Degree Requirements

- Nurses, Medical Technologists and Medical Technicians require less than a baccalaureate degree for minimum entry into the field
- A nursing degree is called a Bachelors of Nursing but is not generally considered to be equivalent to a 4 year Bachelors Degree.
- In certain instances, specialty nurse positions may qualify as H1B.
- Physical Therapists, Occupational Therapists and Physician's Assistants require a baccalaureate degree
- Speech Language Pathologists & Audiologists require a Masters degree

Licensing Requirements

If the occupation (not the duties) requires a license the alien must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for either permanent license, except for administrative reasons, e.g. need Social Security # or need DHS permission to be employed
- Does not include taking licensing tests or exams unless the beneficiary has a temporary or provisional license which allows the beneficiary to fully perform the duties with or without supervision

Identifying Licenses

- Temporary or provisional licenses normally are titled as such and may have requirements stated on the license that need to be completed before a permanent license can be issued.

- However, a few permanent licenses may also list requirements to be completed for a extension of the license and they normally do not have the word "permanent" in the title.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the alien is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.

- Where licensure is required in an occupation, approve the petition for **one year** or for the period that the temporary license is valid, whichever is longer

Permanent Licenses

- A petition can be approved up to three years for beneficiary's who have permanent licenses

- Remember, although they are permanent licenses, they will still have an expiration date and may have renewal requirements listed.

- Expiration dates on Permanent licenses have no bearing on validity dates given. Approval can be up to three years

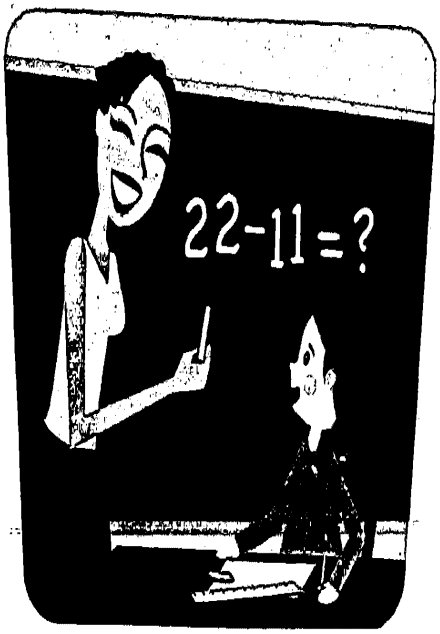
Teachers

- Public school teachers require teaching credentials
  - Unified School Districts
- Private schools do not require a teaching credential
  - Parochial Schools
- Special Education Teachers
  - Require a special certification

Teachers

- Must be teaching in the area that the credential is issued

- If issued an emergency credential, only grant for an increment of one-year



Certified Health Care Workers

- Certification is not to be confused with licensing.
- Licenses required by certain occupations are issued by the state.
- Certifications required by certain health occupations are also issued by the state.
- Don't confuse the title Teaching Certificate (credential) which is actually a license.

Uncertified Health-Care Workers

On or after July 26, 2004, if an alien seeks admission to the U.S., a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the U.S. is employment in of the affected health care occupations

Uncertified Health-Care Workers

Unless properly documented, aliens in the following seven (7) fields are inadmissible to the United States under section 212(a)(5)(C) of the Act as uncertified healthcare workers:

1. Nursing
2. Physical Therapy
3. Occupational Therapy
4. Speech Language Pathology & Audiology
5. Medical Technology
6. Medical Technician
7. Physician's Assistant

Uncertified Health-Care Workers

- In this category nurses include:
  - Licensed practical nurses
  - Licensed vocational nurses
  - Registered nurses
- Medical technologist are also called Clinical Laboratory Scientists
- Medical technicians are also called Clinical Laboratory Technicians

Uncertified Health-Care Workers

At this time, only three entities are approved by the USCIS to certify non-immigrants for 212(a)(5)(C):

- Nurses - Commission on Graduates of Foreign Nursing Schools (CGFNS) – issue certificates for all 7 positions
- Physical Therapists - Foreign Credentialing Commission on Physical Therapy (FCCPT) – for PTs only
- Occupational Therapists - National Board for Certification in Occupational Therapy (NBCOT) – For OTs only

Evidence That the Position Qualifies as a "Specialty Occupation."

- A degree in the specific specialty
- Licensure, if applicable (e.g. Elementary and Secondary Public School Teachers)
- USMLE, or equivalent, and ECFMG, for foreign physicians
- Certification, if applicable, of Healthcare Workers

The job position will determine how many of the four requirements will be applicable for each petition

Umbrella License

- Some occupations allow an individual to work under the license of the employer

- For example, an architect may be able to work without a personal license if the company he works for has a license.

Determining State Licensure Requirements

- There are 50 states all with licensing requirements that vary
- How do you determine the requirements for each case?
- The burden of proof is on the petitioner to provide the requirements for their state and evidence that the beneficiary has satisfied them

Specific Occupations – How many of the four requirements will be applicable to each occupation?

- Teachers
- Healthcare workers
- Physicians
- Analysts
- Accountants
- Managers
- Computer related positions
- All others

Nurses

- Most nursing positions are not professional and do not require a person with a four-year degree in the specialty occupation.
- To qualify for H-1B classification, the institution and/or the duties of the position must be exceptional.
- You need to be satisfied that the position requires a four-year degree.
- Don't be fooled by a degree entitled "Bachelor of Nursing Degree". Despite the title, they are normally not equivalent to a 4 year U.S. degree

Nurses

In contrast to most general RN positions, certain specialized nursing occupations are likely to require a 4 year bachelor's or higher degree in the specific specialty, and accordingly, be H-1B equivalent:

- Clinical Nurse Specialists (CNS)
- Certified Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Nurse-Midwife (CNM).

Specialized Nursing Occupations

- **Clinical Nurse Specialists (CNS):** Acute Care, Adult, Critical Care, Gerontological, Family, Hospice and Palliative Care, Neonatal, Pediatric, Psychiatric and Mental Health-Adult, Psychiatric and Mental Health-Child, and Women's Health

- **Nurse Practitioner (NP):** Acute Care, Adult, Family, Gerontological; Pediatric, Psychiatric & Mental Health, Neonatal, and Women's Health.

- **Certified Registered Nurse Anesthetist (CRNA)**; and

- **Certified Nurse-Midwife (CNM).**

*Note: Nursing positions not qualified for H-1B classification may qualify for H-1C classification under Section 2 of Public Law 106-95 (Adjudicated at Vermont Service Center).

Specialized Nursing Occupations

- Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree.

- Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration.

Specialized Nursing Occupations

- The petitioner may be able to show that the H-1B petition is approvable by demonstrating that the individual nurse position requires a higher degree of knowledge and skill than a typical RN or staff nurse position

Example: The employer demonstrates, through affidavits from independent experts or other means, that the nature of the position's duties are sufficiently specialized and complex that the knowledge required to perform the duties is usually associated with the attainment of a bachelor's or higher degree (or its equivalent). As always, each petition must be adjudicated on a case-by-case basis (taking into account the totality of the requirements for the position).

Physicians

Beneficiary's requirements

1) Has a license or other authorization required by the state of intended employment to practice medicine, *_*or is exempt by law*_ therefrom, if the physician will perform direct patient care and the state requires the license or authorization, and

2) Has a full and unrestricted license to practice medicine in a foreign state or has graduated from a medical school in the United States or in a foreign state.

*Note:

The wording "or is exempt by law" was used to accommodate physicians coming to the U.S. to work at Veterans Administration (VA) hospitals. By law, physicians at VA hospitals are not required to have a license from the state of employment. They do however, need a license to practice medicine from some state.

Physicians

Petitioner requirements – No license required

The petitioner must establish that the alien physician:

1) Is coming to the United States primarily to teach or conduct research, or both, at or for a public or nonprofit private educational or research institution or agency, and that no patient care will be performed, except that which is incidental to the physician's teaching or research.

Physicians

Petitioner requirements – license required

1) If the physician will be employed by a for-profit organization in any capacity, then the petitioner must establish that the beneficiary complies with requirements of an alien physician performing direct patient care.

2) The alien has passed the Federation Licensing Examination (or equivalent examination as determined by the Secretary of Health and Human Services) or is a graduate of a United States medical school; and

Physicians – Foreign Medical Graduates (FMGs)

(i) FMG has competency in oral and written English which shall be demonstrated by the passage of the English language proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG); or

(ii) Is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Physicians FMGs- Exceptions

- Graduates of Canadian medical schools are exempt the ECFMG requirements.

- Canadian medical schools are very similar to U.S. medical school

- Foreign medical school graduates who are of national or international renown are exempt from restrictions on direct patient care listed above. They would, however, require licensure and LCA.

Distinguished Physician of National or International Renown

A physician who is a graduate of a medical school in a foreign state and who is of national or international renown in the field of medicine is exempt from all the petitioner's requirements. [8 CFR 214.2(h)(4)(viii)(C)]

Also exempt from:

- Passing the FLEX or equivalent
- Being competent in English

Physicians FMGs- Exceptions cont'd

- The burden of proof is on the petitioner to prove the FMG's license for that state is distinguished and does not require ECFMG
- Examples of distinguished notations on such licenses:

  Conceded Eminence

  Distinguished Professor
- Even with such terms on a license, the petitioner should explain the term for that state.

Physicians FMGs- Exceptions cont'd

- Remember:

  There are certain states that have licensure exemptions for international medical graduate physicians through recognition of eminence in medical education or medical practice, but these are extremely rare and in most cases tied to a specific medical faculty position or hospital appointment

Physicians

- Physician with a permanent license. Can be approved for up to three years

- Physician with a temporary or provisional license, approve for up to one year or the expiration of the temporary license, whichever is greater.

Physicians – Medical Residents

- Recent medical graduates who are completing their internship are referred to as Medical Residents.
- Medical Residents have temporary licenses
- Exceptions: New York and Connecticut do not issue temporary licenses to their Medical Residents. They can be approved for up to three years.
- Evidence of no licensing requirement is needed for hospitals in other states.

214(l) Doctors

- Relates to J nonimmigrants attempting to change status to H-1B

- Aliens who have received J nonimmigrant classification in order to receive graduate medical education or training are subject to the two-year foreign residence requirement of 212(e) of the INA

214(l) Doctors

- According to section 248(2) of the INA, this alien cannot change status to an H nonimmigrant even with a waiver of the two-year residency requirement

- However, there is an exception, Conrad 30, P.L. 103-416 relates to section 214(l) of the INA (refer to CAP exempt section)

214(l) Doctors

A change of status from J to H-1B is allowed if the beneficiary receives a waiver and is requested by either a federal or state agency based on the following Public Law sections:

- Pub.L. 103-416 (by a State Department or Public Health) or
- Pub.L. 104-208 (by an interested U.S. Government Agency)

J-1 COS to H1B Physician

- Must provide the Conrad authorization document from the state where the hospital is located.
- Cannot file for a COS or EOS/ change of employer until the 3 year CONRAD agreement is completed.
- If hardship is claimed by the J-1's hospital the J-1 can relocate to another CONRAD hospital.

214(I) Doctors

In order to grant a change of status for a J1 under Conrad 30, the petitioner must submit:

- a State Workforce Agency letter concurrent with the Department of State recommendation and
- a CLAIMS generated I-612 approval notice is required

214(l) Doctors

- The beneficiary must fulfill a three year employment commitment in an HHS designated shortage area, VA facility or in medical research or training

- The beneficiary is ineligible to change to another nonimmigrant visa classification or adjust status until this commitment is fulfilled

- Once the CONRAD beneficiary fulfills the three year commitment, he will remain CAP exempt upon extension/change of employer.

214(l) Doctors

- If the commitment is not fulfilled, the beneficiary will again be subject to the two-year residence requirement

- When approving any J nonimmigrant changing status under this program, the adjudicating officer must attach the section 214(l) addendum to the I-797 approval notice.

- This addendum is required to prevent claims that a Foreign Medical Graduate did not know the obligations that accompany a waiver under this section

Analysts

- Look closely at the duties for a Market Research Analyst or business analyst
- Marketing managers and Personnel managers do not require degrees per the OOH
- Industrial production managers do not require degrees per the OOH

Managerial Positions

Managerial positions in advertising or public relations are not normally considered specialty occupations, because no requirement of a baccalaureate degree in a specialized area for employment is required.

Accountants

- It is the complexity of the business - not the complexity of the duties - that may show if the beneficiary qualifies

- Analyze the nature, size and income of the business

- Profit by itself may not be enough evidence. 2 Million dollars in sales does not show anything on its face.

Accountants

- **Size:** Generally companies with less than 15-20 employees would have a difficult time justifying an accounting position. The fewer employees, the less need for a full-time accountant.

- **Transactions**: A piano store that sells 11 pianos a month would have less need for an accountant than an independently owned (non-franchised) auto parts store that conducts thousands of transactions a month with both the public and local auto body and repair shops

Accountants

- **Nature of the business:** A non-profit organization with a more complex financial structure in terms of accounting for grants, taxes, etc., would, more likely, require the services of an accountant rather than a franchise business in which the accounting is normally included in the agreement

- An alien can qualify as an accountant by establishing required accounting duties and still do book keeping duties, as well.

Accountant vs. Book Keeper - Questions

- What are the duties of a book keeper? Pay records? Time sheets? Pay bills?
- What are the duties of an accountant? Analyze finances? Prepare taxes? Project expenditures?
- Are they the same?
- Does the business really need an accountant?
- Look at the totality of the evidence.

Who needs an Accountant?

- A 7-11 store?
- A dry cleaners?
- A Carl's Jr. Restaurant?
- Carl's Jr. Headquarters?

Computer Engineers

What are the duties?

- Writing software programs? Maintain mainframe efficiency? Input data with a keyboard?

Watch for job titles:

- Engineer
- Computer Analyst
- Civil Engineer

General Degrees

A degree in the general area of Business Administration may be insufficient unless the petitioner can show that the beneficiary's academic course work gained him or her the knowledge that was a realistic prerequisite for the position

Example: A Business Administration Degree with a major in accounting would likely qualify the beneficiary as an accountant, but may not qualify him as an architect.

H-1B1 Singapore and Chile Professionals

These are done at VSC, however, we get a few misfiled petitions. For each year's CAP:

- 1,400 visas are designated for Chile
- 5,400 visas are designated for Singapore (See Numerical Limits previous slides)
- The Singapore and Chile CAPS have never filled.

H-1B1 Singapore - Chile EOS – Filed on an I-129

- H-1B1s from Chile and Singapore may be admitted initially for a maximum of one-year, and they may extend their H-1B1 stay an indefinite number of times, in one-year increments, as long as they continue to demonstrate that they do not intend to remain or work in the United States permanently. Note that, unlike the H-1B statute, there is no "dual intent" provision for H-1B1s.

EOS from H-1B1 to H-1B – Subject to the General CAP

- An H-1B1 can EOS with a change of conditions of employment to H1B

- However, because the H1B1 has obtained a CAP number from the separate H-1B1 CAP visa limit, they must qualify for a number in the H1B general CAP, to EOS to H1B.

- Singapore- Chile H1B1s are adjudicated at the Vermont Service Center, but if you receive a misfiled H1B1, see you supervisor

H-1B2 Department of Defense Research Project

- Services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties.

- The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the required guidelines are met.

- ***Note:** Petitioner is **not** required to provide a Form ETA-9035 (LCA).

H-1B2 Department of Defense Research Project

- Verify that the petition is accompanied by a verification letter from DOD project manager. This letter must state that the alien will be working on a cooperative project under a reciprocal government-to-government agreement administered by DOD. Details about the specific project are not required.

H-1B2 Department of Defense Research Project

The petitioner must also:

- Provide a general description of the alien's duties and indicate the actual dates of the alien's employment on the project.

- Submit a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment. The petitioner shall also indicate the names of aliens whose employment on the project ended within the past year.

H-1B2 Department of Defense Research Project

- Verify that the petition is accompanied by evidence that the beneficiary has a baccalaureate or higher degree or its equivalent in the occupational field in which he or she will be performing the services.

- Because of the sensitivity of these types of petitions, it is prudent to consult with your supervisor before taking an adverse action with these cases.

- A maximum of 100 aliens can be employed on a DOD research program at any time. Before you approve the petition, contact Headquarters Adjudications through your Supervisor.

H-1B3 Models

- H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. The alien must come to the United States to perform services that require a fashion model of prominence, and he or she must demonstrate such prominence.

- The Bachelors degree requirements are not applicable to models

- An LCA is required

H-1B3 Models - Requirements

- **Prominence** means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling

H-1B3 Models - Requirements

Verify that the beneficiary is qualified for the position. To establish that the beneficiary qualifies as an alien of distinguished merit and ability in the field of modeling you must have evidence of two of the following:

- Has achieved national or international recognition for outstanding achievements evidenced by critical reviews or other published material by or about the alien in major newspapers, trade journals or magazines;

H-1B3 Models - Requirements

- Has performed and will perform services as a fashion model for employers that have a distinguished reputation;

- Has received recognition for significant achievements from organizations, critics, or other recognized experts in the field of fashion modeling. Such testimonials must be in a form that clearly indicates the author's authority, expertise, and knowledge of the alien's achievements;

- Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

H-1B3 Models - Petitioner

- If the petitioner is the employer (not an agent), it can provide copies of any written contracts with the beneficiary or, if there is no written contract, a summary of the terms of the oral agreement under which the beneficiary will be employed.

- If the petitioner is an agent, he/she must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment.

- The agent can provide a copy of a written agreement between himself and the beneficiary, or a summary of the oral agreement as evidence.

H-1B3 Models - Petitioner

- The petitioner should establish that the services to be performed involve an event, production or activity which have a distinguished reputation OR

- the services to be performed are for an organization or establishment that has a distinguished reputation, or a record of employing prominent persons

The Petitioner

Qualifying Petitioner – A U.S. Employer

A U.S. Employer is:

a person, firm, corporation, contractor, or other association or organization in the U.S., which: permits a person to work in the U.S.; has an IRS tax identification number; and has employer-employee relationship(s) demonstrated by having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee. [8 CFR 214.2(h)(4)(ii)]

Qualifying Petitioner – A U.S. Agent

- A U.S. individual or company in business as an agent may file for types of workers who are traditionally self-employed or use an agent to arrange short-term employment with numerous employers.

  [8 CFR 214.2(h)(2)(i)(F)]

Qualifying Petitioner

Keep in mind:

- Unlike immigrant petitions, the ability to pay the beneficiary does not apply to H-1B nonimmigrant petitions; however, there must be a bona fide qualifying H-1B specialty occupation position for the validity period specified on the petition and LCA

- For EOS petitions with same employer, the evidence (e.g. beneficiaries pay statements, W-2s, etc...) should establish that the petitioner complied with the terms and conditions of employment as was stated and signed for on the initial H-1B petition.

Qualifying Petitioner

- An alien may be employed by more than one employer (petitioner) at any given time.
- This is called concurrent employment.
- However, a separate petition must be approved for each employer. Also, part-time employment is permitted.

Employee/Employer Relationship - Who is the Employer ?

Is the Petitioner a staffing firm or agent?

- If the petitioner is an agent, he must guarantee the wage offered and provide the other terms and conditions of the beneficiary's employment (H-1B3). [8 CF214.2(h)(4)(vii)(A)(2)]
- If the petitioner is an agent, has he/she provided a copy of written agreement between himself and the beneficiary, or a summary of the oral agreement? (control, pay, hire, fire)

What are the actual duties of the position?

Contractors/Agents

A petitioner as the employer of an alien

- Employment contractor/employment agency petitioners
- The petitioner must establish that it has the "right of control" over the beneficiary.
- The third party client can exercise "actual control" at their worksite

Right of Control

- An Employer must establish that it has the right of control over when, where, and how the beneficiary performs the job.
- The petitioner must show in the totality of evidence that it has the right to control the beneficiary's employment
- The nature of the petitioner's business and the beneficiary's position are factors.

Right of Control vs. Actual Control

- Right of Control: having the ability to hire, pay, fire, supervise, or otherwise control the work of any employee.

- Actual Control: Physically supervising the employee. The employee will be physically at the site of actual control.

Third Party Employment.

