

UNITED STATES

HATCH: I-SQUARED 2018



Introduced Jan. 25, 2018 (S. 2344)

HATCH: I-SQUARED 2018

Introduced Jan. 25, 2018 (S. 2344)

Provision	Current Law	2018 I-Squared
Green Card Backlog	<p>140,000 annual limit, which includes spouses and family members. Actual number of workers is approximately 65,000.</p> <p>Backlog is years (and many years at that) for most employment-based green card applicants.</p>	<p>Retains the 140,000 base, but reduces (or eliminates) the green card backlog through a number of exemptions, including:</p> <ul style="list-style-type: none"> • Exempting EB-1 (extraordinary ability and researchers) from annual cap; • Exempting all advanced degree STEM holders from U.S. universities; • Recapturing unused green cards from prior years (approx. 200k); • Exempting all family members of foreign workers; and • Eliminating the per-country limits. <p>An immigrant visa is deemed “immediately available” if any immigrant visa numbers remain in the fiscal year (i.e. early adjustment filing). Requires government to issue all available immigrant visas.</p>
H-1B Fee Escalator	No fee escalator under current law	<p>Raises H-1B filing fee:</p> <ul style="list-style-type: none"> • \$1500 to \$4000 for large companies (25+ employees) • \$750 to \$2000 for small companies (less than 25 employees)

		Creates a fee escalator for the filing fee's tied to marked demand. The fee's will be put into a treasury account named "Promoting American Ingenuity Account" and funds go towards STEM education in the U.S.
Conditional Green Card	No provision	<p>Creates a "conditional green card" system for non-H-1B dependent companies. Annual numerical limit is 35,000 a year.</p> <p>Sponsoring employer must:</p> <ul style="list-style-type: none"> • Pay foreign worker not less than similar workers; • Attest that no U.S. worker has been or will be displaced; • Participate in E-Verify; • Pay \$10,000 application fee; • Not be H-1B dependent (as defined under the new law); • Document ongoing recruitment efforts to hire U.S. workers; and • Sponsor foreign worker for green card within first two years. <p>If the employer pays \$100k, the employer must only show that that no U.S. worker is better qualified (not equally qualified).</p> <p>Employee must not be unemployed more than 180 days.</p> <p>An employee may change employers at any time if the new employer agrees to the attestations and pays a new filing fee (\$10k year 1; \$5k year 2; \$2500 in year 3).</p>
F-1 Student Dual Intent	Foreign students may not begin the green card process while in student status.	Permits "dual intent" for foreign students so that an employer can start the green card process while the student is still in school or working pursuant to Optional Practical Training.
H-1B Cap Increase	<p>Current H-1B base cap is 65,000 per year. Up to 20,000 master's degree or higher H-1B workers are exempt from the cap.</p> <p>Cap was hit in the first five days of FY 2014, and has been hit before the end of the fiscal year in every year except 2001-2003, when the cap was 195,000.</p> <p>H-1B workers who work at institutions of higher education or related or affiliated nonprofit entities, nonprofit research organizations or governmental research organizations are exempt from the annual cap.</p>	<p>Raises the H-1B cap from 65,000 to 85,000. Creates a market-based escalator (from 115,000 to 195,000).</p> <p>Individual earning a U.S. Master's degree or higher (regardless of field) is exempt from H-1B cap if the individual obtains a priority rate (initiation of green card processing) within one year of beginning H-1B status. (employee would start with one year initial approval, then move to three-year increments)</p> <p>More H 1B numbers can be added within any FY as follows:</p> <ul style="list-style-type: none"> • Cap met by May 15 – 30k added, available 10/1 • Cap met by Sept 30 – 20k added, available 10/2 • Cap met by Nov 29 – 10k added, available 12/1 • Cap met by Jan 28 – 5k added, available 2/1

