

FAQs on the H-1B Provisions of the Stimulus Bill

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AILA's Business Committee has prepared this list of Frequently Asked Questions about the H-1B provisions of the American Recovery and Reinvestment Act of 2009 (ARRA or the "Stimulus Bill") and its impact on H-1B employers. Some of the FAQs do not have clear answers, and the Committee will be working with the USCIS liaison committees to clarify these points in the coming weeks.

What Provision of the American Recovery and Reinvestment Act of 2009 Affects H-1B Employers?

Section 1611 of the ARRA, called the Employ American Workers Act, was added to the stimulus bill by Senators Sanders (I-Vt.) and Grassley (R-Iowa) to limit certain banks and other financial institutions from hiring H-1B workers unless they had offered positions to equally- or better-qualified US workers, and to prevent banks from hiring H-1B workers in occupations in which they had laid off US workers.

What Companies Are Covered by the EAWA?

The EAWA places new restrictions on H-1B petitions filed by any company that receives funding under title I of the Emergency Economic Stabilization Act of 2008 (Public Law 110-343, also known as the "TARP Bill") or that receives funding under Section 13 of the Federal Reserve Act (12 U.S.C. § 342 et seq., authorizing the Federal Reserve's "Discount Window" for short-term, secured loans to financial institutions and other companies).

Note that companies receiving funds under the AARA (the "stimulus bill") itself, such as engineering companies that contract with states to build the transportation infrastructure funded by the bill, are NOT subject to any restrictions - only banks and other companies receiving TARP money, or credit directly from the Federal Reserve System, are covered.

How Do I Find Out Whether An Employer Has Received Funds Triggering Application of EAWA?

Recipients of funding under the TARP program are disclosed publicly by the US Treasury, and weekly reports are available on the [Emergency Economic Stabilization Act](#) page of the Treasury Department website.

Recipients of funding through the Federal Reserve's Discount Window program are not disclosed to the public, as explained at in the FAQs on the Federal Reserve Discount Window webpage. [See question #9](#). Generally, any state or federally regulated financial

institution is eligible for such funding, though under the Federal Reserve's emergency authority, non-bank companies such as AIG have been allowed to access short term, low-interest loans through the Discount Window.

What Restrictions Are Placed On Covered Employers?

The EAWA provides that it will be unlawful for any recipient of funding to "hire" an H-1B nonimmigrant unless the recipient has complied with the extra Labor Condition Application attestations previously imposed on "H-1B dependent employers." These extra attestations are:

- that the employer has, prior to filing the H-1B petition, taken good-faith steps to recruit U.S. workers for the position for which the H-1B worker is sought, offering a wage that is at least as high as that required under law to be offered to the H-1B worker. The employer must also attest that, in connection with this recruitment, it has offered the job to any U.S. worker who applies and is equally or better qualified for the position.
- that the employer has not laid off, and will not lay off, any U.S. worker in a job that is essentially equivalent to the H-1B position in the area of intended employment of the H-1B worker within the period beginning 90 days prior to the filing of the H-1B petition and ending 90 days after its filing.

Are "Exempt" H-1B Employees Covered By The New Restrictions?

All H-1B workers "hired" by a covered employer between February 17, 2009 and February 16, 2011 are covered by the EAWA. Even though the H-1B dependent employer rules provide an exemption from the extra attestations for H-1B workers who possess master's degrees or who receive wages of at least \$60,000, the EAWA makes this exemption unavailable to TARP recipients.

Are H-1B Extensions for Existing H-1B Employees of Covered Employers Subject to the New Restrictions?

The term "hire" is defined in the statute as permitting "a new employee to commence a period of employment." Therefore, the new restrictions do not appear to apply to H-1B extension petitions filed on behalf of current H-1B employees of covered employers. However, neither USCIS nor DOL have issued implementation guidance or regulations yet, so it is not completely certain that they will take the same view.

Are H-1B Changes of Status for Existing Employees in Other Nonimmigrant Statuses (F-1, TN, L-1B) Subject to the New Restrictions?

As indicated above, the term "hire" is defined in the statute as permitting "a new employee to commence a period of employment." Therefore, it would appear that the new restrictions do not apply to H-1B petitions filed on behalf of current employees of covered employers, if those employees are currently employed in another nonimmigrant

status such as F-1, TN or L-1B. Furthermore, it should be noted that the I-9 Form is completed at the time the employee is hired, not at the time of any change in status. However as previously noted, neither USCIS nor DOL have issued implementation guidance or regulations yet, so it is not completely certain that they will take the same view.

Are H-1B Amendments or Extensions of Stay for New Hires Already in H-1B Status for Another Employer Subject to the New Restrictions?

This issue will need to be resolved by USCIS and DOL in implementing regulations or procedures; however, new employees seeking to transfer their H-1B from another employer to a covered employer will likely be considered to be a "new employee."

If My Client Is Subject to the Extra Attestations imposed by the EAWA, how do I Complete the LCA?

The Department of Labor [advises](#) employers to complete the LCA on line as follows:

"Until further notice, for those companies that are not dependent H-1B employers but are subject to this provision, please check Box "B" in Section F-1.1 of the ETA-9035 in order to demonstrate compliance as required. It is recommended that such employers retain documentation regarding their status."

When Does the Law Go into Effect, and How Long Is It Effective?

The Employ American Workers Act became effective upon the stimulus bill's enactment, February 17, 2009. It is important to note that the law will remain effective for only two years after its enactment. Thus, it will sunset on February 16, 2011.