- The third party client company will have the petitioner's beneficiary on site and will exert actual control by supervising him.

- The petitioner will still have the right of control to hire, pay, fire, supervise, or otherwise control the work of that employee.

Issues of Right of Control vs. Actual Control

- The ability to supervise the beneficiary
- The manner in which to supervise the beneficiary
- The right to control the work of the beneficiary on a day-to-day basis (if such control is required)
- The source of the instrumentalities and tools needed to perform the job
- The ability to hire, pay, and fire the beneficiary

Issues of Right of Control (con't)

- The ability to evaluate the work product of the beneficiary (i.e. progress/performance reviews)
- To claim the beneficiary for tax purposes
- To provide employee benefits
- The beneficiary's use of the petitioner's proprietary information to perform the duties of employment

Issues of Right of Control (con't)

- Whether the beneficiary produces an end-product linked to the petitioner's business

- The ability to control the manner and means in which the beneficiary's work product is accomplished

Petitioner as the Employer

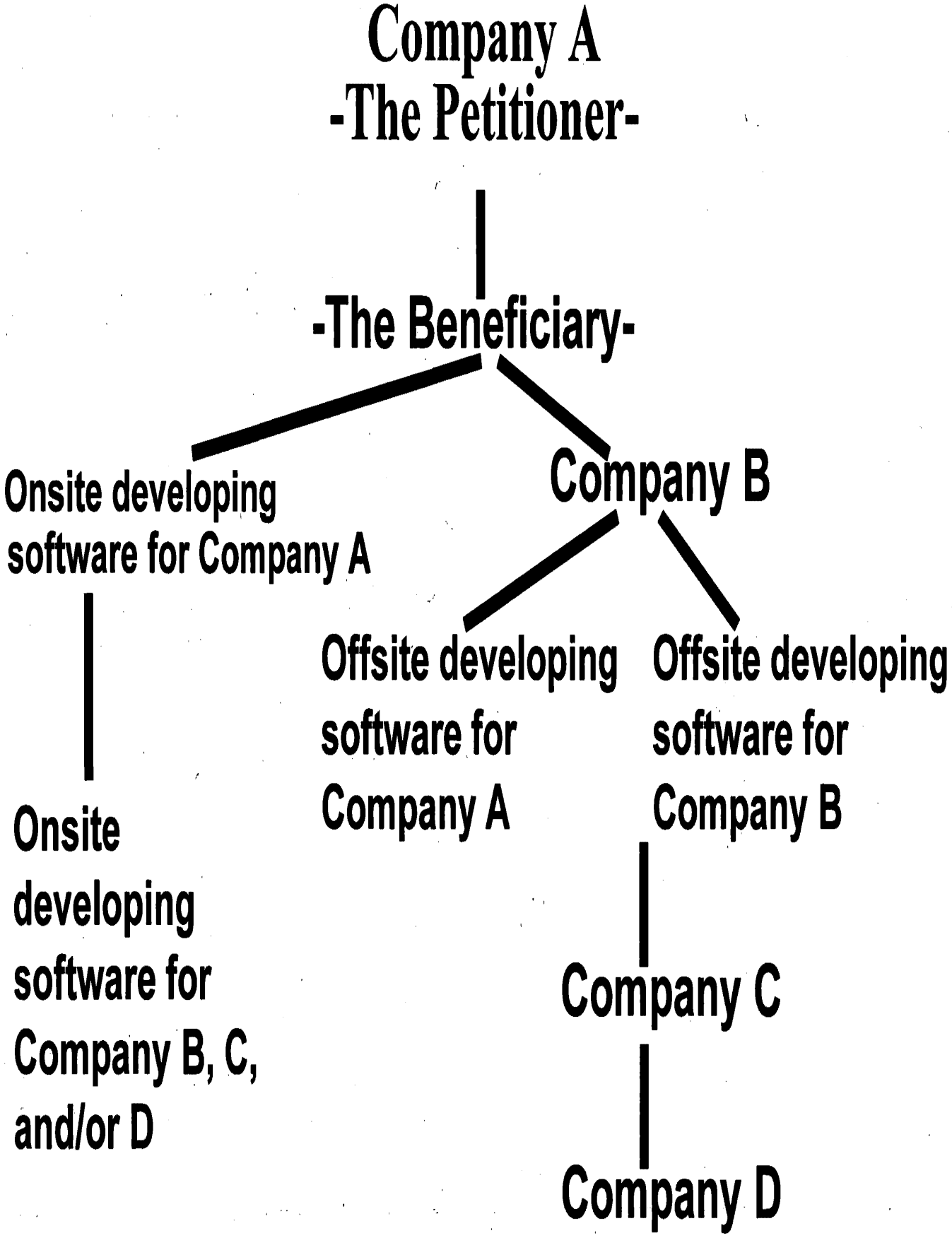
- The petitioner must prove there is an employer/employee relationship with the beneficiary

- In order to do so, the petitioner would have to prove it has the right to control the beneficiary.

Staffing Agency vs. Job Shop

- Staffing agency: by contractual agreement charges a fee to a third party client company for the services of their employee. The right of control stays with the staffing agency

- Job Shop: merely charges a fee and finds a position for their client at a third party company. The client company hires and pays the employee. The job shop does not have the right of control.


Company A
-The Petitioner-
-The Beneficiary-
Onsite developing software for Company A
Company B
Offsite developing software for Company A
Offsite developing software for Company B
Onsite developing software for Company B, C, and/or D
Company C
Company D

Contractors/Agents Assertions vs. Documentation

- An itinerary is a listing of places of proposed employment
- Remember, an itinerary by itself is merely an assertion by the petitioner
- Contracts, statement of work, state wage reports are documentation
- The burden is on the petitioner to show right of control.
- Labor Condition Application must be valid for all employment locations

Contractors/Agents – IT Consulting

- There is a lot of opportunity for abuse with third party client filers.

- Use the 10/25/10 criteria as a guide. Most of the abuse is with these petitioners:

  1. In business less than 10 years
  2. Has less than 25 employees
  3. Is worth less than 10 million dollars (Less than 1 million, very high abuse rate)

* **Note** - Consider the totality of the evidence

Dependent Employers

- A dependent employer is determined by the number of H-1B nonimmigrant's employed as a proportion of the total number of full-time equivalent employees employed in the U.S.
- See H-1B Data Collection and Filing Fee Exemption Supplement, Part A
- See LCA, part F-1, and instructions to LCA on page 5
- See Memo dated April 5, 2006, titled 'Organizations Ineligible for Approval of Immigrant and Nonimmigrant Petitions Under Section 212(n)(2)(c)(ii) of the Act'

TARP Dependent Employer

- H-1B petitioners who receive funds under the Troubled Asset Relief Program (TARP) must comply with the "H-1B dependent employer" provisions regarding recruitment of U.S. workers

- If the petitioner indicates on the petition it has received TARP funding, then the ISO must ensure that the petitioner has indicated they are H-1B dependent on the LCA

- If they did receive TARP but did not indicate on the LCA that they are H1B dependent, the LCA is invalid. The petition will be denied.

TARP

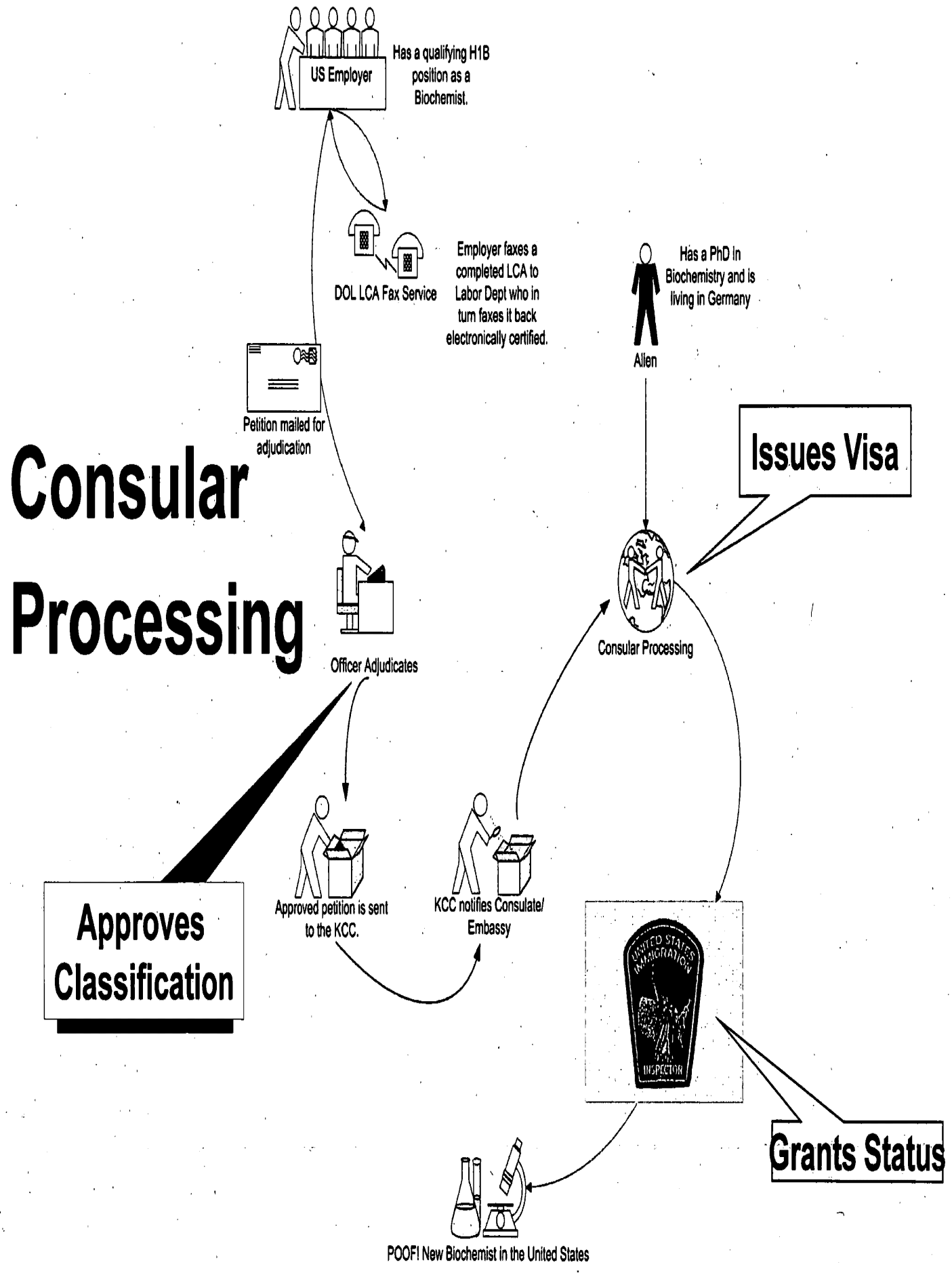
- If they did not indicate on the petition whether they received TARP funds of not, RFE for an answer.

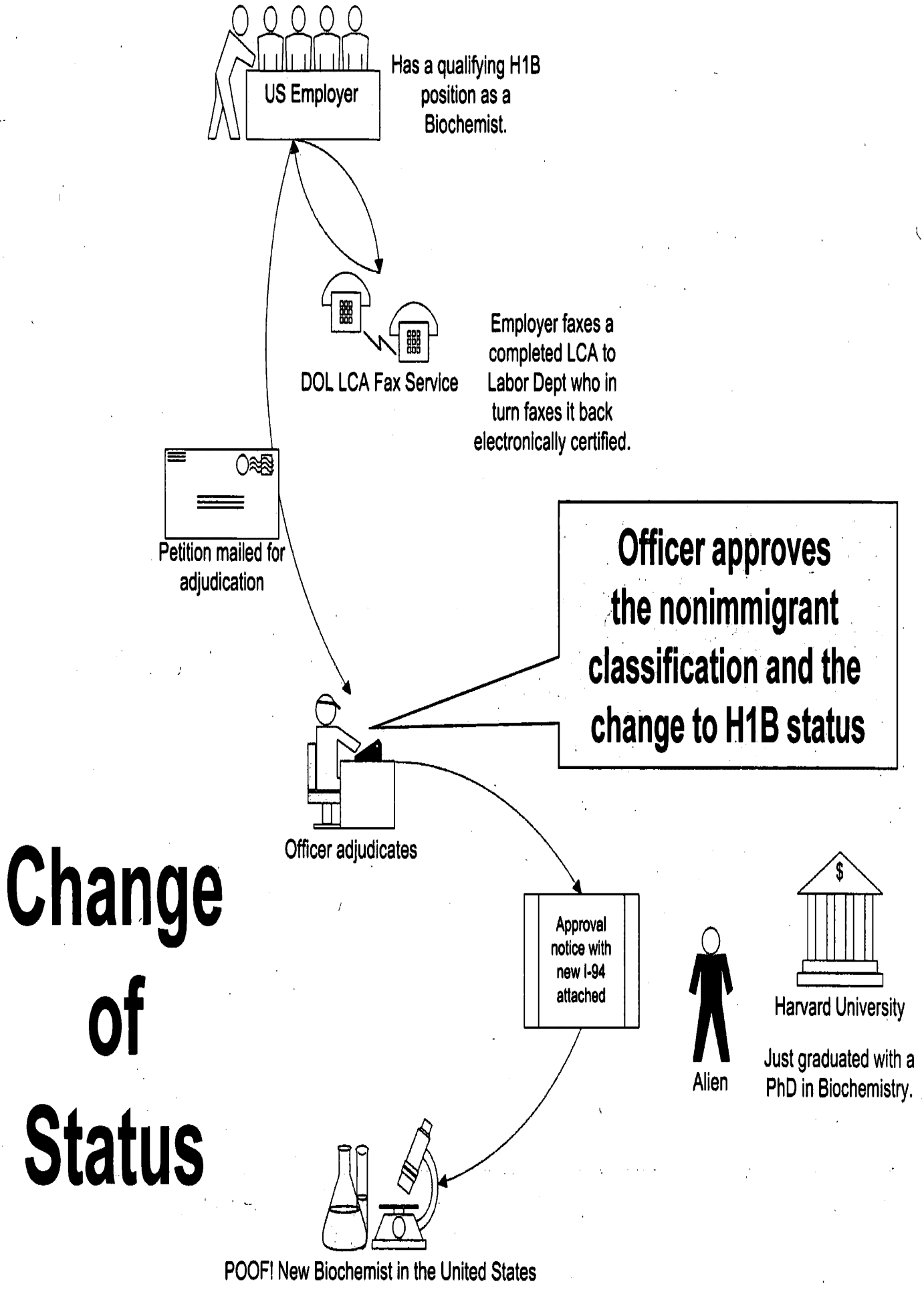
- If they provide evidence that they have paid back the TARP funds then they do not have to indicate on the LCA that they are a dependent employer

The Petition and Visa Process

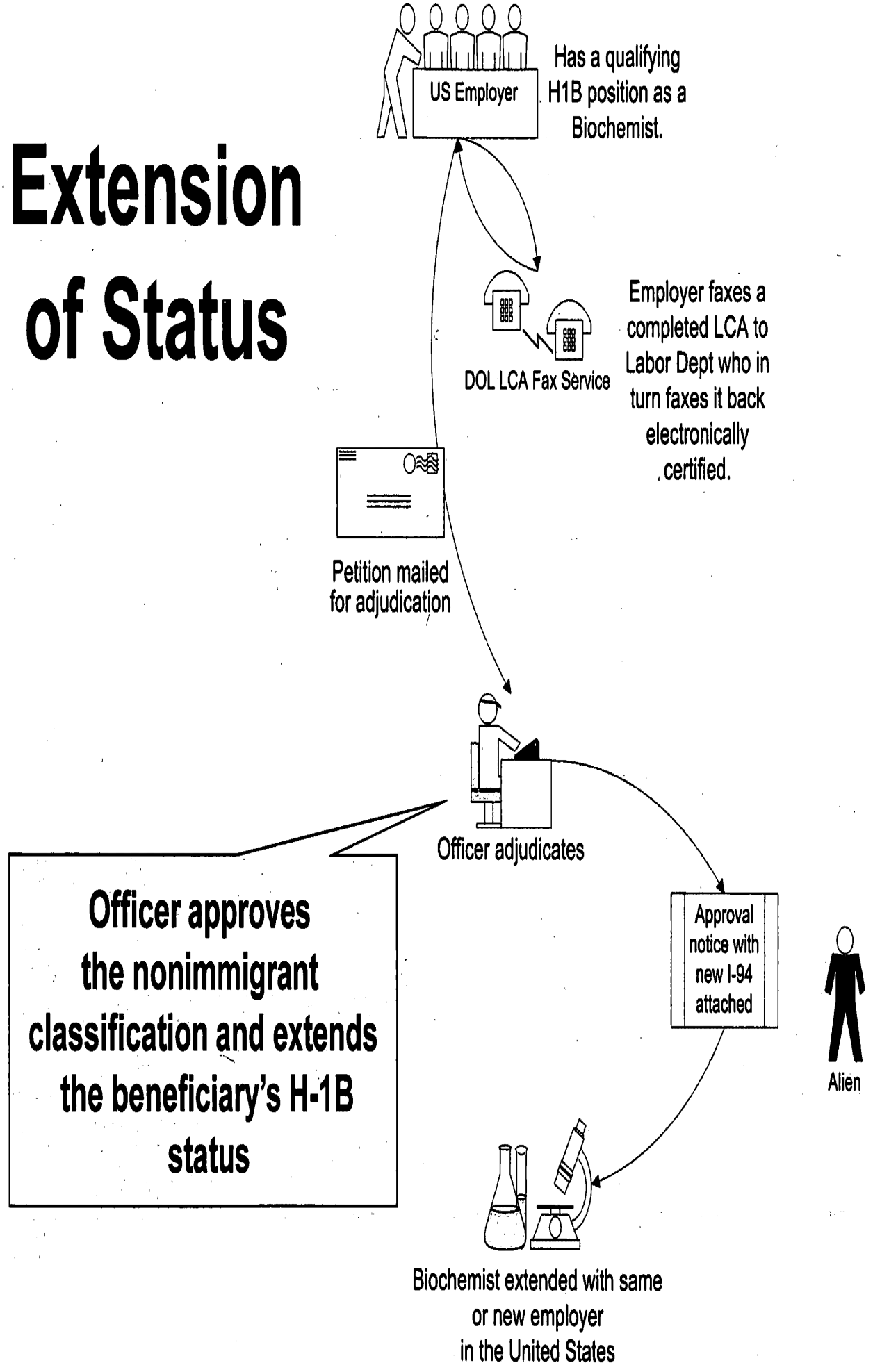
- Depending on whether the alien is abroad or physically present in the U.S., the petitioner may request that notice of an approved H-1B petition be sent to a U.S. consulate abroad so that the alien may apply for an H-1B visa, or that the alien's status be changed or extended in the U.S.

- It is critical to remember that eligibility for the H-1B classification is a separate analysis from whether the beneficiary is eligible for or has maintained valid H-1B status.