<p>Cap-Subject H-1B Prioritization</p>	<p>A total of 85k cap-subject petitions may be approved in a fiscal year.</p> <p>First 20k petitions filed for U.S. masters degrees are exempt from the annual limit. If necessary, a random lottery is run to select the 20k.</p> <p>After the master’s cap lottery is conducted, there is another random lottery to select 65k H-1B petitions.</p>	<p>When the H-1B cap is met in the first 5 business days of the filing period, cap-subject H-1B petitions will be selected based on the following priority system:</p> <ul style="list-style-type: none"> • H-1B beneficiaries with a US Masters or above who are not in the 20,000 set aside (and not being sponsored for a green card within the first year of H-1B status). • H-1B beneficiaries with a Foreign Doctorate, equivalent to a US Doctorate. • H-1B beneficiaries with a US STEM Bachelors. • Remaining cap-subject H-1B petitions.
<p>H-1B Portability</p>	<p>No grace period under current law.</p>	<p>Creates a 60-day grace period for H-1B workers who lose their job to obtain H-1B status through another employer.</p> <p>Requires deference to prior approval if there is no material change in eligibility.</p>
<p>Deference Towards Prior Approvals</p>	<p>The fact that the government previously approved the status is not considered at the time of an extension application.</p>	<p>The government must give deference towards a prior approval unless there has been a material change in facts or there was a substantial error in the prior approval.</p>
<p>H-4 Spousal Employment</p>	<p>Spouses of H-1B workers are not allowed to work. Only spouses of L-1 workers are allowed to obtain an Employment Authorization Document.</p>	<p>Authorizes spouses of H-1B visa holders (H-4s) to work if the principal has a pending or approved labor certification or immigrant petition (i.e. in the green card process).</p> <p>Employer must pay spouse higher of actual wage and prevailing wage.</p>
<p>Visa Revalidation</p>	<p>Foreign temporary workers must renew their visa outside of the U.S. Ability to revalidate within the U.S. was terminated after 9/11.</p>	<p>Requires the DOS to allow certain foreign workers to revalidate their work visas in the U.S.</p>
<p>Green Card Portability</p>	<p>A worker may change jobs or employers if the adjustment of status application (last stage) has been pending for at least 180 days.</p>	<p>Any employee who has an approved labor certification or immigrant petition may change jobs or employers without losing place in line for a green card (i.e. no requirement to wait 180 days).</p>
<p>Early Adjustment Filing (portability)</p>	<p>A worker may not file an adjustment of status application until the priority date is current</p>	<p>A worker may file an adjustment of status application irrespective of whether a green card number is available. (Requires payment of \$500 fee).</p>
<p>Wage Levels for H-1B Workers</p>	<p>Wage levels are based on actual job responsibilities and requirements for the position.</p>	<p>Lowest H-1B wage may not be less than the mean of the lowest 50 percent of the wages surveyed.</p>

	The government publishes a wage survey that includes four tiers, ranging from entry-level up to fully competent.	Clarified that private surveys may be relied upon by employers.
H-1B: Changes in Work Location	An employer is required to file an amended H-1B petition if there is a change in geographic location.	An employer is not required to file an amended petition if there is a change in work location and the employer has an LCA approved for the new work location.
Whether Company is H-1B Dependent	<p>H-1B dependent means an employer:</p> <ul style="list-style-type: none"> • Less than 25 employees, at least 7 H-1Bs; • 26-50 employees, at least 12 H-1Bs; • >51 employees, at least 15 percent H-1B. <p>All H-1B workers are counted towards H-1B dependency, even if they are caught in the green card backlog.</p>	When calculating H-1B or L-1 dependency foreign workers who are in the green card process (“intending immigrants”) are excluded from the calculation. However, an employer must file immigrant petitions for at least 90 percent of the workers who are the beneficiaries of approved DOL labor certifications.
ACWIA Fix (increased wage level to avoid dependency obligations)	An H-1B dependent employer is not subject to additional recruiting and job offer obligations if the beneficiary has a master’s degree or is paid at least \$60k a year.	<p>An H-1B dependent company (as defined under new law) is subject to additional attestations, obligations and penalties unless the H-1B worker is paid higher of 105 percent of mean wage or 100k, or the employee has a PhD degree.</p> <p>A 50/50 company (i.e. employer with more than 50 employees which has more than 50 percent in H-1B status) is always subject to dependent employer obligations.</p>
Prohibition on Speculative Filings	No provision	<p>If an employer hires more than 10 H-1B workers, each worker must spend at least 25 percent of his/her time in the U.S. The employer is required to submit an annual report to DHS.</p> <p>An employer will be subject to a \$10k fine (\$25k if violation in two consecutive years) unless the employer withdraws the petition on the basis that there was an unexpected change in circumstances or the employee entered the U.S. in another visa status. Withdrawn petitions shall be reallocated to other employers in the same or subsequent year.</p> <p>An employer may not withdraw more than 25 percent of H-1B petitions.</p> <p>An employer that violates this provision in three consecutive years will be debarred from filing H-1B petitions in the fourth year.</p>
Department of Labor Investigative Authority	The Department of Labor has limited authority to initiate an investigation into H-1B abuses and may not rely on information submitted to USCIS as a basis for conducting an investigation.	USCIS must provide the Department of Labor with information that indicates that the employer is not complying with visa program requirements and DOL may initiate and conduct an investigation based on that information.

