



CANADA ANNOUNCES NEW PROGRAM FOR HOLDERS OF U.S. H-1B VISAS – BUT DO THEY MEAN VISAS, OR H-1B NONIMMIGRANT STATUS?

Posted on June 29, 2023 by David Isaacson

In a [news release on June 27](#) issued following remarks at the [Collision 2023 conference](#), Canada's Minister of Immigration, Refugees and Citizenship, Sean Fraser, announced several new measures as part of "Canada's first-ever Tech Talent Strategy." One that will likely be of interest to many foreign workers in the United States is "the creation of an open work permit stream for H-1B specialty occupation visa holders in the US to apply for a Canadian work permit, and study or work permit options for their accompanying family members".

This program and other parts of the Tech Talent Strategy have already attracted [significant media attention](#). An open work permit, allowing employment by any employer in Canada rather than the specific sponsor required in the United States for an H-1B, may be an attractive prospect for many H-1B visa holders. The availability of work permits for accompanying family members is likely to be attractive to many as well, particularly those whose H-4 spouses would not be eligible for an Employment Authorization Document in the United States. Some important details, however, remain unclarified.

One such detail is the question of exactly who will be eligible for the new program. According to [the announcement](#), "The new H1-B specialty occupation visa holder work permit will be available as of July 16, 2023. Approved applicants will receive an open work permit of up to three years in duration, which means they will be able to work for almost any employer anywhere in Canada. Their spouses and dependants will also be eligible to apply for a temporary resident visa, with a work or study permit, as needed." The [backgrounder](#) issued by Immigration, Refugees and Citizenship Canada (IRCC)

also refers to “H-1B specialty occupation visa holders in the US,” at more than one point. Read literally, this would suggest that one will need to possess an H-1B visa stamp in order to obtain the new Canadian open work permit.

Not all H-1B nonimmigrants in the United States, however, will hold a valid H-1B visa stamp, or any H-1B visa stamp at all (even an expired one). Rather, there are multiple circumstances under which one can be in H-1B status, but not possess an H-1B visa as such.

Under [section 248 of the Immigration and Nationality Act \(INA\), also known as 8 U.S.C. § 1258](#), and the regulations at [8 C.F.R. Part 248](#), someone who has been admitted to the United States as a nonimmigrant may apply to change status to a different type of nonimmigrant while still within the United States. This process does not require obtaining a new nonimmigrant visa. A new visa is only required if the person wishes to leave the United States and re-enter in their new nonimmigrant status. (Even then, someone making a brief trip to Canada or Mexico of less than 30 days, who has changed status, can sometimes utilize their old visa under a process known as automatic visa revalidation, pursuant to [22 C.F.R. § 41.112\(d\)\(1\)-\(2\)](#).) Thus, someone who entered the United States with, for example, an F-1 student visa, and has never left the United States since then, may have changed their status to H-1B, and may have been issued a Form I-94 acknowledging their H-1B status as part of the approval notice of their application for change of status, but may not have an H-1B visa.

Even if someone did come to the United States with a valid H-1B visa at some point in time, regulations at [8 C.F.R. § 214.1\(c\)](#) allow for an extension of stay as a nonimmigrant beyond the period of initial admission. In this way, as well, someone whose H-1B visa, and initial period of H-1B admission, have already expired, may nevertheless be in valid H-1B nonimmigrant status. But if such a person does not travel outside the United States during the period of the extension, they need not get a new H-1B visa.

Nor are these the only ways that it is possible to be in valid H-1B status but not have a valid H-1B visa. According to [22 C.F.R. § 41.112\(a\)](#), “The period of visa validity has no relation to the period of time the immigration authorities at a port of entry may authorize the alien to stay in the United States.” Rather, as that same regulation explains, “The period of validity of a nonimmigrant visa is the period during which the alien may use it in making application for admission.” And that period is often defined by “reciprocity”, that is, the time

period for which a similar visa would be issued to a U.S. citizen by a particular foreign country. The State Department's [reciprocity schedule for the People's Republic of China](#), for example, indicates that an H-1B visa will only be issued for 12 months. Thus, if a Chinese citizen is issued an H-1B visa valid for one year because of this reciprocity schedule, but has an approved H-1B petition valid for three years, he or she may be admitted in H-1B status until the end of the three years of petition validity, despite having a visa that will expire sooner than that. Even during the latter part of this initial admission, such a person will have H-1B status but no H-1B visa.

It is not clear why IRCC would want to exclude such H-1B nonimmigrants from the new work permit program, despite their lack of an H-1B visa. Based on the language of the [announcement](#) and [IRCC backgrounder](#), however, it appears that they would be excluded. One can hope that this may have simply been an imprecision in language that can be corrected by the time the final program is officially created, but it is at least an open question.

Another open question is exactly how IRCC is going to allocate the limited supply of the new work permits. The [announcement](#) and [IRCC backgrounder](#) state that "This measure will remain in effect for one year, or until IRCC receives 10,000 applications. Only principal applicants, and not their accompanying family members, will count toward the application cap." It appears from this that IRCC may simply allocate the 10,000 available numbers for principal applicants on a first-come, first-served basis.

As has historically come up in the H-1B context itself, however, allocating a sufficiently in-demand supply of application numbers on a purely first-come, first-served basis can result in chaos when more than the allotted number attempt to apply on the first possible day, and this can sometimes lead to the institution of a lottery system. Canada has historically sometimes utilized a similar lottery system, for example [to allocate the limited number of opportunities for Canadian citizens and permanent residents to sponsor their parents and grandparents for permanent residence](#), at least in some years. On the other hand, some Canadian immigration programs with limited allocations – including, at times, the parents and grandparents sponsorship program – have been operated on a purely first-come, first-served basis, even if that rewarded those who could (or whose legal representatives could) most quickly file applications as soon as a program opened. We can hope that IRCC will make clear, before July 16, which approach they will be following for this new

program.

A third open question is whether there will be any requirement linked to the length of remaining time in H-1B status available to an applicant. The [announcement](#) and [IRCC backgrounder](#) do not suggest so, but the [IRCC webpage guidance to high-skilled workers more generally](#), which contains a subsection on the “H-1B visa holders” program, says to “Choose this program if . . . your United States work visa is expiring soon.” Hopefully, this language may be just a prediction regarding who might find the program attractive, rather than a requirement of imminent H-1B expiration. Such a requirement could screen out relatively new H-1B nonimmigrants who would rather have an open work permit in Canada accompanied by work permits for their family members, and there is no obvious policy reason for such a requirement.

The official legal basis for the new work permits, which will likely be in the form of a [temporary public policy](#) or perhaps a [Ministerial Instruction](#), has not yet been made public by IRCC. Once the official temporary public policy or Ministerial instruction is published, it should be possible to answer the open questions discussed above. A sequel to this blog post will likely be published at that time.