US Employer
Has a qualifying H1B position as a Biochemist.
DOL LCA Fax Service
Employer faxes a completed LCA to Labor Dept who in turn faxes it back electronically certified.
Has a PhD in Biochemistry and is living in Germany
Alien
Petition mailed for adjudication
Consular Processing
Issues Visa
Officer Adjudicates
Consular Processing
Approves Classification
Approved petition is sent to the KCC.
KCC notifies Consulate/ Embassy
UNITED STATES IMMIGRATION INSPECTOR
Grants Status
POOF! New Biochemist in the United States

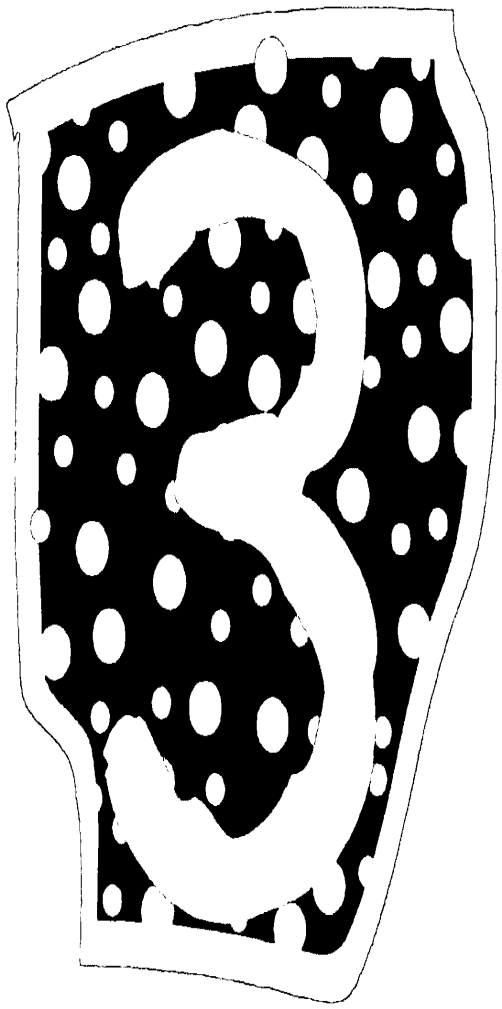

US Employer
Has a qualifying H1B position as a Biochemist.
DOL LCA Fax Service
Employer faxes a completed LCA to Labor Dept who in turn faxes it back electronically certified.
Petition mailed for adjudication
Officer approves the nonimmigrant classification and the change to H1B status
Officer adjudicates
Change of Status
Approval notice with new I-94 attached
Alien
$
Harvard University
Just graduated with a PhD in Biochemistry.
POOF! New Biochemist in the United States

Extension of Status



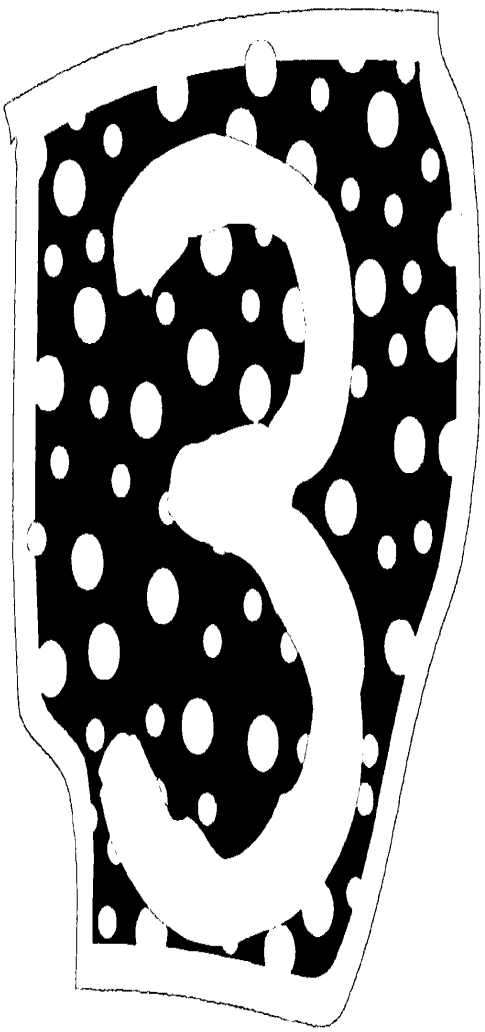
Initial Period of Stay

Specialty Occupations up to 3 years



Extension of Stay

Specialty Occupations **up to 3 years**



Requirements for Extension of Stay (EOS)

- Alien must be in the U.S. at the time of filing the petition
- Passport must be valid at the time of filing
- Alien does not have to be physically in the U.S. while the EOS is pending
- Departure is not treated as abandonment
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused if the late filing was beyond the control of the alien

Validity Period for EOS

- EOS approved (same employer)
  - authorized from the date of expiration
  - backdate the validity date to the day after the beneficiary's status expires to eliminate gaps
- EOS approved (new employer)
  - valid from date of adjudication unless it's a future date

Validity Dates

- Determining the "To" validity date for EOS/COS approval
- National SOP page 5-70

RFE & Denials on EOS Petitions

- See Memo dated April 23, 2004, titled 'The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity'
- "Material Error"
- "Substantial Change in Circumstances"
- "New Material Information"

RFE & Denials on EOS Petitions

The Deputy Director will review and clear in writing, prior to the issuance of an RFE or final decision, any case involving an extension of stay of petition validity in a nonimmigrant classification where the parties and facts involved have not changed, but where the current adjudicating officer determines nonetheless that it is necessary to issue an RFE or deny the application for extension of petition validity.

Advance Parole

- An alien in H1B status can request advance parole upon leaving the U.S.
- Upon returning to the U.S. the alien will be paroled in.
- The petitioner can then file an I-129 requesting the alien be admitted as an H-1B.

Adjudicating Advance Parole

- If the previous granted H1B status is still valid at the time the petition is filed for an alien requesting admittance as an H1B, adjudicate as any normal EOS filing

- If the previous status has expired at the time of filing, adjudicate as any normal file that will be approved as a split decision

EOS – Split Decisions

- Remember if an alien in the U.S. wants to change nonimmigrant status or extend nonimmigrant status, they must be currently in nonimmigrant status at the time of filing

- The adjudication of the H1B petition of an alien currently in the U.S. has two distinct parts. Adjudication of the H1B petition and the adjudication of the COS or EOS request

- If they are not in status when filing an EOS or COS and we approve the H1B petition, we will deny the EOS or COS. This is called a split decision.

Requirements for Change of Status (COS)

- Alien must be physically in the U.S. at the time of filing
- Passport must be valid at the time of filing
- Departure is treated as abandonment until petition is approved
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused if the delay was beyond the petitioner/benes' control

Requirements for Change of Status (COS) – Split Decision

Follow the same procedures as for an EOS split decision covered on a previous slide

Change of Status (COS)

Classifications that cannot change to H1-B status, among others:

- M-1 student - 8 CFR 248.1(d)
- J-1 exchange visitor, who is subject to the 2-year foreign residence requirement of section 212(e)

F-1 COS

- Interim Rule 4/8/08 – Extends the period of OPT time from 12 months to 29 months for F-1 students who have completed a STEM degree

- STEM: science, technology, engineering or mathematics

- Employment must be with a U.S. employer enrolled in the E-verify program

Consulate Notification

- If the alien beneficiary is not in the U.S. then we will not have to consider any change or extension of status.

- If we approve the H1B petition we will send the approval notice to the consulate (through KCC) in the alien's foreign country.

Limitation on Stay

Specialty Occupations maximum of 6 years

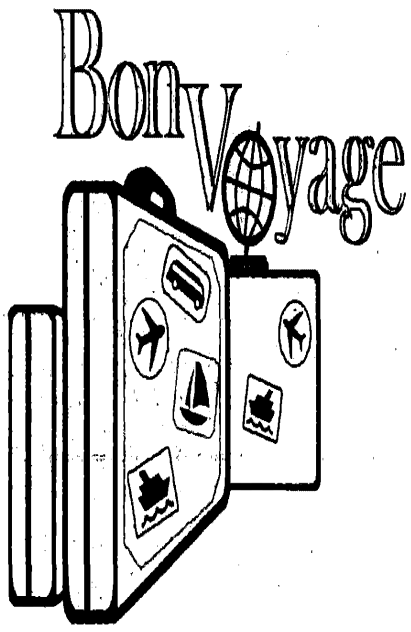
Limitation on Stay

- Limitations on the duration of time spent in H-1B status refer only to the principal alien worker and do not apply to the spouse and children

- Time spent as an H-4 dependent does not count against the maximum allowable period of stay

Split Decision

- Approve the classification
- Deny extension of stay (EOS) or change of status (COS)
- Beneficiary must depart the U.S. and apply for H-1B visa to enter



E-Verify Program

- E-Verify is a Web-based system that electronically verifies the employment eligibility of newly hired employees.

- E-Verify is a partnership between the Department of Homeland Security (DHS) and the Social Security Administration (SSA). U.S. Citizenship and Immigration Services (USCIS) oversees the program.

VIBE Program

- VIBE Description: VIBE is a program to verify the viability and current level of business operations by petitioners. VIBE will use open source data from an independent information provider (IIP), Dunn and Bradstreet, to validate and verify the information submitted by petitioners. Results will be included in each petition.

- Deployment of this system is scheduled for February of 2011.

- ALL I-129 files will be subject to VIBE verification.

Four Categories of 6-Year Exceptions

Seasonal or Intermittent Employment

- The 6-year limitation shall not apply to H-1B aliens who did not reside continually in the U.S. and whose employment was seasonal or intermittent or was for an aggregate of six months or less per year.

- The 6-year limitation shall not apply to H-1B aliens who reside abroad and regularly commute to the U.S. to engage in part-time employment.

Seasonal or Intermittent Employment

- To qualify for this exception, the petitioner must provide clear and convincing proof that the beneficiary qualifies for such an exception.

- Such proof could consist of evidence such as arrival and departure records, copies of tax returns of the petitioner, and records of employment abroad.

❷Recaptured Time

- See the Adopted Decision, Matter of IT, Ascent (September 2, 2005)

- The 6-year period of authorized admission of an H-1B nonimmigrant accrues only during periods when the alien is lawfully admitted and physically present in the U.S.

- The petitioner must submit supporting documentary evidence to meet its burden of proof.

AC21

Overview of AC21 Statute

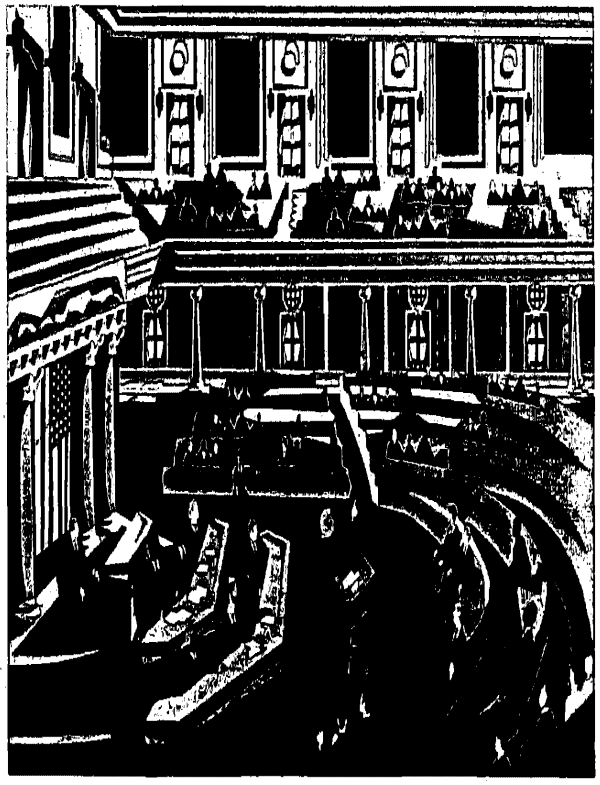
The American Competitiveness in the Twenty-First Century Act ("AC21"), Public Law 106-313, was signed into law on October 17, 2000. The law significantly changed the H-1B program as well as the employment based immigration program. The law very clearly has two major purposes and themes.

AC21 cont...

First, Congress was concerned with making U.S. immigration laws responsive to the needs of U.S. companies involved in the hiring of foreign nationals. Second, Congress was concerned with [Immigration and Naturalization Service] delays in adjudicating petitions, which create hardships to U.S. businesses and foreign nationals alike.

AC21 Congressional Intent

A Senate Report accompanied the AC21 legislation. *See* S. Rep. No. 106-260 (April 11, 2000). It is in that Senate Report that much of the legislative history of AC21 is found:



Congressional Intent cont...

Congress sought ways to retain highly skilled foreign workers since they believed U.S. employers and the economy were hampered by the lack of ability to hire the workers they need and retain them. This resulted in raises to the H-1B numerical limitations and creation of H-1B exemptions.

Congressional Intent cont...

Congress looked to provide relief for aliens subject to processing backlogs and lengthy adjudications. Congress referred to [INS] backlogs as "inordinate delays in labor certification and [INS] visa processing"

The resulting consequence is that "individuals in these circumstances are currently being forced to leave the country and disrupt the projects they are working on simply on account of entirely unreasonable administrative delays."

Congressional Intent cont...

H-1B extensions beyond the 6th year was intended to protect qualified workers from "being forced to leave the country and disrupt the projects they are working on simply on account of entirely unreasonable administrative delays" in labor certification and [INS] visa processing

This allows an individual on an H-1B visa on whose behalf an employer has taken steps to seek an immigrant visa to obtain an extension on that visa so the individual can stay in the United States until a decision is made on his or her case.

Overview of AC21 Statute

On November 2, 2002, President Bush signed into law the Twenty-First Century Department of Justice Appropriations Authorization Act (21st Century DOJ Appropriations Act). This law made certain amendments to AC21.

❸106(a) of AC21

Sec. 106(a), as amended by the 21st Century DOJ Appropriations Act. The H-1B 7th year extension provisions allow for extensions of H-1B status in one-year increments to H-1B aliens who have a labor certification, employment-based immigrant visa petition or application for adjustment of status pending if it has been more than 365 days since the visa petition or the labor certification application has been filed.

Previously, H-1B aliens were subject to a 6-year period of maximum stay.

§ 106(a) cont...

SEC. 106. SPECIAL PROVISIONS IN CASES OF LENGTHY ADJUDICATIONS.

(a) EXEMPTION FROM LIMITATION.—"(a) EXEMPTION FROM LIMITATION.—The limitation contained in section 214(g)(4) of the Immigration and Nationality Act with respect to the duration of authorized stay shall not apply to any nonimmigrant alien previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) if 365 days or more have elapsed since the filing of any of the following:

§ 106(a) cont...

"(1) Any application for labor certification under section 212(a)(5)(A) of such Act, in a case in which certification is required or used by the alien to obtain status under section 203(b) of such Act."

"(2) A petition described in section 204(b) of such Act to accord the alien a status under section 203(b) of such Act."

Thus the labor certification, the I-140 and any other employment based immigrant petition, and the I-485 become the eligible documents.

§ 106(a) cont...

- When the date of filing of a pending or approved labor certification or an I-140 is more than 365 days from the 6 year anniversary date of the H1B status, the beneficiary becomes eligible for consideration of AC21 benefits.

- When the filing date of a pending I-485 is more than 356 days from the 6 year anniversary, the beneficiary becomes eligible for consideration of AC21

§ 106(a) cont...

If an H1B nonimmigrant qualifies for AC21, under sec. 106, grant the extension of stay of such H-1B nonimmigrants in **one-year increments** until a final decision is made to:

- Deny the application for labor certification; or
- If the labor certification was approved, to revoke the approved labor certification; or
- Deny the employment based immigrant petition; or
- Grant or deny the alien's application for an immigrant visa or for adjustment of status.

§ 106(a) cont...

- 20 CFR 656.30(b) provides for a 180-day validity period for labor certifications that are approved.

- All labor certifications that are approved must have an I-140 filed within 180 calendar days of the labor certification's approval date

§ 106(a) cont...

- USCIS will not grant an extension of stay under AC21 if, at the time the adjudication, the labor certification has expired by virtue of not having been timely filed in support of an I-140

- However, once the labor certification is filed within 180 calendar days in support of an I-140 petition, the labor certification remains valid, even if the I-140 petition is denied.

- The same labor cert. can be filed in support of a second I-140 after the first one has been denied.

§ 106(a) I-140s That Do Not Require Labor Certs.

- When determining the applicability of Section 106(a) for employment-based (EB) categories (I-140s) that do not require a labor certification, the 365 days will pertain only to the filing of the EB petition.

I-140 Classifications not requiring labor certification:

- 203(b)(1)(A) Alien of Extraordinary Ability (E-11)
- 203(b)(1)(B) Outstanding Professor/Researcher (E-12) H1B Masters CAP (PHDs)
- 203(b)(1)(C) Multinational Executive or Manager (E-13)

§ 106(a) -I-140s That Do Require Labor Certs.

I-140 Classifications Requiring a Labor Cert.:

- 203(b)(2) Member of Professions (E-21) H1B
- 203(b)(3)(A)(i) Skilled Worker (E-31)
- 203(b)(3)(A)(ii) Professional (E-32)
- 203(b)(3)(A)(iii) Other Worker (EW3)

The vast majority of H1Bs will be filing I-140s in these classes requiring labor certs.

❹ 104(c) of AC21

Sec. 104(c). These provisions allow for extensions of H-1B status until an alien's adjustment of status application can be processed and a decision made, notwithstanding per-country visa limitations that may delay an alien's immigration.

§ 104(c) of AC21 cont...

SEC. 104. LIMITATION ON PER COUNTRY CEILING WITH RESPECT TO EMPLOYMENT-BASED IMMIGRANTS.

...(c) ONE-TIME PROTECTION UNDER PER COUNTRY CEILING.—

Notwithstanding section 214(g)(4) of the Immigration and Nationality Act, any alien who—

(1) is the beneficiary of a petition filed under section 204(a) of that Act for a preference status under paragraph (1), (2), or (3) of section 203(b) of that Act; and

§ 104(c) cont...

(2) is eligible to be granted that status but for application of the per country limitations applicable to immigrants under those paragraphs, may apply for, and the Attorney General may grant, an extension of such nonimmigrant status until the alien's application for adjustment of status has been processed and a decision made.

Note* - Although Sec. 104 is titled a "one time" protection, this does not mean that only one extension can be granted. AC21 extensions can be granted for as long as the alien qualifies.

Sec. 104

- Sec. 104 basically provides AC21 benefits for those nonimmigrants with approved I-140 petitions, but the visa is not available due to a backlog.

- Any current nonimmigrant alien who has an approved I-140 but is on the waiting list for a visa at the time of the filing date of the H1B petition, can qualify to be granted H1B status for an additional 3 year stay under AC21

- The Visa Bulletin determines availability

For All AC21 Filings After the 6th Year

- A petitioner must file a Form I-129 on behalf of the nonimmigrant beneficiary.
- The petitioner may be either the beneficiary's current employer or a new employer.
- The validity period may still only be granted within the time allotted by an endorsed LCA.
- All licensing and certification restrictions must still be met.
- The beneficiary need **NOT** be in H-1B status when requesting an additional period of stay beyond the 6-year maximum.

Sections 104(c) and 106

- Though both sections of AC21 use the term "extension of stay," eligibility for the exemptions is not restricted solely to requests for extensions of stay while in the United States.

- Aliens who are eligible for the 7th year extension may be granted an extension of stay regardless of whether they are currently in the United States or abroad and regardless of whether they currently hold H-1B status

§ 104(c) cont...

Check the DOS Web site to view the visa bulletin:

http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html

Filing for an AC21 Extension

- The alien does not have to be in the U.S. at the time of filing.
- The alien does not have to be in H1B status at the time of filing.
- The alien does have to be in a nonimmigrant status at the time of filing for a COS or EOS of AC21 benefits

Spouses of AC21 recipients

- An alien who has reached his/her 6 years in H-1B status, and who has an H-1B spouse who has a pending or approved labor certification and/or pending or approved I-140, is not eligible for extensions under AC21 under the spouses petitions and labor cert.

- The spouse must have their own pending or approved Labor cert. and/or I-140 to be eligible for AC21 benefits.

Accrual of Unlawful Presence

- An alien may stay beyond the 6-year maximum period of stay as defined in INA Section 214(g)(4), and remain in status under AC21 provisions as long as the alien remains in a period of stay authorized through extensions and does not accrue unlawful presence.

§ 105 of AC21, INA 214(n). H-1B "portability"

Sec. 105 (INA 214(n)). The H-1B portability provisions allow a nonimmigrant alien previously issued an H-1B visa or otherwise accorded H-1B status to begin working for a new H-1B employer as soon as the new employer files an H-1B petition for the alien. Previously, aliens in this situation had to await [INS] approval before commencing the new H-1B employment.

Extensions For The Balance of the 6 Years And AC21

- Extensions for AC21 benefits can be combined with the balance of the six year maximum and recapture time.

- The maximum time an H1B petition can be approved for is 3 years.

§ 105 cont...

SEC. 105. INCREASED PORTABILITY OF H-1B STATUS.

(a) IN GENERAL.— Section 214 of the Immigration and Nationality Act is amended by adding at the end the following new subsection:

§ 105 cont...

