

MYTHS ABOUT CONSULAR PROCESS FOR U.S. VISAS –
WHAT IS YOUR B&G SPOT?
PART IV

By: Michael Phulwani, Esq. and David H. Nachman, Esq.

There are a lot of myths and misconceptions that people have relating to the U.S. visas. This is especially the case for India who applies for visas and receives random denials on bases of 221(g) & 214(b). This is the concluding part of a series of articles about the common myths that relate to various types of visa processing.

MYTHS ABOUT H-1B VISAS

1. H-1B visas are available any time during the year.

FACT: Not True. The H-1B filing period begins on April 1st of each fiscal year for employment that commences on October 1st. The filing period closes as soon as USCIS receives sufficient petitions to meet the 20,000 H-1B cap for U.S. Master's Degree holders and the 65,000 H-1B visa cap for holders of a Bachelors Degree or its U.S. equivalent. Once the cap for a particular year has been reached, the filing period will be closed and will open again on April 1st for the next fiscal year. However, certain cap exempt H-1B petitions, such as transfers, change of employers, and H-1Bs for academic institutions of higher education can be filed anytime during the year.

2. All foreign nationals are subject to the 65,000 H-1B cap.

FACT: Not true. Although there is a 20,000 H-1B cap for U.S. Master's Degree holders and a 65,000 annual cap on new H-1B visas for holders of a Bachelors Degree or its U.S. equivalent, beginning with each new fiscal year (on October 1st), there are exemptions from that H-1B cap (cap-exempt petitions). Some of them are:

- A. Foreign nationals who are already in the U.S. in H-1B status are exempt from the cap if they have already been counted for the cap in a previous year (e.g., a foreign national in H-1B status is exempt from the cap when a new employer files an H-1B petition for them).
- B. Employers that are nonprofit research organizations and government research organizations, post-secondary educational institutions such as universities and colleges (including two-year technical schools) and their nonprofit affiliates, are exempt.

Included in the exemption for these above groups are workers who will work at the locations of these organizations even though they are actually employed by for-profit companies.

For example, physicians who are privately employed, but work at university-affiliated hospitals, will likely qualify for cap-exempt H-1B status.

- C. Also important to the cap count are the 20,000 exemptions available for each fiscal year for H-1B petitions where the beneficiary holds an advanced degree (masters degree or higher) from a U.S. educational institution (for these exemptions, a foreign degree equivalency is not sufficient).
- D.

3. *I have a bachelor's degree, so I qualify for an H-1B visa.*

FACT: This is incorrect. To be more precise, this is incomplete information. A bachelor's degree is one of the requirements for an H-1B visa. However, the job offered to the foreign national must also require a bachelor degree as a minimum for entry into the position.

In addition, your educational qualifications must match the requirements of the job offered to you. For instance, if the normal requirement for an Accountant is a bachelor's degree in accounting, you would not automatically qualify for H-1B status if your degree in the related field is in Business Administration.

4. *To qualify for the H-1B visa, I have to prove that I intend to return to my home country after my authorized stay in H-1B status expires.*

FACT: Not True. There is no such requirement. The H-1B is a "dual intent" visa and it does not require nonimmigrant intent, which means that you can have an intention to apply for permanent residence in the U.S. and still obtain an H-1B visa. H-1B visa supports the doctrine of dual intent. When you apply for the H-1B at the U.S. Consulate abroad, you should not encounter a 214(b) denial, even if someone has filed Immigrant Visa on your behalf or you are married to a U.S. Citizen or Green Card holder.

5. *Only big firms and/or companies may obtain H-1B visas for their employees.*

FACT: This is absolutely not true at all. Any size of U.S. employer may petition for an H-1B employee, as long as it is a U.S. entity and a tax identification number has been issued by the Internal Revenue Service (IRS). Many smaller companies may have to provide additional financial and business information to establish the need for the position sought and that they are financially stable.

6. *The U.S. employer has to prove that it has attempted to recruit U.S. workers through advertising before filing the H-1B petition.*

FACT: Not True. There is no such requirement. U.S. employers are not required to prove that they have attempted to recruit U.S. workers before filing the H-1B petition for the foreign national. The only exceptions are H-1B dependent employers (employers who have more than 15% of their employees in H-1B status) and employers who received Troubled Asset Relief Program (TARP) funds. However, we are also aware of Request For Evidence (RFEs) that have been issued to H-1B employers that do ask if any attempts have been made to recruit U.S. workers for the job. In such cases the employer can respond that such requirement does not apply other than the categories mentioned above.

