the cost of petitions steeply. The rule is in a 60-day comment period that ends March 6, making it unlikely changes would take place this year. But next year, if the rule is published, the H-1B cap lottery registration fee will rise from \$10 to \$215!

If you have H-1B petitions you plan to submit, consider doing them this year before the cost rises 2,050%. The stakes are high with H-1B petitions. Here are five mistakes employers commonly make and how to avoid them to ensure you have a solid petition.

1. Starting Too Late

The petition process can require several back-up steps to ensure everything is in order for a strong petition.

- Any company filing an H-1B needs to have a Labor Condition Application (LCA) on file with the Department of Labor (DOL).
- Companies also need to demonstrate that the “specialty occupation” requires a bachelor’s degree and prove the applicant has the degree.
- In H-1B cap cases, if the foreign national is changing status, USCIS will want evidence that the national has been maintaining the existing status.

Security measures for online employer registration preparation include multifactor authentication. This means each time someone makes a change, both the client and our office receive codes that must be entered. The code transfers elongate the employer registration process.

Many steps require exchanges with the DOL or USCIS. These exchanges take time too – and the offices get jammed as the filing date approaches.

Beginning the process in January increases the chances you will be able to put all the documentation in order, respond to any requests for further documentation and still have your information ready in time for the March online submission window.

2. Presenting a Weak Company Profile

The DOL and USCIS look for evidence that the company sponsoring the petition exists and is financially sound. As mentioned above, companies submitting H-1B petitions need to have a LCA on file with the DOL. The LCA speaks to the company's agreement to pay the prevailing wage for the position offered.

What specifically are the DOL and USCIS looking for?

- **Confirmation that the company exists from a Dunn & Bradstreet listing.** The government contracts with Dunn & Bradstreet (D&B) and uses them as the source to confirm the company's history (length of time in business), size and well-being. A current D&B listing is crucial to your application's success.
- **Office space.** As a traditional organization, the Department of Labor has not yet begun to put credence in companies that work only virtually. This may seem silly, but I have had to tell clients to get a lease to strengthen their LCA.
- **At least one recently filed federal tax return.** Proof of the company's financial condition and ability to support payroll are key areas that USCIS will scrutinize.

Companies that often need extra help with the LCA requirements include:

- Small companies or start-ups
- Newly formed companies that have not yet filed a tax return
- Companies that work virtually

The Labor Condition Application has to be certified before an H-1B petition can be filed.

3. Providing Little Substantiation to Support the "Specialty Occupation"

To obtain one of the 65,000 H-1B visas for "professional or specialty occupations," a company has to present evidence that the position in question requires a bachelor's degree. The Master's cap permits an additional 20,000 H-1B petitions to be filed for foreign nationals with Master's or higher degrees from US institutions.

There are four areas that have been singled out as obviously requiring this level of education – Science, Technology, Engineering and Math – commonly known as STEM. **If your industry and the job in question fall clearly into a STEM category, proving need for a bachelor's degree is easy.**

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For non-STEM positions, it can be more challenging.

Information Technology (IT) professionals sometimes get questioned. Sales & business related positions can be hard to justify as well and have been highly scrutinized in the past.

4. Failing to Comply

Any company sponsoring an H-1B petition could be subject to Department of Labor and/or USCIS audits.

Auditors can knock on your office door unannounced. They will want to see the foreign national at their desk doing what they are supposed to be doing as required by their specialty occupation. They can also check to see that you are actually paying their salary, creating the required compliance documents and posting them on-site.

Posting the compliance documents can create some awkward situations. **The Labor Condition Application must be posted at the foreign national's place of work.** If the employee is an IT consultant, this can mean posting the employee's pay in view of the client who could then compute the company's profit margin.

Despite the awkwardness, **companies should post the notices promptly.** Not doing so can open the company to liability, which can range from DOL or USCIS fines, to back wages, to criminal charges if the filing is found to be fraudulent, or a knowing or willful violation.

5. Not Updating Work Locations Since Before COVID

As mentioned above, the LCA must be posted at the foreign national's place of work. This applies to all their work locations. The COVID-19 pandemic prompted many employees to work from home. This means they need a LCA posted there too.

Their home needs to be listed as a work place on the LCA. Moreover, the DOL will want to know what percentage of time the employee spends at each work site. Employers need to disclose this information on the LCA too.

If you plan to file an H-1B petition, please begin by February 10.

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