"(m)(1) A nonimmigrant alien described in paragraph (2) who was previously issued a visa or otherwise provided nonimmigrant status under section 101(a)(15)(H)(i)(b) is authorized to accept new employment upon the filing by the prospective employer of a new petition on behalf of such nonimmigrant as provided under subsection (a). Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.

AC21 Memo 2008

- Supplemental Guidance Relating to Processing Forms I-140 Employment-Based Immigrant Petitions and I-129 H-1B Petitions, and Form I-485, Adjustment Applications Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (...) (138KB PDF)
  Donald Neufeld, Acting Associate Director, Domestic Operations 05/30/2008

Approved Petitions

- If provided forward a duplicate KCC for EOS or COS cases
- If consulate notification is requested, the petitioner must provide a duplicate copy of the petition
- If a duplicate copy is not provided the petitioner will be notified that they must file an I824 to notify the consulate
- Letter is found at: O:\ Adjudications\I-824\4-Correspondence
- PIMS process

Approved Petitions

- Approved petitions are routed to State Department's Kentucky Consular Center (KCC) in Williamsburg, Kentucky

CLAIMS Designations and Validity Dates

- 1B1 (H1B) - up to 3 years, but may not exceed validity period endorsed by DOL on LCA
- 1B1 (H-1B2 DOD)- up to 5 years **NO** LCA required
- 1B1 (H-1B3 Model)- Up to 3 years, but may not exceed validity period endorsed by DOL on LCA
- HSC – (H-1B1Singapore/Chile) Up to 1 year, but may not exceed validity period endorsed by DOL on LCA.
- These designations are for CLAIMS updating. All of these are considered as H1B specialty occupations

EOS/Dependents

- Filed on I-539
- Classification is H-4 (spouse or children)
- Children must be under age of **21**
- Evidence: Form I-94, I-797, visa pages, etc.
- Dependent files are attached to related I-129
- Departure is not treated as abandonment
- Family Unity

COS/Dependents

- Filed on I-539
- Classification is H-4 (spouse or children)
- Children must be under the age of **21**
- Evidence: I-94, I-797, proof of relationship (marriage certificate, birth certificate, etc.)
- Must be physically in the U.S. – Departure is treated as abandonment
- Dependents file most often attached to the related I-129

Dependents

- If a child will turn 21 all applicants on the I-539 will be approved to date prior to the child's 21st birthday

- If the child is 21 at time of filing a split decision will be made, the age out child will be denied and the other applicants will be approved

Denials

- When to use an I-292
- When to use an I-541
- When to use both
- Standard Denial formula – IRAC
- Citations in support of our decisions
- 9th Circuit rulings

Systems Checks

- IBIS
- SQ94
  - EOS Approval – not required
  - EOS Denial – not required
  - COS Approval within 15 days before
  - COS Denial within 15 days before
- SEVIS for F, J, or M COS printout on right side of file

No Appeal Rights

There are no appeal rights for:

- Denial for failure to pay the ACWIA or Fraud Detection fee
- Abandonment denials
- The denial of an extension of stay (EOS) or a change of status (COS) portion of the petition

Other Info

- FID - Fraud Intelligence Digest
- Common errors

Summary

- Fees and exceptions
- The Cap
- What is an H-1B temporary worker
- Requirements of the petitioner and beneficiary
- LCA
- 6-year exceptions
- Specific occupations and things to know

Thank You,

The End?

Form I-129 H-1B Adjudication

June 2012

Agenda Training Matters

- Introduction
- Burden of Proof and Standard of Proof
- The Definition of an H-1B Nonimmigrant Worker
- Filing Procedures and Fees
- Numerical Limitations and Exceptions
- Position and Beneficiary Requirements

Agenda Training Matters (Cont'd)

- Petitioner Requirements
- Labor Condition Application Requirements (LCA)
- Exceptions to the 6-Year Maximum Period of Stay
- Adjudication of the Petition
- Summary

Burden of Proof and Standard of Proof

Adjudicator's Field Manual (AFM) 11.1(c)

Burden of Proof

The burden is on the petitioner to establish that he or she is eligible for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Standard of Proof

The standard of proof applied is the "preponderance of the evidence" standard. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Preponderance of the evidence means that it is more likely than not that the beneficiary qualifies for the benefit sought. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1999).

Application of the Preponderance Standard

- If the petitioner submits evidence that leads USCIS to believe that the claim is "probably true" or "more likely than not," the petitioner has satisfied the standard of proof. ("More likely than not" is generally considered as a greater than 50 percent probability of having something occur.)

- This means that the petition should be approved if the evidence provided tips in favor of the petitioner (50.1%) even if the officer has questions regarding eligibility.

- If a petitioner provides supporting documentation that satisfies the regulatory criteria, and such documentation is legitimate (e.g., not forged, not issued in error, accurate, etc.), USCIS cannot unilaterally impose novel substantive or evidentiary requirements beyond those set forth in regulatory requirements.

Sources of Information for H-1B Adjudication

- Immigration and Nationality Act (INA)
  - Sections 101, 212, 214
- Title 8 Code of Federal Regulations (CFR)
  - Parts 103, 214, 248, 274
- Acts & Legislation
  - American Competitiveness in the Twenty-First Century Act of 2000 (AC21)
- Adopted Decisions
- Guidance and policy memoranda

What is an H-1B Nonimmigrant Worker?

Definition

According to 101(a)(15)(H)(i)(b) of the Act is –

An alien subject to section 212(j)(2) who is coming temporarily to the United States to perform services...in a specialty occupation described in section 214(i)(1) or as a fashion model, who meets the requirements for the occupation specified in section 214(i)(2) or, in the case of a fashion model, is of distinguished merit and ability...

Divisions of the H-1B Classification

- **H-1B (1B1)** Specialty occupation workers
- **H-1B2 (1B2)** Department of Defense (DOD) cooperative research and development project or co-production project workers
- **H-1B3 (1B3)** Fashion models of distinguished merit and ability

What are the Filing Procedures and Fees?

Filing Procedures

- A United States employer or agent must file Form I-129, *Petition for a Nonimmigrant Worker*, on behalf of an alien to request H-1B nonimmigrant status.

- The petition may be filed up to six months before the anticipated start date of the alien as stated on the petition.

- The petition must be filed at the Service Center with jurisdiction over the place of employment.

- CSC has sole jurisdiction over petitions for cap exempt entities (slide 22).

Fees

- Form I-129 base fee ($325)
- American Competitiveness and Workforce Improvement Act (ACWIA) fee ($1,500 or $750), with some exceptions
  - Applies to first petition and first extension request filed by an employer for a particular worker
- Fraud Prevention and Detection Fee ($500)
  - Applies to initial H-1B status request filed by a specific employer for a particular worker
- Public Law 111-230 fee ($2,000)
  - Applies to initial H-1B status request filed by a specific employer for a particular worker if:
    - The petition is filed on/after August 14, 2010 and before October 1, 2015 and
    - The petitioner employs 50 or more employees in the U.S. and over 50% of those U.S. employees are in H-1B or L-1 nonimmigrant status
- Premium Processing Fee ($1,225), if requesting Premium Processing Service

ACWIA Fee

- U.S. employers with 25 or fewer full-time equivalent employees, including all affiliated and subsidiary entities, must pay $750

- U.S. employers with 26 or more full-time equivalent employees, including all affiliated and subsidiary entities, must pay $1,500

ACWIA Fee (Cont'd)

The following entities are exempt from the ACWIA fee:

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a);
- Nonprofit organizations or entities related to or affiliated with institutions of higher education;
- Nonprofit research organizations or governmental research organizations;
- Primary or secondary educational institutions, private or public; and
- Nonprofit entities that engage in an established curriculum-related clinical training program for students.

ACWIA Fee (Cont'd)

Additionally, the ACWIA fee is not required for:

- An amended I-129 petition that does not contain any request for extension of stay;
- An I-129 petition filed for the purpose of correcting a USCIS error; or
- The second or subsequent extension by the same employer for the same employee.

What are the numerical limitations?

Numerical Limitations

The total number of temporary workers who may be issued initial visas or otherwise provided nonimmigrant status for H-1B classification in a fiscal year is currently 65,000. This is known as the "cap."

The cap applies to the principal H-1B nonimmigrant and not to the spouse and children of the H-1B nonimmigrant.

The DOD cooperative research project workers (H-1B2) have their own separate numerical limitation. A maximum of 100 H-1B2 workers can be employed the U.S. at any time.

Numerical Limitations (Cont'd)

- Of the available 65,000 visa numbers,
  - Up to 1,400 visas may be set aside for nationals of Chile under the U.S.-Chile Free Trade Agreement, and
  - Up to 5,400 visas may be set aside for nationals of Singapore under the U.S.-Singapore Free Trade Agreement.
- Unused numbers under the Free Trade Agreements are rolled back into the regular cap.

Numerical Limitations (Cont'd)

- Petitioners can file cap petitions for the next fiscal year beginning on April 1 of the current fiscal year.
- If the cap is met anytime during the first five business days, USCIS will conduct a random selection process (also known as the lottery) on all of the petitions received during those five days. Non-selected petitions will be rejected.
- USCIS may also conduct the random selection process on the final receipt date when the cap is not met within the first five business day.
- Duplicate cap subject petitions (same petitioner and same beneficiary) will be denied if they are filed in the same fiscal year.
- The Fiscal Year (FY) 2013 cap closed on June 11, 2012.

Numerical Limitation Exceptions - Masters Cap

- The first 20,000 petitions filed on behalf of a beneficiary with a U.S. master's degree or higher are exempt from the cap. This is also known as the advanced degree exemption or "master's cap."

- Any surplus over the 20,000 is then counted against the general cap.

Numerical Limitation Exceptions - Masters Cap (Cont'd)

- Officers must always apply all other cap exemption provisions first before applying the H-1B master's cap.

- The master's degree (or higher) must be issued from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-329), 20 U.S.C. 1001(a).

Numerical Limitation Exceptions – Petitioners not subject to the cap INA 214(g)(5)(A) and (B)

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a)

- Nonprofit entities that are related to or affiliated with an institution of higher education

- Nonprofit research organizations or governmental research organizations

Let's define these entities...

Institutions of Higher Education

- "Institution of higher education" is defined by the Higher Education Act of 1965;
- Admit students holding a high school diploma (or equivalent);
- Are certified to provide higher education pursuant to state regulations and are accredited by a nationally recognized accrediting agency;
- Provide an educational program that awards a bachelor's degree or a two-year program that awards credit toward such degree;
- Qualify as a public or nonprofit institution

Definition of a Nonprofit Organization

- Defined as a tax exempt organization under the Internal Revenue Code of 1986, section 501(c)(3), (c)(4) or (c)(6) and

- Has been approved as a tax exempt organization for research or educational purpose by the IRS

Research Organizations

- A nonprofit research organization:
  - is primarily engaged in basic research and/or applied research
- A governmental research organization:
  - is a United States Government entity whose primary mission is the performance or promotion of basic research or applied research.

Basic Research

- Is general research to gain more comprehensive knowledge or understanding of the subject under study, without specific applications in mind.

- Is also research that advances scientific knowledge, but does not have specific immediate commercial objectives although it may be in fields of present or potential commercial interest.

- May include research and investigation in the sciences, social sciences, or humanities.

Applied Research

- Research to gain knowledge or understanding to determine the means by which a specific, recognized need may be met.
- Investigations oriented to discovering new scientific knowledge that has specific commercial objectives with respect to products, processes, or services.
- It may include research and investigation in the sciences, social sciences, or humanities.

Possible Evidence Establishing the Petitioner is a Research Organization

- Documentation that establishes the organization's research activities, such as a copy of the organizing instrument of the organization that specifies the purposes of the organization; organizational literature, such as books, articles, brochures, research papers, and other literature describing the purpose and nature of the research activities of the organization;

- A complete copy of the petitioner's most recent IRS Form 990, Return of Organization Exempt from Income Tax. The copies of the tax returns should include all required schedules and statements that identify the organization's primary exempt purpose.

Note: Do not deny a petition solely based on a tax document indicating that the company is a charitable organization.

Related or Affiliated Nonprofit Entities

- When determining an affiliation, USCIS uses 8 CFR 214.2 (h)(19)(iii)(B) which states:
  - that an affiliated or related nonprofit entity is a nonprofit entity that is connected or associated with an institution of higher education through one of the following three prongs

Related or Affiliated Nonprofit Entities (Cont'd)

- Prong 1 - The petitioner is associated with an institution of higher education, through shared ownership or control by the same board or federation;

- Prong 2 - Operated by an institution of higher education; or

- Prong 3 - Attached to an institution of higher education as a member, branch, cooperative, or subsidiary

Note: All initial affiliation petitions will be adjudicated by the affiliation team.

Related or Affiliated Nonprofit Entities-Interim Guidance

- Since USCIS is currently reviewing its policy on H-1B cap exemptions for nonprofit entities that are related to or affiliated with an institution of higher education, USCIS HQ instituted an interim procedure to provide consistency in adjudications until new guidance is issued.

- Interim guidance dated April 28, 2011 gives deference to prior H-1B cap exemption determinations for nonprofit entities made since June 6, 2006.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- To establish receipt of a prior determination of H-1B cap exemption based on affiliation, the petitioner may provide some or all of the following documentation or similar types of evidence:
  - A copy of the previously approved cap-exempt petition (relevant pages of the Form I-129 and pertinent supplements) filed by the petitioner;
  - A copy of the corresponding Form I-797 approval notice (issued after June 6, 2006) for the affiliation-based cap exempt petition; and/or
  - Documentation previously submitted with a petition in support of the claimed cap exemption.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- The petitioner may also include a statement attesting that its organization was determined to be cap-exempt since June 6, 2006 as a nonprofit entity related to or affiliated with an institution of higher education.

- However, a statement alone from the petitioner, without a prior receipt number or other supporting documentation, would not be sufficient.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- A review of CLAIMS may help to substantiate a prior claim of cap exemption as an affiliated or related nonprofit entity.

- Consult with your supervisor when the prior approved petition was adjudicated at the VSC.

  - The CSC and VSC have established points of contact who are able to supply information from local CLAIMS to assist in corroborating the claimed H-1B cap exemption determination.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

- Issue a RFE only if the claimed prior cap exemption determination cannot be corroborated through CLAIMS or the evidence in the record.

- Officers should not attempt to re-adjudicate the prior cap exemption determination unless evidence suggests that the prior cap exempt determination was clearly erroneous or that there has been a significant change in circumstances related to the affiliation of the petitioner to an institution of higher education.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

Examples of significant changes may include, but are not limited to:

- Evidence that the nonprofit entity has reorganized to a for-profit entity;
- Evidence that the affiliation agreement with the related or affiliated institution of higher education has expired and has not been renewed automatically or otherwise; or
- Evidence that the new petition is seeking cap exemption based on affiliation or relation to a different institution of higher education.

Related or Affiliated Nonprofit Entities-Interim Guidance (Cont'd)

Examples of clear error in the prior adjudication may include, but are not limited to:

- Evidence of affiliation with an organization that is NOT an institution of higher education; or
- Evidence of a prior approval that was subsequently revoked on an affiliation ground.

NOTE: ACD must concur and SCOPS must be consulted prior to issuance of an ITD or denial based on evidence of significant changes or clear error.

Numerical Limitation Exceptions – Beneficiary Employed "at" a Cap-Exempt Employer

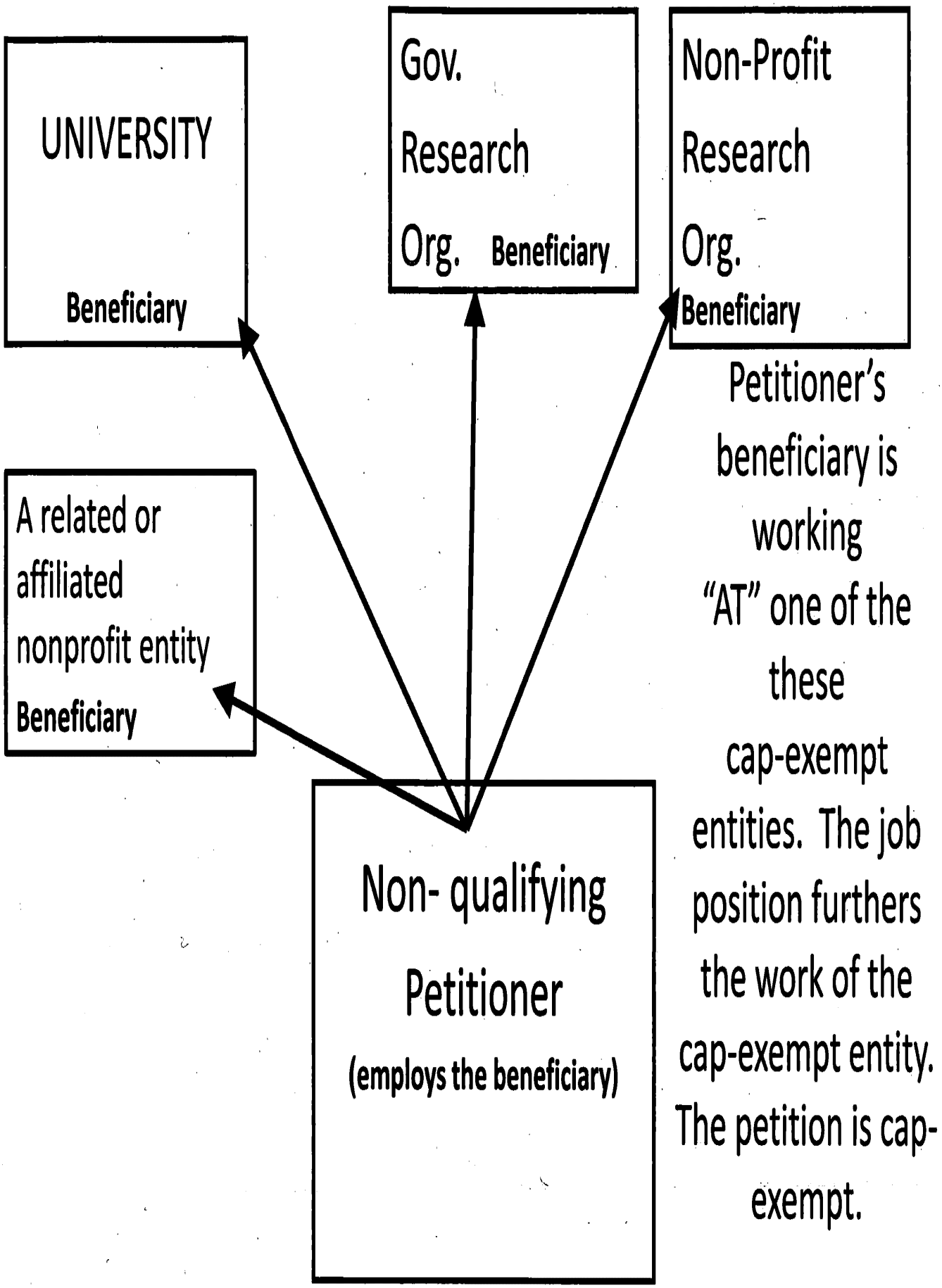
In addition to the exemptions noted previously, even if the petitioner is not a cap exempt institution, an alien is exempt from the H-1B cap if the alien is employed (or has received an offer of employment) **"at"**

- *an institution of higher education,
- *a related or affiliated nonprofit entity,
- *a nonprofit research organization, or
- *a governmental research organization

*referred to as a "qualifying institution"

Numerical Limitation Exceptions – Beneficiary Employed "at" a Cap-Exempt Employer (Cont'd)

- The June 6, 2006 Aytes H-1B cap exemption memo provides guidance on these cases.
- The petitioner will employ and pay the beneficiary, but the beneficiary will work at the site of the cap exempt entity. The following conditions must be met to satisfy that the petition will be cap exempt:
  - The beneficiary must be working "at" a qualifying institution at least part of the time; and
  - The job position "at" a qualifying institution must directly and predominately further the normal, primary, or essential purpose, mission, objectives or function of the qualifying institution.