United States - Hatch: I-Squared 2018. Last updated: 25 Jan. 2018

Copyright © 2018 Berry Appleman & Leiden LLP. Government immigration agencies often change their policies and practices without notice. Please check with your BAL representative to make sure you have the most recent document version. This document does not constitute legal advice or create an attorney-client relationship.

Filing Fees for High Volume Users	If company has more than 50 percent H-1B or L-1, employer is required to pay an additional \$4,000.	No new provision.
Non-Displacement Attestation	<p>A non-dependent company is not required to make an attestation regarding displacement.</p> <p>A dependent employer (15 percent or more H-1B) must attest that it did not displace and will not displace an essentially equivalent U.S. worker within the period 90 days before and after the filing of the petition. The employer does not have to attest if the H-1B worker will be paid at least \$60,000 and/or has a master's or higher degree.</p>	<p>Every employer – dependent and non-dependent – will be subject to a non-replacement attestations. Specifically, an employer may not hire an H-1B nonimmigrant for the purpose and with the intent to replace a United States worker with the H-1B nonimmigrant (other than through the United States worker's promotion, voluntary transfer, voluntary departure, or voluntary retirement). In an enforcement action for a violation of this clause, the agency initiating the enforcement action shall bear the burden of proving that the employer acted with the purpose and intent to replace the United States worker with the H-1B nonimmigrant.</p> <p>No employer, having the purpose and intent to replace a current employee with an H-1B nonimmigrant, may condition the employee's pay, bonus, or severance, or any other form of compensation, or the employee's performance review, on the employee's willingness to train the H-1B nonimmigrant to perform the employee's responsibilities. Burden is on government to prove violation.</p>
H-1B Fees	<p>In addition to filing fees and an anti-fraud fee, there is a \$750/1500 training fee:</p> <ul style="list-style-type: none"> • 50 percent for job training, • 30 percent for low-income scholarships, • 10 percent for private-public partnerships, • 5 percent for processing, and • 5 percent to decrease H-1B processing times. 	<p>Establishes a floating fee for U.S. worker training and education. The minimum amount will be \$2000 and the fee will go up to \$8000 if the H-1B cap increases. Fees to be allocated in the following way:</p> <ul style="list-style-type: none"> • Two percent for Secretary of Education for federal agencies or national nonprofits, • Five percent for low-income students, • Ninety-five percent to states for STEM related activities. This will include employment based STEM education and training programs, including apprenticeships.
STEM Definition	Not defined under statute.	Establishing that the term "STEM" means academic and professional disciplines of science (excluding social sciences), technology, engineering, and mathematics."
Schedule A Study	DOL determines which occupations are deemed to be "shortage occupations," meaning the employer may bypass the labor market test for a green card. DOL has not updated the list in years.	Requires a report to the House and Senate Judiciary to determine whether Schedule A should be expanded.