7. *I can start working as soon as my U.S. employer files the H-1B petition.*

FACT: The answer here depends on your current status in the U.S.

- A. If you already have H-1B status and are in the U.S. working for a sponsoring employer, you can begin working for a new H-1B employer as soon as the new employer files a new H-1B petition on your behalf. This is referred to as AC-21, Section 105 “portability”.
- B. In all other cases, you have to wait for the H-1B approval before legally starting to work. For instance, if you hold F-1 status and do not have any other work authorization document, you must wait for the H-1B approval before you can start working, generally on or after October 1st.

8. *I am on F-1 status with an Optional Practical Training (OPT) work permit that expires on August 1st. My employer wants to file an H-1B petition for me. However, because of the H-1B cap, the earliest start date for me with H-1B status will be October 1st. I have to stop working on August 1st.*

FACT: Not necessarily! Under current rules, if your H-1B petition is filed before your F-1 OPT expires, you may continue working after the OPT expires up to and including October 1st. If your H-1B is approved for an October 1st start date (and a change of status is granted to you in the U.S.), your OPT will be extended and your status will be changed from F-1 to H-1B on October 1st. If your H-1B is denied after your OPT expires, you must stop working.

Case Scenario: Mr. Shah, a national of India, finished his bachelor’s degree in Biology and graduated in June 2009. He timely filed for and received OPT for one year. His position as a laboratory technician in a cancer research lab has worked out very well and his employer wants to keep him. Mr. Shah’s OPT expires on July 26th, 2010. His employer files an H-1B petition for him on July 1st, 2010, for an October 1st, 2010 start

date, the earliest date an H-1B is available for Mr. Shah. Does Mr. Shah have to stop working on July 26th, 2010 when his OPT expires and return to India until he can start working on October 1st?

Answer: Since his employer filed an H-1B petition for Mr. Shah before his current F-1 status (with OPT) expired, Mr. Shah qualifies to take advantage of the “cap gap” rule. The cap gap rule automatically extends his OPT until October 1st, allowing him to remain in the U.S. and to continue working until his H-1B start date.

9. Once I have an H-1B visa, I can work for any employer.

FACT: Not true. An H-1B visa is employer specific, which means you can only work for the petitioning employer. If you want to work for a new employer, the new employer must file a new H-1B petition for you.

10. H-1B petition can be filed for full-time employment only.

FACT: Not True. The law also permits filing of H-1B for part-time employment. As a matter of fact, if the H-1B visa holder is employed in a full-time position and wants to work part-time for another employer, the second employer can file a separate H-1B petition for part-time employment and upon approval, the individual can continue both full-time and part-time employment at the same time. This is also referred to as having concurrent H-1B visas.

11. I cannot travel outside the U.S. while I am on H-1B.

FACT: Absolutely wrong! You can travel in and out of the U.S. freely as long as your H-1B visa stamp (which you received at the Consulate) is valid.

Note: Changed your status from another non-immigrant category based upon you entered the U.S. such as B1/B2 or F1 visa, to H1B category and travel abroad, you need to obtain H1B visa stamp in your passport to re-enter the U.S. If you believe that there are any issues which may lead to denial of H-1B stamp by the Consul, you should consult with your Immigration Attorney and seek appropriate for guidance before traveling abroad.

12. H-1B workers do not pay taxes in the U.S.

FACT: This is not true at all. H-1B workers are required to pay the same taxes on worldwide income as U.S. workers. They also pay the same social security, unemployment, and state taxes. It is important for the H-1B nonimmigrant to consult with a qualified tax professional as there may be tax credits and other ways for the H-1B nonimmigrant to reduce his/her potential tax liability.

13. My employer cannot dismiss me from employment as long as my H-1B is valid.

FACT: Absolutely wrong! There is no such thing as guaranteed employment based on an H-1B visa. H-1B employment is “at will” and subject to all the normal labor and employment laws in the U.S. Subject to employment laws, an employer can dismiss or terminate the employment of an H-1B worker at any time during the validity period of the H-1B visa.

However, in such a situation, the H-1B employer will be responsible for the worker’s reasonable costs of return transportation to his/her home country if the worker chooses to return.

Also, if your H-1B employment is terminated, you will lose your H-1B status, unless (1) you have a new employer who files an H-1B petition for you before you stop working; or (2) you change your status to that of a another non-immigrant category such as visitor or student; or (3) you had a concurrent H-1B visa and you work on the non-terminated H1B status.

This concludes our series of articles on common Myths about U.S. Non-Immigrant Visa.