UNIVERSITY
Beneficiary
Gov. Research Org. Beneficiary
Non-Profit Research Org.
Beneficiary
A related or affiliated nonprofit entity
Beneficiary
Non- qualifying Petitioner
(employs the beneficiary)
Petitioner's beneficiary is working "AT" one of the these cap-exempt entities. The job position furthers the work of the cap-exempt entity. The petition is cap-exempt.

Numerical Limitation Exceptions – J-1 Physicians with Waiver

- The beneficiary is a J-1 foreign medical graduate who received a waiver of the 2-year foreign residence requirement.
- The J-1 cap exemption applies only to medical doctors who have received a Conrad 20/30 waiver under INA 214(l)
- Must work at a hospital designated by the Secretary of HHS as a:
  - Health Professional Shortage Area (HPSA);
  - Medically Underserved Area (MUA); or
  - Medically Underserved Population (MUP).

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- In order to grant a change of status for a J-1 under Conrad 30, the petition should include evidence that the beneficiary has received a waiver of the foreign residency requirement.
  - This can include a copy of the I-797, Approval Notice, for a Form I-612, with an addendum of work locations.
  - Before issuing an RFE for evidence of the waiver grant, officers must first check systems to see if a Form I-612 has been approved in the system. If it is not found, contact VSC via your supervisor to either locate the I-612 approval notice or have it adjudicated.
- A State Workforce Agency/a State Department of Health letter concurrent with the Department of State recommendation may be submitted but is not required.

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- Officers should not re-adjudicate the approved I-612 waiver by RFE for documentation (e.g. work locations, employment contracts) unless a material discrepancy in the record exists.

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- The beneficiary must fulfill a three-year employment commitment in an HHS-designated shortage area, VA facility or in medical research or training.
  - Exception for a change of employer petition during the three years if there is evidence of extenuating circumstances and that the new employment will also be in a HHS-designated area.
- The beneficiary is ineligible to change to another nonimmigrant visa classification or adjust status until this commitment is fulfilled.

Note: H-1B approvals when a beneficiary was unable to fulfill the three-year commitment at the original facility due to extenuating circumstances requires SISO/ACD concurrence.

Numerical Limitation Exceptions – J-1 Physicians with Waiver (Cont'd)

- Once the beneficiary fulfills the three year commitment, he will remain CAP exempt upon extension/change of employer.

- If the commitment is not fulfilled, the beneficiary will again be subject to the two-year foreign residence requirement and the numerical cap.

- A J-2 dependent cannot COS to any other nonimmigrant classifications except H-4 until the principal fulfills the three-year commitment as he/she is subject to the same conditions of the waiver as the principal J-1. (Approval of J-2 COS to H-1B requires SISO and ACD concurrence.)

Numerical Limitation Exceptions –Additional Exceptions

- Change of employer from one cap-exempt employer to another cap-exempt employer.
- The beneficiary was previously counted against the cap once within the last six years and has not reached the maximum allowable period of stay.
- Has reached the 6-year maximum but is:
  - exempt from the limit (seasonal/intermittent);
  - eligible for recaptured time; or
  - eligible for extension under AC21 sec. 104 or 106.
- H-1B workers performing labor or services in the CNMI and Guam
  - exempt until December 31, 2014.
- Concurrent filing when at least one petition is cap-exempt.

Position and Beneficiary Requirements for a Specialty Occupation Worker

1B1 Specialty Occupation Workers

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

1) theoretical and practical application of a body of highly specialized knowledge, and

2) the attainment of a bachelor's degree or higher in a *specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States (emphasis added)

Position Requirements

The petitioner must meet one of the following four criteria:

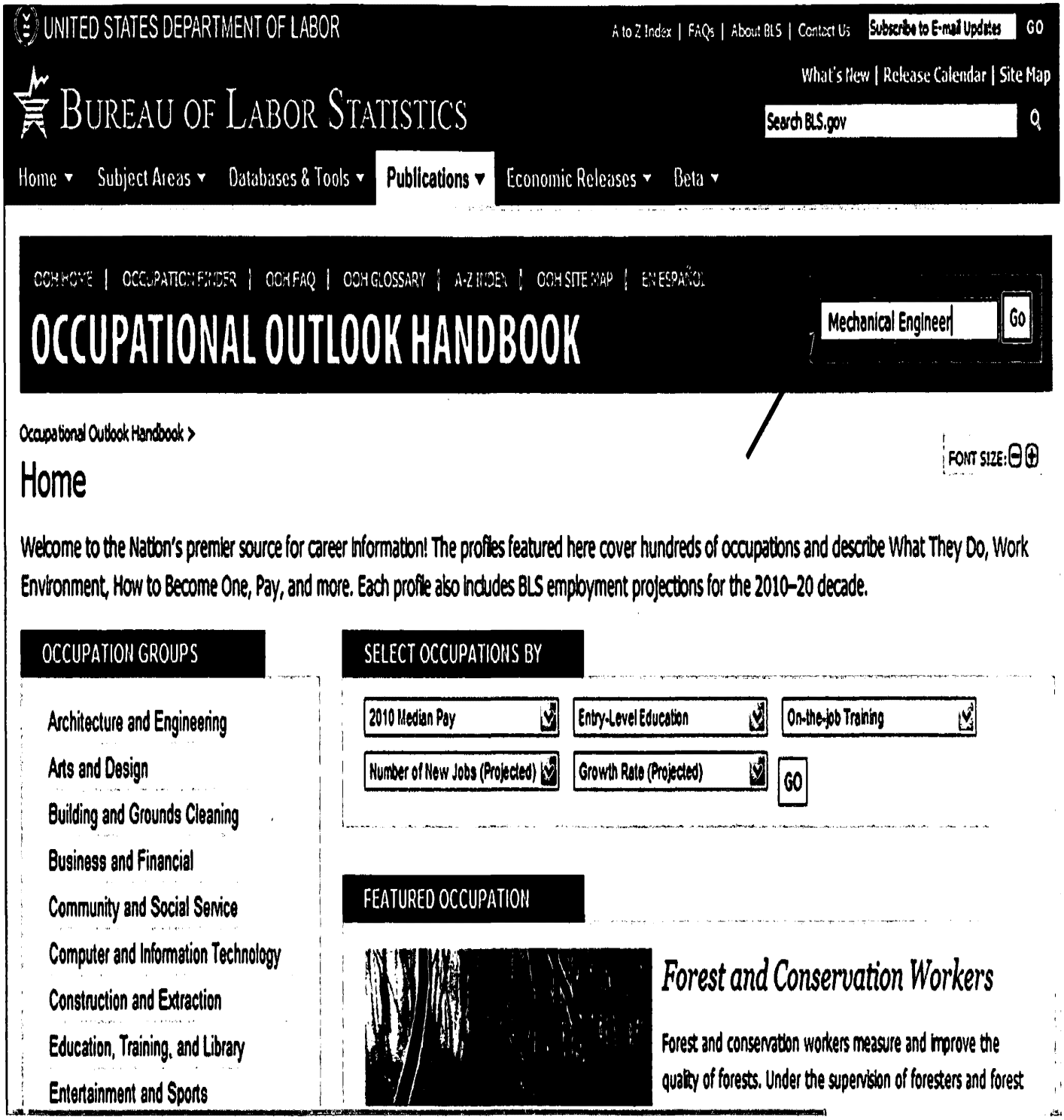
1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;
2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular position 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 positions; or
4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

Position Requirements

The petitioner must meet **one** of the following four criteria:

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

Does the Department of Labor's Occupational Outlook Handbook (OOH) recognize the proffered position as one that normally requires a degree in a specific specialty? The OOH can be located at http://www.bls.gov/oco.



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Mechanical Engineers

What Mechanical Engineers Do

About this section

Mechanical engineering is one of the broadest engineering disciplines. Mechanical engineers research, design, develop, build, and test mechanical devices, including tools, engines, and machines.

Duties

Mechanical engineers typically do the following:

- Analyze problems to see how a mechanical device might help solve the problem
- Design or redesign mechanical devices, creating blueprints so the device can be built
- Develop a prototype of the device and test the prototype
- Analyze the test results and change the design as needed
- Oversee the manufacturing process for the device

Mechanical engineers develop and build mechanical devices for use in industrial processes.

Mechanical engineers use many types of tools, engines, and machines. Examples include the following:

- Power-producing machines such as electric generators, internal combustion engines, and steam and gas turbines
- Power-using machines, such as refrigeration and air-conditioning

How to Become a Mechanical Engineer

About this section

Mechanical engineers need a bachelor's degree. A graduate degree is typically needed to be hired or promoted into managerial positions. Mechanical engineers who sell services publicly must be licensed in all states and the District of Columbia.

Education

Nearly all entry-level mechanical engineering jobs require a bachelor's degree in mechanical engineering.

Mechanical engineering degree programs usually include courses in mathematics and life and physical sciences, as well as engineering and design courses. The programs typically last 4 years, but many students take between 4 and 5 years to earn a degree. A mechanical engineering degree program may emphasize internships and co-ops to prepare students for work in industry. Theory is often another main focus, in order to prepare students for graduate-level work.

A few engineering schools allow students who spend 3 years in a liberal arts college studying pre-engineering subjects and 2 years in an engineering school studying core subjects to receive a bachelor's degree from each school.

Some colleges and universities offer 5-year programs that allow students to obtain both a bachelor's and a master's degree. Some 5- or even 6-year cooperative plans combine classroom study with practical work, enabling students to gain valuable experience and earn money to finance part of their education.

Many engineering programs are accredited by ABET (formerly the Accreditation Board for Engineering and Technology). Some employers prefer students from an accredited program. A degree from an ABET accredited program is usually necessary to become a licensed professional engineer.

Position Requirements (Cont'd)

2a) The degree requirement is common to the industry in parallel positions among similar organizations...

Position and Job Postings:

Industry requirements may be identified by reviewing the job listings of organizations similarly situated to the petitioner (duties, educational requirement, experience and skills) for the position in question to determine whether a degree in a specific specialty is a prerequisite.

Position Requirements (Cont'd)

Examples of items to keep in mind when reviewing documents from an industry-related professional association:

- Does a member or representative state that a degree in a specific specialty is required as a minimum entry requirement?
- What is the academic and public status of the association?
- How many members do they have?
- What are the membership requirements?

Examples of items to keep in mind when reviewing documents from firms or individuals in the industry:

- Are these qualified members of a related industry or field?
- Does the evidence detail the job description and educational requirements?

Position Requirements (Cont'd)

2b) ...in the alternative, an employer may show that its particular position is so complex or unique that it can be performed only by an individual with a degree

- Does the break down of the job description indicate to you that the duties are complex and unique?

- What percentage of time will the beneficiary spend on these complex or unique duties?

Position Requirements (Cont'd)

3) The employer normally requires a degree or its equivalent for the positions

- Employment history of the petitioner for similar positions to that on which the petition is based;

- Contains corroborating evidence of employing individuals in a similar position:
  - Description of duties
  - Pay records
  - Evidence of educational credentials

Position Requirements (Cont'd)

4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

- Does the petitioner's business and position requirements demand duties that are so specialized and complex that they exceed normal industry standard educational preparation?

- How are the duties of the position more specialized and complex from similar positions within the industry?

- Do these requirements necessitate skills that are normally associated with a baccalaureate level degree or higher in a specific specialty?

General Degrees

A degree in the general area of Business Administration may be insufficient to demonstrate that the beneficiary is qualified to perform a specialty occupation. However, a degree in Business Administration with a specific focus in a field of study related to the specialty occupation could qualify the beneficiary to perform the specialty occupation.

Example: A Business Administration Degree with an emphasis in accounting would likely qualify the beneficiary as an accountant, but would not, by itself, qualify him as an architect.

Beneficiary Qualifications

The petitioner must show that the beneficiary meets **one** of the following four criteria:

1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- Should be for a course of study in the specialty that relates to the occupation
  - Copy of baccalaureate degree
  - Transcripts

Beneficiary Qualifications (Cont'd)

2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;

- Foreign degree and/or transcripts accompanied by a translation
- A foreign bachelor's degree does not necessarily mean that it is equivalent to a **United States** bachelor's degree.
- RFE for educational evaluation <u>if unable</u> to determine if foreign academic program is equivalent to United States

Beneficiary Qualifications (Cont'd)

- Generally, the three-year foreign degrees are equivalent to three years of undergraduate coursework at a U.S. institution of higher learning.

- Four-year degrees can usually be considered equivalent to a U.S. bachelor's degree, but not always.

- Focus on the course of study for the degree. Be careful not to penalize a beneficiary for the manner in which he/she obtains the degree (e.g., the beneficiary earns a four-year degree in three years, etc.).

Beneficiary Qualifications (Cont'd)

3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment;

- Examples are occupations such as teachers, lawyers, engineers, architects, pharmacists, . . .

- Not all occupations requiring licensure meet the definition of a specialty occupation (e.g., pilots, cosmetologists, flight instructors, barbers, taxi drivers)

Beneficiary Qualifications (Cont'd)

4) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

- If the beneficiary does not have a baccalaureate degree, equivalence can be shown with a combination of education and work experience.

Degree Equivalence

(Equivalence to completion of a college degree)

The beneficiary's education, specialized training, and/or progressively responsible experience may be recognized as equivalent to a baccalaureate degree.

Degree Equivalence (Cont'd)

If the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by one or more of the following:

1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Non-collegiate Sponsored Instruction (PONSI);

Degree Equivalence (Cont'd)

3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- For purposes of equivalence, an acceptable evaluation of formal education should:
  - Consider formal education only, not practical experience;
  - State if the collegiate training was post-secondary education (e.g., whether the education in question was obtained after completing the U.S. equivalent of high school);

Degree Equivalence (Cont'd)

- Provide a detailed explanation of the material evaluated rather than a simple concluding statement; and

- Briefly state the qualifications and experience of the evaluator providing the opinion.

Degree Equivalence (Cont'd)

4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

Degree Equivalence (Cont'd)

5) A determination by the Service that the equivalent of the degree required has been acquired:

- through a combination of education, specialized training, and/or work experience in areas related to the specialty

AND

- that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Degree Equivalence (Cont'd)

For purposes of determining equivalency to a baccalaureate degree in the specialty, three years of specialized training and/or work experience must be demonstrated for each year of college-level training the alien lacks.

For equivalence to an advanced (or Masters) degree, the alien must have a baccalaureate degree followed by at least five years of experience in the specialty.

If required by a specialty, the alien must hold a Doctorate degree or its foreign equivalent. The petitioner cannot use a combination of education, training and/or work experience to demonstrate eligibility in this situation.

Degree Equivalence (Cont'd)

It must be clearly demonstrated that:

- the alien's training and/or work experience included the theoretical and practical application of specialized knowledge required by the specialty occupation;
- the alien's experience was gained while working with peers, supervisors, or subordinates who have a degree or its equivalent in the specialty occupation; and
- the alien has recognition of expertise in the specialty.

Degree Equivalence (Cont'd)

Recognition of expertise in the specialty should be evidenced by at least one type of documentation such as:

- Recognition of expertise in the specialty occupation by at least two recognized authorities in the same specialty occupation;

- Membership in a recognized foreign or United States association or society in the specialty occupation;

Degree Equivalence (Cont'd)

- Published material by or about the alien in professional publications, trade journals, books, or major newspapers;
- Licensure or registration to practice the specialty occupation in a foreign country; or
- Achievements which a recognized authority has determined to be significant contributions to the field of the specialty occupation.

Degree Equivalence (Cont'd)

Recognized authority

A recognized authority is a person or an organization with expertise in a particular field, and the expertise to render the type of opinion requested.

Degree Equivalence (Cont'd)

Ultimately, the adjudicating officer makes the final determination that the equivalent of the degree required by the specialty occupation has been acquired through a combination of education, specialized training, and/or work experience in areas related to the specialty, and that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.

Licensing Requirements

If the occupation (not the duties) requires a state or local license the alien must:

- Have a permanent license, or
- Have a temporary license, or
- Be eligible for a permanent license, except for administrative reasons, e.g. need Social Security # or DHS permission to be employed to receive licensure.

Identifying Licenses

- Temporary or provisional licenses normally are titled as such and may have requirements stated on the license that need to be completed before a permanent license can be issued.

- However, a few permanent licenses may also list requirements to be completed for an extension of the license and they normally do not have the word "permanent" in the title.

Temporary or Provisional License

- If a temporary license is available in the state of employment, and the beneficiary is allowed to fully perform the duties of the occupation without a permanent license, then H-1B classification may be granted.

- If otherwise approvable, the petition may be granted for **one year** or for the period that the temporary license is valid, whichever is longer.

Permanent Licenses

- A petition can be approved up to three years for beneficiaries who have permanent licenses

- Permanent licenses will still have an expiration date and may have renewal requirements listed.

  - Expiration dates on permanent licenses have no bearing on validity dates given. If otherwise eligible, the petition may be granted for up to three years.

Licensing Requirements for Teachers

- Public school teachers require teaching credentials, certificates, or licensure from the appropriate state licensing authority
  - e.g., Unified School Districts
- Private schools may not require a teaching credential
  - e.g., Parochial Schools
- Some teaching positions may require a special certification
  - e.g., special education teachers

Certified Health Care Workers

- Certification should not to be confused with licensing.
- Licenses required by certain occupations are issued by the state.
- Certifications required by certain health occupations are also issued by the state.

Uncertified Health Care Workers

On or after July 26, 2004, if an alien seeks admission to the U.S., a change of status, or an extension of stay, the alien must provide evidence of health care worker certification if the primary purpose for coming to or remaining in the U.S. is employment in the affected health care occupations.

Uncertified Health Care Workers

Unless they have been certified, aliens in the following seven (7) fields are inadmissible to the United States under section 212(a)(5)(C) of the Act as uncertified health care workers:

1. Nurses
2. Physical Therapists
3. Occupational Therapists
4. Speech Language Pathologists & Audiologists
5. Medical Technologists
6. Medical Technicians
7. Physician's Assistants

Uncertified Health Care Workers

- In this category, nurses include:
  - Licensed practical nurses
  - Licensed vocational nurses
  - Registered nurses
- Medical technologist are also called Clinical Laboratory Scientists
- Medical technicians are also called Clinical Laboratory Technicians

Health Care Worker Certifications

At this time, only three entities are approved by USCIS to certify health care workers:

- Commission on Graduates of Foreign Nursing Schools (CGFNS) – issue certificates for all health care workers
- Foreign Credentialing Commission on Physical Therapy (FCCPT) – issues certifications for physical therapists
- National Board for Certification in Occupational Therapy (NBCOT) – issues certifications for occupational therapists

Health Care Degree Requirements

- Generally, Nurses, Medical Technologists and Medical Technicians require less than a baccalaureate degree for minimum entry into the field.

- Physical Therapists, Occupational Therapists and Physician's Assistants require a baccalaureate degree.

- Speech Language Pathologists & Audiologists may require a Masters degree.

Nurses

- Most nursing positions do not require a person with a four-year degree in the specialty occupation.
- To qualify for H-1B classification, the institution and/or the duties of the position must be specialized.
- Foreign Degrees entitled "Bachelor of Nursing Degree" may not be equivalent to a 4-year U.S. degree
- If approving an H-1B Nurse, (or any position requiring a nursing degree) you must have SISO sign-off.

Nurses (Cont'd)

In contrast to general RN positions, certain specialized nursing occupations may require a 4 year bachelor's or higher degree in a specific specialty:

- Clinical Nurse Specialists (CNS)
- Certified Nurse Practitioner (NP)
- Certified Registered Nurse Anesthetist (CRNA)
- Nurse-Midwife (CNM)

Nurses (Cont'd)

- Certain other nursing occupations, such as an upper-level "nurse manager" in a hospital administration position, may be H-1B equivalent since administrative positions typically require, and the individual must hold, a bachelor's degree.

- Nursing Services Administrators are generally supervisory level nurses who hold an RN, and a graduate degree in nursing or health administration.

Physicians

All H-1B petitions filed for a physician must include evidence that the beneficiary:

- Has a full and unrestricted license to practice medicine in a foreign state;

OR

- has graduated from a medical school in the United States or in a foreign state.

Physicians (Cont'd)

Petitions for physicians performing direct patient care must include:

- Evidence that the beneficiary has the license or authorization required by the state of intended employment to practice medicine

OR

- Evidence that the beneficiary is exempt from law from the licensing requirement

Physicians (Cont'd)

Unless the beneficiary is of national or international renown in the field of medicine, the petitioner must establish that the beneficiary:

Will be employed primarily to teach and/or conduct research for a public or nonprofit private educational or research institution or agency and no patient care will be performed, except that which is incidental to the physician's teaching or research

OR...

Physicians (Cont'd)

The beneficiary has:

- passed the Federation Licensing Examination (or equivalent examination as determined by the Secretary of Health and Human Services) **or**
- is a graduate of a United States medical school;

AND

- has competency in oral and written English (demonstrated through passage of a proficiency test given by the Educational Commission for Foreign Medical Graduates (ECFMG)); **or**
- is a graduate of a school of medicine accredited by a body or bodies approved for that purpose by the Secretary of Education.

Physicians – Medical Residents

- Recent medical graduates who are completing their internship are referred to as Medical Residents.

- Medical Residents may have temporary licenses.

  - Exceptions: New York and Connecticut do not issue temporary licenses to their Medical Residents. They can be approved for up to three years.

  - Evidence of no licensing requirement is needed for hospitals in other states.

Position and Beneficiary Requirements for a DOD Cooperative Research Project Worker

1B2 Department of Defense (DOD) Research Project Workers

- Services of an exceptional nature relating to DOD cooperative research and development projects or co-production projects shall be those services which require a baccalaureate or higher degree, or its equivalent, to perform the duties.

- The existence of this special program does not preclude the DOD from utilizing the regular H-1B provisions provided the requirements are met.

1B2 Department of Defense (DOD) Research Project Workers (Cont'd)

The petition must include:

- a verification letter from DOD project manager;
  - This letter must state that the alien will be working on a cooperative project under a reciprocal government-to-government agreement administered by DOD.

- a general description of the alien's duties and indicate the actual dates of the alien's employment on the project; and

- a statement indicating the names of aliens currently employed on the project in the United States and their dates of employment.
  - The petitioner should also indicate the names of aliens whose employment on the project ended within the past year.

1B2 Department of Defense (DOD) Research Project Workers (Cont'd)

- Verify that the petition is accompanied by evidence that the beneficiary has a bachelor's or higher degree or its equivalent in the occupational field in which he or she will be performing the services.

- Because of the sensitivity of these types of petitions, it is prudent to consult with your supervisor before taking action on these cases.

- A maximum of 100 aliens can be employed on a DOD research program at any time. Consult with SCOPS HQ through the appropriate chain of command to ascertain whether this cap has been met before approving a case.

Position and Beneficiary Requirements for a Fashion Model of Distinguished Merit and Ability

1B3 Fashion Models

H-1B classification may be granted to an alien who is of distinguished merit and ability in the field of fashion modeling. The alien must come to the United States to perform services that require a fashion model of prominence, and he or she must demonstrate such prominence.

1B3 Fashion Models (Cont'd)

- **Prominence** means a high level of achievement in the field of fashion modeling evidenced by a degree of skill and recognition substantially above that ordinarily encountered to the extent that a person described as prominent is renowned, leading, or well-known in the field of fashion modeling

1B3 Fashion Models (Cont'd)

- The petitioner should establish that the services to be performed involve an event, production or activity which have a distinguished reputation, OR

- The services to be performed are for an organization or establishment that has a distinguished reputation, or a record of employing prominent persons

1B3 Fashion Models (Cont'd)

- The petition must include:
  - Evidence that the beneficiary is a fashion model of distinguished merit and ability
  - Copies of any written contracts between the petitioner and beneficiary or a summary of the terms of oral agreement (if there is not a written contract.

1B3 Fashion Models (Cont'd)

- Verify that the beneficiary is qualified for the position. To establish that the beneficiary qualifies as an alien of distinguished merit and ability in the field of modeling you must have evidence of two of the following:

  - Has achieved national or international recognition for outstanding achievements evidenced by reviews in major newspapers, trade journals, magazines, or other published material;

1B3 Fashion Models (Cont'd)

- Has performed and will perform services as a fashion model for employers that have a distinguished reputation;
- Has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field of fashion modeling;
- Commands a high salary or other substantial remuneration for services (in relation to others in the field) as evidenced by contracts or other reliable evidence.

H-1B Petitioner Requirements

United States Employer

8 C.F.R. § 214.2(h)(4)(ii) defines this as:

A person, firm, corporation, contractor or other association or organization in the U.S. which:

1. Engages a person to work within the U.S.
2. Has an employer-employee relationship with respect to employees under this part; and
3. Has an IRS tax identification number

United States Employer (Cont'd)

The 8 CFR 214.2(h)(4)(ii) definition of "U.S. Employer" also states that an employer – employee relationship is indicated by the fact that the petitioner may:

- hire,
- pay,
- fire,
- supervise, or
- otherwise control the work of the beneficiary.

Employer-Employee Relationship

- In addition to the other requirements for an H-1B visa, a petitioner must satisfy the requirement that it is a U.S. employer or an agent.

- The petitioner must establish that a valid employer–employee relationship exists (or will exist) between itself and the beneficiary, *and* that the relationship will continue to exist throughout the requested H-1B validity period.

Agents

- Under 8 CFR 214.2(h)(2)(i)(F) it is possible for an "agent" to file an H-1B petition.
- The beneficiary must be one who is *traditionally self-employed* or who uses agents to arrange short term employment on his/her behalf with numerous employers or in cases where a foreign employer authorizes the agent to act on its behalf.
- An agent may be:
  - The actual employer (performing the function of an employer);
  - a representative of both the employer(s) and the beneficiary; or
  - A person or entity authorized by the employer to act for (or in place of) the employer.

Agents (Cont'd)

- An agent functioning as an employer must:
  - Guarantee wages and other terms and conditions of employment by contractual agreement with the beneficiary
  - Provide an itinerary of definite employment and information on other planned services.
- An agent in business as an agent must:
  - Provide a complete itinerary of services or engagements (including dates, names and addresses of actual employers, and names and addresses of venues).
  - Contracts between the employers and the beneficiary may be required in questionable cases.
- However, the fact that a petition is filed by an agent who is not the actual employer does not change the requirement that the end-employer have a valid employer-employee relationship with the beneficiary.

Purpose of January 8, 2010 Memorandum

- This memorandum is intended to be a forward-looking document and is not intended to be used by adjudicators to re-adjudicate previously approved petitions.

- The memorandum and attached AFM update were issued to provide clear guidance in the context of H-1B petitions on the requirement that the petitioner establish that an employer – employee relationship exists, and will continue to exist with the beneficiary throughout the duration of the requested H-1B validity period.

January 8, 2010 Memorandum

- USCIS interprets the employer–employee relationship to be the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992).

- This common law test requires that all characteristics of the relationship be assessed and weighed with no one factor being decisive.

Third Party Placement

- Third party placement is the placement of a beneficiary at a work site that is not operated by the petitioner. This is a common practice in some industries.

- Third party placement may make it more difficult to assess whether the requisite employer–employee relationship exists and will continue to exist.

- Third party placement arrangements can meet the employer–employee relationship requirement, but sometimes they do not.

The Right to Control

- USCIS must look at many factors to determine whether the petitioner has the right to control the beneficiary such that a valid employer–employee relationship exists.
- The petitioner must establish that it has the right to control when, where, and how the beneficiary performs the job.

Right to Control vs. Actual Control

- The right to control the beneficiary is different from actual control.

- An employer may have the right to control the beneficiary's job-related duties and yet not exercise actual control over each function performed by that beneficiary.

- The employee–employer relationship hinges on the *right* to control the beneficiary.

Factors to Consider

1. Does the petitioner supervise the beneficiary and is such supervision on or off-site?

2. If the supervision is off-site, how does the petitioner maintain such supervision, *e.g.*, weekly calls, reporting back to the main office routinely, or site visits by the petitioner?

3. Does the petitioner have the right to control the work of the beneficiary on a day-to-day basis if such control is required?

4. Does the petitioner provide the tools or instrumentalities needed for the beneficiary to perform the duties of employment?

Factors to Consider

5. Does the petitioner hire, pay, and have the ability to fire the beneficiary?

6. Does the petitioner evaluate the work-product of the beneficiary, *e.g.* progress/performance reviews?

7. Does the petitioner claim the beneficiary for tax purposes?

8. Does the petitioner provide the beneficiary any type of employee benefits?

9. Does the beneficiary use proprietary information of the petitioner in order to perform the duties of employment?

Factors to Consider

10. Does the beneficiary produce an end-product that is directly linked to the petitioner's line of business?

11. Does the petitioner have the ability to control the manner and means in which the work product of the beneficiary is accomplished?

Remember: No single factor is dispositive.

Self Employed Beneficiary – Sole Stockholder

- USCIS acknowledges that a sole stockholder of a corporation can be employed by that corporation as the corporation is a separate legal entity from its owners and even its sole owner. *See Matter of Aphrodite*, 17 I&N Dec. 530 (BIA 1980).

- If a petitioner is able to show, through evidence (e.g., documentation that there is an independent Board of Directors) that in fact the corporation has the independent right to control the employment of the owner/majority shareholder, then the petitioner may be able to establish a valid employer-employee relationship.

Self Employed Beneficiary – Stockholder

- In determining whether a valid employer-employee relationship exists between a stockholder petitioner (the corporation) and the beneficiary, the adjudicator must determine whether it is the corporation that has the independent right to control the work of the employee.

- However, an H-1B beneficiary/employee who owns a majority of the sponsoring entity and who reports to no one but him or herself may have difficulty establishing that a valid employment relationship exists in that the beneficiary, who is also the owner, may not be able to establish the requisite "control." See generally Administrator, Wage and Hour Division v. Avenue Dental Care, 6-LCA-29 (ALJ June 28, 2007) at 20-21.

Additional Factors for Majority Shareholders and Sole Owners

- Whether the petitioner can hire or fire the beneficiary or set rules or regulations on the beneficiary's work;
- Whether the petitioner supervises the beneficiary's work and, if so, to what extent;
- Whether the beneficiary reports to someone higher in the petitioner's organization;

Additional Factors for Majority Shareholders and Sole Owners (Cont'd)

- Whether the beneficiary is able to influence the petitioner and, if so, to what extent; and/or

- Whether the parties intended the beneficiary to be an employee, as expressed in written agreements or contracts.

Again, please remember: No single factor is dispositive.

Meeting the Test

- The petitioner meets the relationship test if in the totality of the circumstances it presents evidence to establish by a preponderance of the evidence its right to control the beneficiary's employment throughout the duration of the term of employment.

- Officers should be mindful of the nature of petitioner's business and the type of work done by the beneficiary.

- Furthermore, not all or even a majority of the listed criteria need be met; however, the fact finder must weigh and compare a combination of the factors in analyzing the facts of each individual case.

Documentation of the Employer–Employee Relationship

- The evidence should provide sufficient detail that the employer and the beneficiary are (or will be) engaged in a valid employer-employee relationship.

- If the employer will not have the right to control the employee as required, the petition may be denied for failure of the petitioner to satisfy the requirements of being a U.S. employer under 8 CFR § 214.2(h)(4)(ii).

Evidence of the Relationship in Initial H-1B Petitions

The petitioner can demonstrate an employer – employee relationship by providing a combination of the following or similar types of evidence:

1. A complete itinerary of services or engagements that specifies:

   - the dates of each service or engagement, and
   - the names and addresses of the establishment, venues, or locations where the services will be performed for the period of time requested;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

2. Copy of signed Employment Agreement between the petitioner and the beneficiary detailing the terms and conditions of employment;

3. Copy of an employment offer letter that clearly describes the nature of the employer – employee relationship and the services to be performed by the beneficiary;

4. A description of the performance review process;

5. Copy of petitioner's organizational chart, demonstrating beneficiary's supervisory chain;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

6. Copy of relevant portions of valid contracts between the petitioner and a client (in which the petitioner has entered into a business agreement for which the petitioner's employees will be utilized)

   - that establishes that while the petitioner's employees are placed at the third-party worksite, the petitioner will continue to have the right to control its employees;

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

7. Copies of signed contractual agreements, statements of work, work orders, service agreements, and letters between the petitioner and the authorized officials of the ultimate end-client companies where the work will actually be performed by the beneficiary, which provide information such as:
   - a detailed description of the duties the beneficiary will perform,
   - the qualifications that are required to perform the job duties,
   - salary or wages paid, hours worked, benefits,
   - a brief description of who will supervise the beneficiary and their duties, and
   - any other related evidence; and/or

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

8. Copy of position description or any other documentation that describes:

   - the skills required to perform the job offered,
   - the source of the instrumentalities and tools needed to perform the job,
   - the product to be developed or the service to be provided,
   - the location where the beneficiary will perform the duties,
   - the duration of the relationship between the petitioner and beneficiary,
   - whether the petitioner has the right to assign additional duties,

Evidence of the Relationship in Initial H-1B Petitions (Cont'd)

- the extent of petitioner's discretion over when and how long the beneficiary will work,
- the method of payment,
- the petitioner's role in paying and hiring assistants to be utilized by the beneficiary,
- whether the work to be performed is part of the regular business of the petitioner,
- the provision of employee benefits, and
- the tax treatment of the beneficiary in relation to the petitioner.

Evidence of the Relationship in EOS H-1B Petitions

- A petition for extension of an H-1B status must establish that a valid employer – employee relationship will continue to exist.

- The petitioner can meet this requirement by providing evidence that the petitioner continues to have the right to control the employment of the beneficiary.

- The petitioner must also document that it maintained a valid employer-employee relationship with the beneficiary throughout the initial H-1B status approval period.

Evidence of the Relationship in EOS H-1B Petitions (Cont'd)

The petitioner can demonstrate maintenance of the employer – employee relationship by providing a combination of the following or similar types of evidence:

- Copies of the beneficiary's pay records (leave and earnings statements, and pay stubs, etc.) for the period of the previously approved H-1B status;
- Copies of the beneficiary's payroll summaries and/or Form W-2s, evidencing wages paid to the beneficiary during the period of previously approved H-1B status;
- Copy of time sheets during the period of previously approved H-1B status;
- Copy of prior years' work schedules;

Evidence of the Relationship in EOS H-1B Petitions (Cont'd)

- Documentary examples of work product created or produced by the beneficiary for the past H-1B validity period, (*e.g.* copies of: business plans, reports, presentations, evaluations, recommendations, critical reviews, promotional materials, designs, blueprints, newspaper articles, web-site text, news copy, photographs of prototypes, etc.). Note: the materials must clearly substantiate the author and date created;
- Copy of dated performance reviews; and/or
- Copy of any employment history records, including but not limited to, documentation showing date of hire, dates of job changes, *e.g.* promotions, demotions, transfers, layoffs, and pay changes with effective dates.

Denial on Extension Based on Failure to Establish Relationship

If while adjudicating the extension request, USCIS may deny the petition if it determines that the petitioner:

- failed to maintain a valid employer – employee relationship with the beneficiary throughout the initial approval period, or
- violated any other terms of its prior H-1B petition

Itinerary Requirement

If the petition requires the beneficiary to perform services at more than one work location, 8 CFR 214.2(h)(2)(i)(B) requires the petitioner to submit a complete itinerary of services or engagements detailing:

- The dates of each service or engagement;
- And the names and addresses of the establishment, venues or locations where the services will be performed.

Concurrent Filing – Two Employers

- An H-1B alien can be employed by two separate petitioners at the same time. A separate petition must be filed by each employer.
- Concurrent employment may only be granted to an alien seeking employment in the same nonimmigrant classification. For example, an H-1B alien may not seek concurrent employment as an H-1B1 (HSC), H-1B2, H-1B3, or vice-versa.
- An H-1B alien who is not subject to the cap is also not subject to the cap for his/her concurrent employment, until such time as the cap-exempt employment ceases.
- If the H-1B alien has ceased to be employed at a cap-exempt entity or organization, then the alien will be subject to the H-1B cap, and the concurrent employment petition may not be approved unless a cap number was available to the alien beneficiary at the time the petition was filed.

Portability under § 105 of AC21

H-1B portability applies to a nonimmigrant who is currently in H-1B status or an authorized period of stay based on a timely filed H-1B petition. H-1B portability does not apply to a person who is in a valid status other than H-1B.

Export Control

- Petitioners are required to answer Part 6 "Certification Regarding the Release of Controlled Technology or Technical Data to Foreign Persons in the United States" of Form I-129.
- If a petitioner did not answer this question, the adjudicator must issue a RFE.
- The RFE for Export Control is located in O:Common.

Debarment

- In accordance with 20 CFR 655.855, DOL notifies USCIS about organizations that have engaged in certain actions that render them subject to mandatory debarment (212(n)(2)(C)(i) and (iii).

- During a period of debarment, USCIS is prohibited from approving any petitions filed by the petitioner (including pending petitions filed prior to the period of debarment).

- The ban does not generally affect previously approved petitions.

Labor Condition Application (LCA)

Labor Condition Application (LCA)- General Requirements

- DOL Form ETA 9035
- Every I-129 petition for H-1B classification must have an LCA.*
- LCA has to be certified by Department of Labor (DOL) prior to filing I-129 petition.
- The LCA **does not** constitute a determination that the occupation is a specialty occupation.

*(Except H-1B2 petitions for DOD research project workers)

Labor Condition Application (LCA)- General Requirements (Cont'd)

- Validity dates - employment may only be authorized for these dates. The approval dates on the petition cannot be outside the range of the LCA start and end dates.
- LCAs for multiple beneficiaries - In some cases DOL may issue an LCA that is valid for more than one beneficiary.
- Because only one alien can be on an H-1B petition, the same LCA can be used for multiple petitions if it is designated so on the LCA.
- Petitioner must submit a list of all the prior petitions filed using this LCA each time a new petition is submitted.

Labor Condition Application (LCA)- Contents

- Employers information
- Rate of pay
- Period of employment and occupation information
- Information related to work location
- Employer Labor Condition Statements
- Public disclosure information
- Declaration of employer
- Contact Information
- Number of alien workers sought

Labor Condition Application (LCA)- SMSA

An LCA is also required for each Standard Metropolitan Statistical Area (SMSA) where the beneficiary will be working:

- This is an area designated by DOL
- Usually an SMSA follows county lines, but not always
- We do make some exceptions to crossing SMSA lines in large metropolitan areas like LA/Orange/Riverside/San Diego Counties
- More than one work location may be listed on an LCA

Labor Condition Application (LCA)- Purpose

The employer attests on the LCA that:

- it will pay the H-1B employee the greater of the prevailing or actual wage;
- the working conditions for the H-1B employee will be similar to the working conditions for similar U.S. workers;
- there is not a strike or lockout occurring at the place of employment; and
- it has provided notice of filing of an LCA at the H-1B employee's worksite.

Labor Condition Application (LCA)- Review

- Check validity dates of the LCA
- The LCA must reflect the specialty occupation that the beneficiary will be employed in
- The LCA must reflect the location where beneficiary will be working
- If the beneficiary is to work at multiple sites in more than one SMSAs, all SMSAs must be listed on the LCA. Multiple work locations may be included on the same or separate LCAs.

Labor Condition Application (LCA)- Review (Cont'd)

- In the event that the duties of the proffered position do not correspond with the occupational specialty certified on the LCA, you may issue a request for evidence for:
  - an LCA, certified prior to the date of the filing of the present petition, for the occupation that corresponds to the proffered duties.
  - further clarification of the proffered position that confirms the occupation on the LCA is correct for the position.
- Note: SISO concurrence is required for issuance of this RFE.

Labor Condition Application (LCA)- Review (Cont'd)

- The petitioner must obtain the LCA before filing the H-1B petition.
- Therefore, the LCA must have a certified date that is on or before the receipt date of the I-129 H-1B petition.
- If the LCA is obtained after the filing of the I-129 H-1B petition (or not obtained at all), the petition shall be denied.

Limitations on Stay and Exceptions

Initial Period of Stay

- For specialty occupations and fashion models, the validity period may be for up to three years
  - may not exceed the validity period of the corresponding LCA
  - may be limited by other factors (e.g., temporary licensure, etc.)
- For DOD cooperative research project workers, the validity period may be for up to five years

Extension of Stay (EOS)

- For specialty occupations and fashion models, the validity period may be for up to three years (generally, not to exceed a maximum of six years)
  - may not exceed the validity period of the corresponding LCA
  - may be limited by other factors
- For DOD cooperative research project workers, the validity period may be for up to five years (not to exceed ten years)

Validity Period for EOS

- EOS approved (same employer)
  - authorized from the date of expiration
  - backdate the validity date to the day after the beneficiary's status expires to eliminate gaps
- EOS approved (new employer)
  - valid from date of adjudication unless the employment will commence on a future date

Limitation on Stay-Exceptions

- Limitations on the duration of time spent in H-1B status refer only to the principal H-1B worker and do not apply to the spouse and children

- Time spent as an H-4 dependent does not count against the maximum allowable period of stay

Limitation on Stay-Seasonal or Intermittent Exception

- The 6-year limitation shall not apply to H-1B aliens who did not reside continually in the U.S. and whose employment was seasonal or intermittent or was for an aggregate of six months or less per year.

- The 6-year limitation shall not apply to H-1B aliens who reside abroad and regularly commute to the U.S. to engage in part-time employment.

Limitation on Stay-Seasonal or Intermittent Exception (Cont'd)

- To qualify for this exception, the petitioner must provide clear and convincing proof that the beneficiary qualifies for such an exception. 8 CFR 214(2)(h)(13)(v)

- Such proof could consist of evidence such as arrival and departure records, copies of tax returns of the petitioner, and records of employment abroad.

Limitation on Stay-AC21

The American Competitiveness in the Twenty-First Century Act (AC21), Public Law 106-313, was signed into law on October 17, 2000. The law provided some exceptions to the maximum period of stay for H-1B nonimmigrants.

§ 106(a) of AC21

- The H-1B 7th year extension provisions allow for extensions of H-1B status in one-year increments to H-1B aliens who have:
  - A pending Form I-140 filed on behalf of the beneficiary at least 365 days prior to conclusion of the six-year limit on stay

OR

  - A permanent labor certification filed at least 365 days prior to conclusion of the six-year limit on stay and
  - The permanent labor certification is either pending or, if approved, was filed with a Form I-140 petition within 180 days of the approval

§ 106(a) of AC21 (Cont'd)

- When determining the applicability of Section 106(a) for employment-based (EB) categories (I-140s) that do not require a labor certification, the 365 days will pertain only to the filing of the EB petition.

- I-140 Classifications not requiring labor certification:
  - 203(b)(1)(A) Alien of Extraordinary Ability (E-11)
  - 203(b)(1)(B) Outstanding Professor/Researcher (E-12)
  - 203(b)(1)(C) Multinational Executive or Manager (E-13)

§ 106(a) of AC21 (Cont'd)

- USCIS will not grant an extension of stay under AC21 if, at the time the adjudication, the labor certification has expired by virtue of not having been timely filed in support of an I-140

- However, once the permanent labor certification is filed within 180 calendar days in support of an I-140 petition, the labor certification remains valid, even if the I-140 petition is denied.

- The same permanent labor cert. can be filed in support of a second I-140 after the first one has been denied.

§ 104(c) of AC21

Allows for extensions of H-1B status until an alien's adjustment of status application can be processed and a decision made, notwithstanding per-country visa limitations that may delay an alien's immigration.

§ 104(c) of AC21 (Cont'd)

- Sec. 104 provides AC21 benefits for those nonimmigrants with approved I-140 petitions, but for whom the visa is not available due to a backlog in the per-country visa limitations.

- Any current nonimmigrant alien who has an approved I-140 but is on the waiting list for a visa due to per-country limitations at the time of the filing date of the H-1B petition, can qualify to be granted H-1B status for additional 3-year periods stay under AC21 until a visa is available.

- The Visa Bulletin determines availability (http://travel.state.gov/visa/frvi/bulletin/bulletin_1360.html)

- Eligibility for section 104 must be established at the time of filing I-129 petition.

AC21 Extensions In General

An eligible H-1B nonimmigrant may be granted an extension of stay pursuant to AC21 in either one-year (106(a)) or three-year (104(c)) increments until a final decision is made to:

- Deny the application for labor certification; or
- If the labor certification was approved, to revoke the approved labor certification; or
- Deny the employment based immigrant petition; or
- Grant or deny the alien's application for an immigrant visa or for adjustment of status.

AC21 Extensions In General (Cont'd)

- A petitioner must file a Form I-129 on behalf of the nonimmigrant beneficiary.
- The petitioner may be either the beneficiary's current employer or a new employer.
- The validity period may still only be granted within the time allotted by an endorsed LCA.
- All licensing and certification restrictions must still be met.
- The beneficiary need **NOT** be in H-1B status when requesting an additional period of stay beyond the 6-year maximum.

AC21 Extensions In General (Cont'd)

- The alien does not have to be in the U.S. at the time of filing.

- The alien does have to be in a nonimmigrant status at the time of filing for a COS or EOS for AC21 benefits (remember that there are still specific filing requirements for EOS or COS, in general).

H-1B Spouses of AC21 Beneficiaries

- A nonimmigrant who has reached his/her 6 years in H-1B status, and who has an H-1B spouse that has a pending or approved labor certification and/or pending or approved I-140, is not eligible for H-1B extensions under AC21 under the spouse's petitions and labor cert.

- The spouse must have his/her own pending or approved permanent labor cert. and/or I-140 to be eligible for an H-1B extension under AC21.

Extensions for the Balance of the 6 Years and AC21

- Extensions for AC21 benefits can be combined with the balance of the six year maximum and recapture time.

- Remember: The maximum time an H-1B specialty occupation or fashion model petition can be approved for is 3 years.

Recaptured Time

- See the Adopted Decision, Matter of IT, Ascent (September 2, 2005)

- The 6-year period of authorized admission of an H-1B nonimmigrant accrues only during periods when the beneficiary is lawfully admitted and physically present in the U.S.

- The petitioner must submit supporting documentary evidence to meet its burden of proof. (e.g. copies of passport stamps, I-94s, and/or plane tickets)

- Unsubstantiated recapture time claimed may not be granted.

Adjudication of the Petition

The Petition and Visa Process

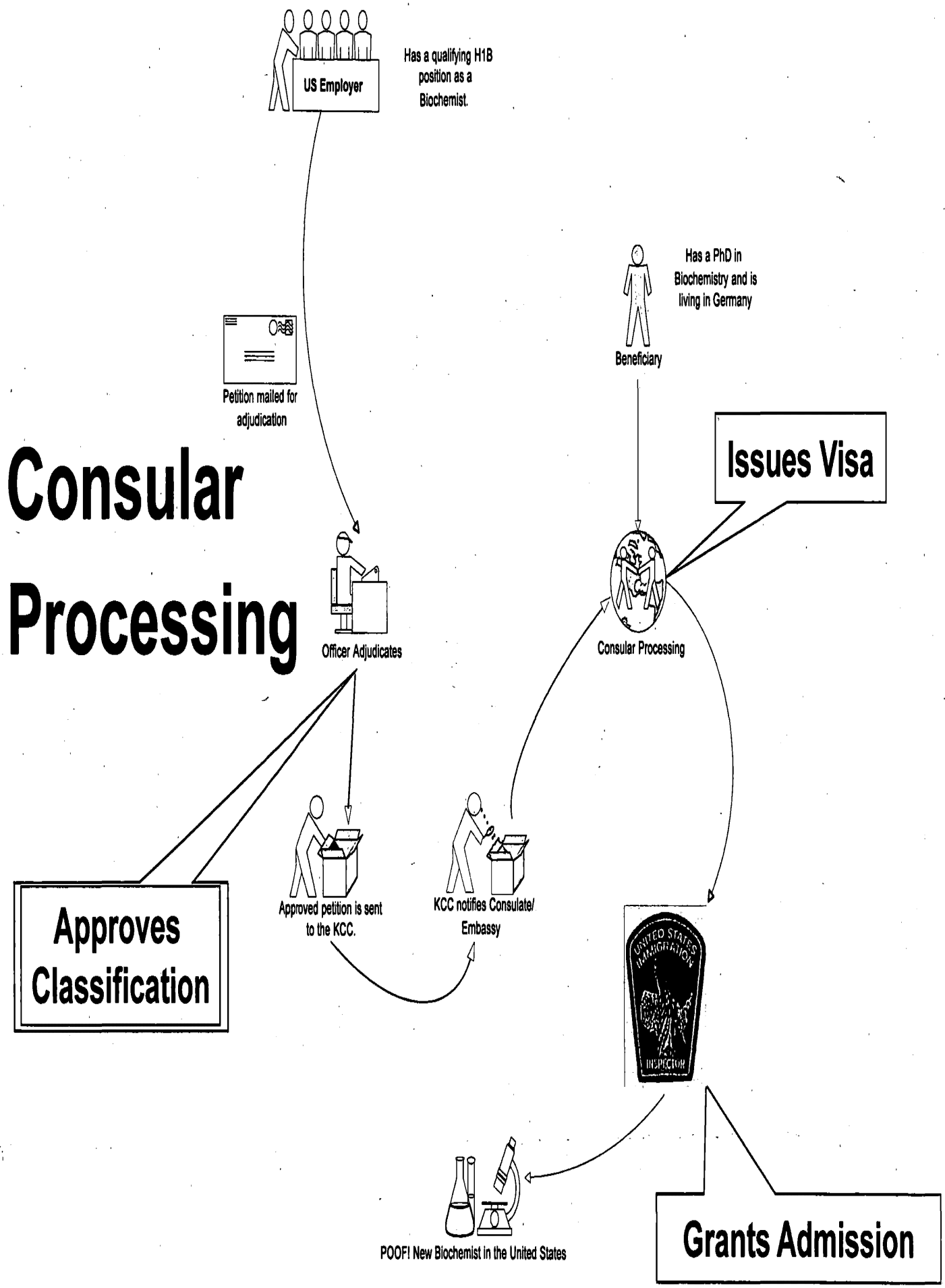
- The petitioner may request that notice of an approved H-1B petition be sent to a U.S. consulate abroad so that the alien may apply for an H-1B visa, or that the alien's status be changed or extended to H-1B in the U.S.

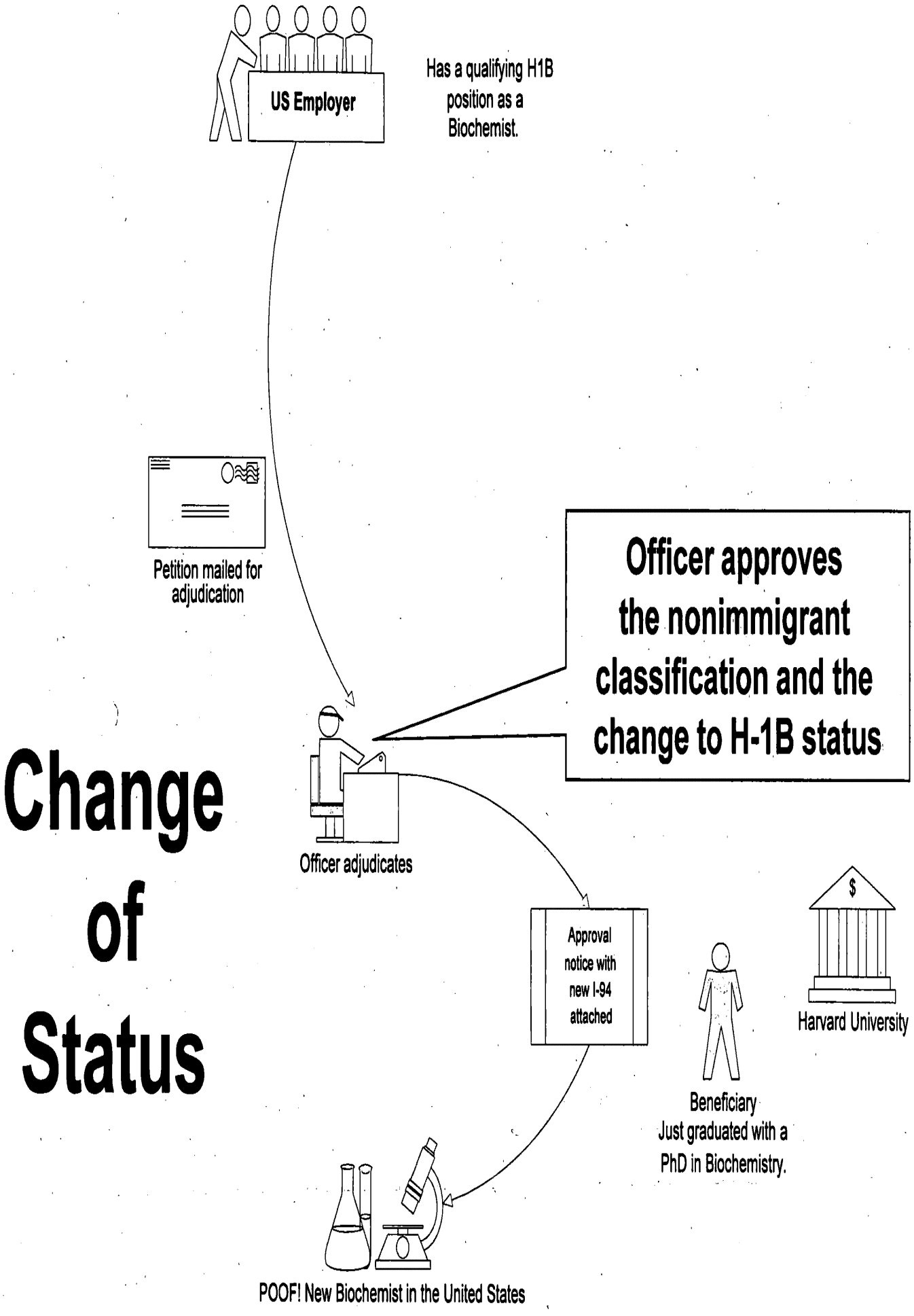
- It is critical to remember that the eligibility for H-1B classification is a separate analysis from whether the beneficiary has maintained valid status and is, therefore, eligible to extend or change status.

Consulate Notification

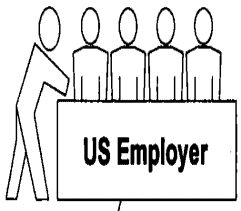
- If the beneficiary is not in the U.S. they are not eligible for a change of status or an extension of stay.

- If we approve the H-1B petition we will send a duplicate copy of the approved petition (if one has been provided) to the consulate (through KCC) in the beneficiary's foreign country.


US Employer
Has a qualifying H1B position as a Biochemist.
Has a PhD in Biochemistry and is living in Germany
Beneficiary
Petition mailed for adjudication
Consular Processing
Issues Visa
Officer Adjudicates
Consular Processing
Approves Classification
Approved petition is sent to the KCC.
KCC notifies Consulate/ Embassy
UNITED STATES IMMIGRATION
INSPECTOR
POOF! New Biochemist in the United States
Grants Admission

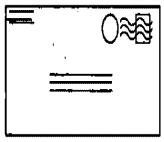

US Employer
Has a qualifying H1B position as a Biochemist.
Petition mailed for adjudication
Officer approves the nonimmigrant classification and the change to H-1B status
Change of Status
Officer adjudicates
Approval notice with new I-94 attached
$
Harvard University
Beneficiary
Just graduated with a PhD in Biochemistry.
POOF! New Biochemist in the United States

Extension of Status

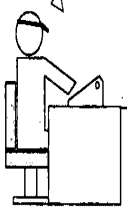


US Employer

Has a qualifying H1B position as a Biochemist.



Petition mailed for adjudication

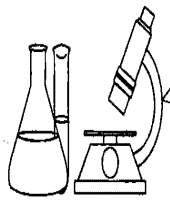


Officer adjudicates

Officer approves the nonimmigrant classification and extends the beneficiary's H-1B status

Approval notice with new I-94 attached

Beneficiary



Biochemist extended with same or new employer in the United States

Requirements for Extension of Stay (EOS)

- Beneficiary must be in the U.S. at the time of filing the petition.
- Passport must be valid at the time of filing.
- Beneficiary does not have to be physically in the U.S. while the EOS is pending.
- Departure is not treated as abandonment.
- Must be maintaining status.
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused if there are extraordinary circumstances.

RFE & Denials on EOS Petitions

- See Memo dated April 23, 2004, titled 'The Significance of a Prior CIS Approval of a Nonimmigrant Petition in the Context of a Subsequent Determination Regarding Eligibility for Extension of Petition Validity'

- "Material Error"

- "Substantial Change in Circumstances"

- "New Material Information"

RFE & Denials on EOS Petitions

The Deputy Director will review and clear in writing, prior to the issuance of an RFE or final decision, any case involving an extension of stay of petition validity in a nonimmigrant classification where the parties and facts involved have not changed, but where the current adjudicating officer determines nonetheless that it is necessary to issue an RFE or deny the application for extension of petition validity.

Advanced Parole

- A nonimmigrant in H-1B status with a pending adjustment of status application may apply for and receive advanced parole before leaving the U.S.
- Upon returning to the U.S. the nonimmigrant may be paroled in.
- If the beneficiary wishes to continue H-1B employment with the previous H-1B petitioner, the petitioner can then file an I-129 requesting H-1B status.

Adjudicating Petition for Beneficiary on Advanced Parole

- If the previous granted H-1B status would have still been valid at the time the petition is filed for a nonimmigrant requesting admittance as an H-1B, adjudicate as any normal EOS filing.

- If the previous status would have already been expired at the time of filing, adjudicate as any normal file that will be adjudicated as a split decision.

Requirements for Change of Status (COS)

- Beneficiary must be physically in the U.S. at the time of filing
- Passport must be valid at the time of filing
- Departure is treated as abandonment until petition is approved
- Must be maintaining status
- The petition must be filed prior to the expiration of the alien's stay except that failure to file before the previously authorized period of stay expired may be excused under extraordinary circumstances

Change of Status (COS)-Prohibitions

There are some nonimmigrant classifications that do not permit a change to H-1B status. These classifications include, but are not limited to:

- J-1 exchange visitor, who is subject to the 2-year foreign residence requirement of section 212(e)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- M-1 student - 8 CFR 248.1(d)
  - If the education or training which the student received while an M-1 student enables the student to meet the qualifications for temporary worker classification the COS will be denied. (SEVIS I-20 forms).
  - Must be maintaining status (I-94, 797, etc.)

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-2B – An H-2B who has spent 3 years in the U.S. under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they are outside of the US for the immediately preceding 3 months.

Change of Status (COS)-Prohibitions (Cont'd)

Restrictions on classifications that cannot change to H-1B status, among others:

- H-3 – An H-3 trainee who has spent 24 months in the US under 101(a)(15)(H) and/or (L) of the INA may not seek extension, change status or be readmitted under those sections until they have resided outside of the US for the immediate prior 6 months.

F-1 COS to H-1B

- Interim Rule Published on 4/8/08 – Extends the period of OPT time from 12 months to 29 months for F-1 students who have completed a STEM degree in the United States.
- STEM: science, technology, engineering or mathematics
- STEM extended OPT employment must be with a U.S. employer enrolled in the E-verify program
- F-1 students on OPT maintaining valid F-1 status until the expiration of their OPT are authorized to remain in the U.S. for up to 60 days after completion of their OPT to prepare for departure.

F-1 COS to H-1B-"Cap Gap"

Under the interim rule, the status and any employment authorization under 8 CFR 274a.12(c)(3)(i)(B) and (C) for an F-1 student who is the beneficiary of a COS petition will be automatically extended until October 1 of the FY in which the H-1B visa is being requested where the H-1B COS petition is timely filed requesting an October 1 employment start date.

The automatic extension is terminated if the H-1B petition is rejected, denied or revoked.

Requests for Evidence (RFE)

- USCIS may issue an RFE and/or Notice of Intent to Deny (NOID) when the petitioner has failed to establish eligibility for the benefit being sought.

- The RFE should specifically state what is at issue and be tailored to request specific types of evidence from the petitioner that directly relate to the deficiency USCIS has identified.

- The RFE should not require a specific type of evidence unless provided for by the regulations (*e.g.* an itinerary of service dates and locations), nor request information that has already been provided.

- Officers should state what element the petitioner has failed to establish and provide examples of documents that could be provided to cure the deficiency.

Approved Petitions

- If provided, forward a duplicate to KCC for EOS or COS cases
- If consulate notification is requested, the petitioner must provide a duplicate copy of the petition
- If a duplicate copy is not provided for consular notification during the course of adjudication, the petitioner will be notified that they must file an I-824 to notify the consulate
- Letter is found at: O:\ Adjudications\I-824\4-Correspondence
- PIMS process

Split Decisions

- Remember if a nonimmigrant in the U.S. wants to change nonimmigrant status or extend nonimmigrant status, they must be currently in nonimmigrant status at the time of filing

- The adjudication of the H-1B petition of an alien currently in the U.S. has two distinct parts. Adjudication of the H-1B petition and the adjudication of the COS or EOS request.

- If they are not in or maintaining status when filing an EOS or COS and we approve the H1B petition, we may deny the EOS or COS. This is called a split decision.

Split Decisions (Cont'd)

- Approve the classification
- Deny extension of stay (EOS) or change of status (COS)
- In order to effectuate the H-1B status, the beneficiary would have to depart the United States and re-enter on a valid H-1B visa (unless visa exempt).

Denials

- When to use an I-292
- When to use an I-541
- When to use both
- Standard Denial formula – IRAC
- 9th Circuit rulings

No Appeal Rights

There are no appeal rights for:

- Denial for failure to pay the ACWIA or Fraud Detection and Prevention fee
- Abandonment denials
- The denial of an extension of stay (EOS) or a change of status (COS) portion of the petition

Systems Checks

Ensure that you have completed all required systems checks.

Summary

- Burden of Proof and Standard of Proof
- The Definition of an H-1B Nonimmigrant Worker
- Filing Procedures and Fees
- Numerical Limitations and Exceptions
- Position and Beneficiary Requirements
- Petitioner Requirements
- Labor Condition Application Requirements (LCA)
- Exceptions to the 6-Year Maximum Period of Stay
- Adjudication of the Petition

Questions?

If the petitioner is requesting consulate/embassy notification, provide the following evidence in duplicate. Any document submitted to the U.S. Citizenship and Immigration Services (USCIS) containing a foreign language, must be accompanied by a full English language translation that has been certified by the translator as complete and accurate, and that the translator is competent to translate from the foreign language into English.

H-1B Extension beyond the Six-Year Limit: The U.S. Citizenship and Immigration Services (USCIS) finds that the requested date for employment exceeds the six-year limit for the H-1B status. However, it is not clear from the record how the petitioner has determined the beneficiary qualifies to extend beyond the sixth-year. There are four ways a beneficiary may qualify to extend his or her employment beyond the sixth-year limit:

1. Recapturing any time outside the U.S. including seasonal or intermittent employment, etc.;

2. remaining outside the U.S. for 1 continuous year, enabling them to be eligible to start a new six year period, upon satisfying current CAP restrictions or exemptions.

3. exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status in cases of lengthy adjudication of the alien's lawful permanent resident status; or

4. exemption from the six-year maximum limitation of authorized stay in H and/or L nonimmigrant status when an H-1B nonimmigrant with approved I-140 petition is unable to adjust status due to limitation on visa availability by country.

Accordingly, the petitioner must choose one of the four reasons below and support it with the listed documentation to establish eligibility for extension beyond the six-year limit.

Recaptured Time—A beneficiary may be able to extend his/her H-1B nonimmigrant status past the six-year limit if there was time spent outside the United States. The amount of time a beneficiary may extend his/her status equals the amount of time spent outside the United States.

To qualify for this exception, the petitioner must provide clear and convincing proof that the beneficiary qualifies for this exception. Submit the following:

- Calculation of the total time in days spent outside the United States.

- A copy of an itinerary showing departure and return dates.

- Clear, legible copies of all passport pages including identification pages, visa pages, any page that has an entry or exit stamp on it, and blank pages.

RECAPTURED TIME – General RFE Procedure:

a.) Petitioner is requesting a validity period that is beyond the six-year limit:

IF...	THEN...
The petitioner does not specifically request recaptured time, and • no other RFE issues exist.	Only grant the remaining eligible time without an RFE.
The petitioner does specifically request recaptured time; but • the request for recaptured time is unsupported; and • no other RFE issues exist.	Only grant the remaining eligible time without an RFE.

(Rev. 04-16-09)

RECAPTURED TIME CALCULATOR: There is a calculator in the I-129, H-1B, RFE folder. Use Windows Explorer to get to the calculator. It will not work in "Word."

For more information on recaptured time see: See Matter of IT Ascent and Aytes memo dated 10/21/2005, located in the H-1B, Legal Reference Info, Time Recapture folder.

OR

One year outside the United States: If the beneficiary has resided or been physically present outside the United States continuously for the immediate prior year, he or she is eligible to begin again a new six-year limit, providing they qualify for the current CAP restrictions or exemptions. Submit the following:

- Calculation of the total time in days spent outside the United States.
- A copy of an itinerary showing departure and return dates.
- Clear, legible copies of all passport pages including identification pages, visa pages, any page that has an entry or exit stamp on it, and blank pages.

OR

Section 106(a), Sixth-Year Limitation Exemption Due to Lengthy Adjudication: There are special provisions for exemption from the six-year maximum limitation of authorized stay

in H and/or L nonimmigrant status in cases of lengthy adjudication of the alien's lawful permanent resident status. The 21st Century DOJ Appropriations Act (November 02, 2002) amends § 106(a) of AC21 to permit H-1B nonimmigrants to obtain an extension of H-1B status beyond the 6-year maximum period, when:

1. 365 days or more have passed since the filing of any application for labor certification, Form ETA 750, that is required or used by the alien to obtain status as an EB immigrant, or

2. 365 days or more have passed since the filing of an EB immigrant petition.

Further, the 21st Century Department of Justice Appropriations Authorization Act, allows for the extension of H-1B nonimmigrant worker status, for an alien who qualifies for this exemption, in one-year increments, until such time as a final decision is made:

- to deny the alien's labor certification application, if it is required for the alien to obtain status as an employment based immigrant, or if the labor certification is approved, to deny the EB immigrant petition that was filed pursuant to the approved labor certification; or

- to deny the alien's employment based immigrant petition; or

- to grant or deny the alien's application for an immigrant visa or for adjustment of status to that of an alien lawfully admitted for permanent residence.

In order to establish eligibility for an extension beyond the 6-year maximum period, submit the following:

- Verification from DOL that the labor certification application has been pending for 365 days, <u>if it is required for the alien to obtain status as an employment based immigrant</u>, and that the petitioner is still pursuing its labor certification;

- A copy of the Form I-797, Notice of Action, to show that 365 days or more have passed since an employment based immigrant petition was filed on behalf of or by the H-1B nonimmigrant beneficiary.

- If the petitioner' s Form ETA-9089 was denied by the DOL, submit evidence from the DOL that the petitioner has appealed that decision and that the appeal is still pending with the Board of Alien Labor Certification Appeals (BALCA).

- If the petitioner's employment based petition has been denied, submit evidence from the AAO (copy of I-797 or receipt notice) that the petitioner has appealed that decision and that the appeal is still pending.

IMPORTANT! See Michael Aytes Memorandum dated December 05, 2006, Guidance on Determining Periods of Admission for Aliens Previously in H-4 or L-2 Status; Aliens Applying for Additional periods of Admission beyond the H-1B Six year Maximum; and Aliens Who Have Not Exhausted the Six-Year Maximum But Who Have Been Absent from the United States for Over One Year. It is located in AC21, Legal Reference, folder.

DECOUPLING H-4 AND L-2 FROM H-1B AND L-1 TIME: Time spent as an H-4 and L-2 dependent no longer counts against the maximum allowable periods of stay available to principals in H-1B and L-1 status.

PERIODS OF STAY IN H-1B STATUS BEYOND THE SIX YEAR MAXIMUM: H-1B aliens under AC21 need not be in H-1B status when requesting an additional period of stay beyond the six year maximum.

H-1B "REMAINDER" OPTION: Pending the AC21 regulations, USCIS for now will allow an alien to elect either (1) to be re-admitted for the "remainder" of the initial six-year admission period without being subject to the H-1B cap if previously counted or (2) seek to be admitted as a "new" H-1B alien subject to the H-1B cap. (Rev. 12-21-2006)

OR

Section 104(c), Sixth-Year Limitation Exemption - One-Time Protection Under Per Country Ceiling: On October 17, 2000, an exemption to the six-year H-1B limitation was created by The American Competitiveness in the Twenty-First Century Act ("AC21"), Public Law 106-313. Further, section 104(c) of AC21 enables H-1B nonimmigrants with approved I-140 petitions, who are unable to adjust status due to a limitation on visa availability by country, to be eligible to extend their H-1B nonimmigrant status until their application for adjustment of status has been adjudicated. An H-1B nonimmigrant may be eligible for this benefit even if he or she has exhausted the maximum 6-year period of authorized stay for H-1B nonimmigrants under INA 214(g)(4). The statute states that the beneficiary must:

(a) have a petition filed on his or her behalf for a preference status under INA 203(b)(1), (2), or (3) (an employment based ("EB") I-140 petition); and

(b) be eligible to be granted that status except for the per-country visa availability limitations.

SECTION 104(c): The beneficiary must have an approved I-140 but their visa has been regressed (no visa available at time of adjudication). For a "Visa Availability Bulletin" go to the CSC website. Just under the address bar there is "Links" bar. Click on the "USCIS" button and pick "DOS Visa Bulletin" from the drop down menu.

Extensions are granted in increments of up to three years. Although the law is for a one-time protection under the per-country ceiling, USCIS recognizes that in some cases per country limits may take more than three years for the alien to be eligible to adjust.

There is no requirement that the beneficiary have a pending I-485 to be eligible for the One-Time Protection Under Per Country Ceiling because if no visa is available there I-485 will be rejected by data entry.

See December 27, 2005, Michael Aytes, Interim Guidance for Processing Form I-140 Employment-Based Immigrant Petitions and Form I-485 and H-1B Petitions Affected by the American Competitiveness in the Twenty-First Century Act of 2000 (AC21)(Public Law 106-313) in the Legal Reference folder under AC21.

Any H-1B nonimmigrant who meets the statutory requirements above may be approved extensions of stay under AC21 Section 104(c) in increments of three years until a decision is made on the nonimmigrant's application for adjustment of status. In order to establish eligibility for an extension under this section submit the following:

- a copy of the alien's Form I-797, approval notice for an I-140 immigrant worker petition.

Note: If the petitioner filed the I-140 and I-485 concurrently, and the I-140 has not yet been adjudicated then the petitioner may wish to seek exemption of the sixth-year limitation due to lengthy adjudication as shown above.

H-1B EMPLOYER NOT THE SAME AS I-140 PETITIONER: An H-1B worker can get an H-1B extension under section 104 even if the extension is filed by an employer other than the one who filed the approved I-140.

There is nothing under AC21 section 104(c) that requires that the beneficiary be working for the I-140 petitioner in order to qualify for an extension beyond the 6-year maximum period of authorized stay for H-1B nonimmigrants. The statute only states that the beneficiary must (a) have a petition filed on his or her behalf for a preference status under INA section 203(b)(1),(2) or (3) (an employment based ("EB" petition); and (b) be eligible to be granted that status except for the per-country limitations. This is reflected on page 3 of the June 19, 2001, memo by Michael D. Cronin on the "Initial Guidance of Processing H-1B Petitions as Affected by the "AC21" Public Law 106-396". (Rev. 03-02-06)

Form I-129 H-1B Adjudication

March 2013

Burden of Proof and Standard of Proof

Adjudicator's Field Manual (AFM) 11.1(c)

Burden of Proof

The burden is on the petitioner to establish that he or she is eligible for the benefit sought. *Matter of Brantigan*, 11 I&N Dec. 493 (BIA 1966).

Standard of Proof

The standard of proof applied is the "preponderance of the evidence" standard. *Matter of Chawathe*, 25 I&N Dec. 369 (AAO 2010).

Preponderance of the evidence means that it is more likely than not that the beneficiary qualifies for the benefit sought. *Matter of E-M-*, 20 I&N Dec. 77 (BIA 1999).

Divisions of the H-1B Classification

- **H-1B (1B1)** Specialty occupation workers
- **H-1B2 (1B2)** Department of Defense (DOD) cooperative research and development project or co-production project workers
- **H-1B3 (1B3)** Fashion models of distinguished merit and ability

Fees

- Form I-129 base fee ($325)
- American Competitiveness and Workforce Improvement Act (ACWIA) fee ($1,500 or $750), with some exceptions
  - Applies to first petition and first extension request filed by an employer for a particular worker
- Fraud Prevention and Detection Fee ($500)
  - Applies to all initial H-1B status request filed by a specific employer for a particular worker
- Public Law 111-230 fee ($2,000)
  - Applies to initial H-1B status request filed by a specific employer for a particular worker if:
    - The petition is filed on/after August 14, 2010 and before October 1, 2015 and
    - The petitioner employs 50 or more employees in the U.S. and over 50% of those U.S. employees are in H-1B or L-1 nonimmigrant status
- Premium Processing Fee ($1,225), if requesting Premium Processing Service

ACWIA Fee

- U.S. employers with 25 or fewer full-time equivalent employees, including all affiliated and subsidiary entities, must pay $750

- U.S. employers with 26 or more full-time equivalent employees, including all affiliated and subsidiary entities, must pay $1,500

ACWIA Fee (Cont'd)

The following entities are exempt from the ACWIA fee:

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a);
- Nonprofit organizations or entities related to or affiliated with institutions of higher education;
- Nonprofit research organizations or governmental research organizations;
- Primary or secondary educational institutions, private or public; and
- Nonprofit entities that engage in an established curriculum-related clinical training program for students.

What are the numerical limitations?

Numerical Limitations

The total number of temporary workers who may be issued initial visas or otherwise provided nonimmigrant status for H-1B classification in a fiscal year is currently 65,000. This is known as the "cap."

The cap applies to the principal H-1B nonimmigrant and not to the spouse and children of the H-1B nonimmigrant.

Numerical Limitation Exceptions - Masters Cap

- The first 20,000 petitions filed on behalf of a beneficiary with a U.S. master's degree or higher are exempt from the cap. This is also known as the advanced degree exemption or "master's cap."
  - Any surplus over the 20,000 is then counted against the general cap.
- The master's degree (or higher) must be issued from a U.S. institution of higher education as defined in section 101(a) of the Higher Education Act of 1965 (Pub. Law 89-329), 20 U.S.C. 1001(a).

Institutions of Higher Education

- "Institution of higher education" is defined by the Higher Education Act of 1965;
- Admit students holding a high school diploma (or equivalent);
- Are certified to provide higher education pursuant to state regulations and are accredited by a nationally recognized accrediting agency;
- Provide an educational program that awards a bachelor's degree or a two-year program that awards credit toward such degree;
- Qualify as a public or nonprofit institution

Numerical Limitation Exceptions – Petitioners not subject to the cap INA 214(g)(5)(A) and (B)

- Institutions of higher education, as defined in the Higher Education Act of 1965, section 101(a)

- Nonprofit entities that are related to or affiliated with an institution of higher education
  - All initial affiliation cases are adjudicated by the affiliation team.

- Nonprofit research organizations or governmental research organizations

Numerical Limitation Exceptions – J-1 Physicians with Waiver

- The beneficiary is a J-1 foreign medical graduate who received a waiver of the 2-year foreign residence requirement.
- The J-1 cap exemption applies only to medical doctors who have received a Conrad 20/30 waiver under INA 214(l)
- Must work for 3 years at a hospital designated by the Secretary of HHS as a:
  - Health Professional Shortage Area (HPSA);
  - Medically Underserved Area (MUA); or
  - Medically Underserved Population (MUP).
- The beneficiary is ineligible to change to another nonimmigrant visa classification or adjust status until this commitment is fulfilled.

Position and Beneficiary Requirements for a Specialty Occupation Worker

1B1 Specialty Occupation Workers

Section 214(i)(1) of the INA defines "specialty occupation" as an occupation which requires:

1) theoretical and practical application of a body of highly specialized knowledge, and

2) the attainment of a bachelor's degree or higher in a *specific specialty* (or its equivalent) as a minimum for entry into the occupation in the United States (emphasis added)

Position Requirements

The petitioner must meet **one** of the following four criteria:

1) A baccalaureate or higher degree or its equivalent is normally the minimum requirement for entry into the particular position;

2) The degree requirement is common to the industry in parallel positions among similar organizations or, in the alternative, an employer may show that its particular 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 positions; or

4) The nature of the specific duties are so specialized and complex that knowledge required to perform the duties is usually associated with the attainment of a baccalaureate or higher degree.

General Degrees

A degree in the general area of Business Administration may be insufficient to demonstrate that the beneficiary is qualified to perform a specialty occupation. However, a degree in Business Administration with a specific focus in a field of study related to the specialty occupation could qualify the beneficiary to perform the specialty occupation.

Example: A Business Administration Degree with an emphasis in accounting would likely qualify the beneficiary as an accountant, but would not, by itself, qualify him as an architect.

Beneficiary Qualifications

The petitioner must show that the beneficiary meets **one** of the following four criteria:

1) The beneficiary holds a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
2) The beneficiary holds a foreign degree determined to be equivalent to a United States baccalaureate or higher degree required by the specialty occupation from an accredited college or university;
   - RFE for educational evaluation if unable to determine if foreign academic program is equivalent to United States

Beneficiary Qualifications (Cont'd)

- Generally, the three-year foreign degrees are equivalent to three years of undergraduate coursework at a U.S. institution of higher learning.

- Four-year degrees can usually be considered equivalent to a U.S. bachelor's degree, but not always.

- Focus on the course of study for the degree. Be careful not to penalize a beneficiary for the manner in which he/she obtains the degree (e.g., the beneficiary earns a four-year degree in three years, etc.).

Beneficiary Qualifications (Cont'd)

3) The beneficiary holds an unrestricted state license, registration or certification which authorizes him or her to fully practice the specialty occupation and be immediately engaged in that specialty in the state of intended employment;

- Examples are occupations such as teachers, lawyers, engineers, architects, pharmacists, . . .

- Not all occupations requiring licensure meet the definition of a specialty occupation (e.g., pilots, cosmetologists, flight instructors, barbers, taxi drivers)

Beneficiary Qualifications (Cont'd)

4) The beneficiary has education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States baccalaureate or higher degree in the specialty occupation, and has recognition of expertise in the specialty through progressively responsible positions directly related to the specialty.

- If the beneficiary does not have a baccalaureate degree, equivalence can be shown with a combination of education and work experience.

Degree Equivalence

(Equivalence to completion of a college degree)

If the beneficiary has knowledge, competence and practice in the specialty occupation that has been determined to be equal to a baccalaureate or higher degree as evidenced by one or more of the following:

1) An evaluation from an official who has authority to grant college-level credit for training and/or experience in the specialty at an accredited college or university which has a program for granting such credit based on an individual's training and/or work experience;

2) The results of recognized college-level equivalency examinations or special credit programs, such as the College Level Examination Program (CLEP), or Program on Non-collegiate Sponsored Instruction (PONSI);

Degree Equivalence (Cont'd)

3) An evaluation of education by a reliable credentials evaluation service which specializes in evaluating foreign educational credentials;

- For purposes of equivalence, an acceptable evaluation of formal education should:
  - Consider formal education only, not practical experience;
  - State if the collegiate training was post-secondary education (e.g., whether the education in question was obtained after completing the U.S. equivalent of high school);
  - Provide a detailed explanation of the material evaluated rather than a simple concluding statement; and
  - Briefly state the qualifications and experience of the evaluator providing the opinion.

Degree Equivalence (Cont'd)

4) Evidence of certification or registration from a nationally-recognized professional association or society for the specialty that is known to grant certification or registration to persons in the occupational specialty who have achieved a certain level of competence in the specialty;

Degree Equivalence (Cont'd)

5) A determination by the Service that the equivalent of the degree required has been acquired:

- through a combination of education, specialized training, and/or work experience in areas related to the specialty

AND

- that the alien has achieved recognition of expertise in the specialty occupation as a result of such training and experience.