

H-1B Visas

One of the most popular visa categories is the H-1B. The H-1B visa is granted to those applicants who can demonstrate that they are employed in a specialty occupation or to fashion models of distinguished merit and ability.

The H-1B visa is one of the many petition-based visa categories, which means that an applicant must apply first at USCIS, and upon receiving an approval notice, may then apply for the visa stamp at a US embassy or consulate. H-1B visa holders are allowed to remain in the US for up to six years and do not need to demonstrate their ties to their home country. Because the H-B is a dual intent visa, H-1B visa holders are allowed to have a pending green card application with no adverse affect on their visa status, which is not permissible with every nonimmigrant visa status.

Specialty Occupations

A specialty occupation is generally defined as an occupation that requires specialized knowledge and at least a bachelor's degree in the United States. It is important to understand that not every occupation can qualify under this category. If an occupation does not require the individual to at minimum have a bachelor's degree, the occupation does not qualify for H-1B status.

H-1B Cap

One of the major difficulties with H-1B visas is that there is an annual limit of 65,000 visas issued per year. Up to 100 visas are granted each year to persons who will perform services of an exceptional nature in connection with the US Department of Defense. Further, 6,800 visas are also set aside from the 65,000 cap each year for the H-1B1 program under the terms of the legislation implementing the US-Chile and US-Singapore Free Trade Agreements. Unused numbers in this pool are made available for H-1B use for the next fiscal year.

There are also an additional 20,000 H-1B visas available each year for those who have completed a Master's degree (or higher) in the United States. Once USCIS has approved the first 20,000 Master's degree cases, any other similar cases are then counted against the regular H-1B cap, unless they are cap-exempt.

Exemptions from the H-1B Cap

There are some cases where individuals may be exempt from the H-1B cap each year. These include those filing for amendments, extensions, and transfers. The cap also does not apply to applicants filing H-1B visas through universities, nonprofit research organizations, and government research organizations. Additionally, physicians whose jobs are based on Conrad State 30 or federal government agency J-1 visa waivers based on their service to medically underserved communities are exempt from the H-1B cap.

Labor Condition Application (LCA)

The first step in the H-1B application process is to file a Labor Condition Application (LCA) with the US Department of Labor. The LCA must be filed online at the Department of Labor's website.

The LCA serves two purposes. The first is to ensure that US salaries are not negatively affected by the hiring of a foreign worker, while the second is to ensure that foreign workers are not exploited. On the LCA form, the employer makes several attestations regarding the conditions under which the foreign worker was hired and will be employed, including:

- The employer will pay the required wage, which is the greater of the prevailing wage or the actual wage paid to other employees in the same position;
- The employment of H-1B workers will not adversely effect the working conditions of US workers;
- There was no strike, lockout or other work stoppage because of a labor dispute at the time the LCA was filed;
- The H-1B worker will be given a copy of the LCA, and the employer has notified the bargaining representative if the job is unionized, or if not, has posted a notice that the LCA was filed.

Within one business day of filing the LCA, the employer must establish a public access file that may be viewed by any person. This file must include a copy of the LCA, a statement of the actual wage received by the H-1B worker, the prevailing wage, a memo from the employer explaining the actual wage determination, and evidence that the LCA has been filed.

Additionally, the employer must post a notice that the LCA was filed for 10 consecutive days in at least two conspicuous locations at each place of employment where any H-1B worker will be employed.

Once certified, an LCA is valid for three years.

H-1B Application

Obtaining an LCA is only the first step in the H-1B process. The application for an H-1B visa is made on Form I-129. The application must also include evidence that will convince USCIS that the employer has a legitimate need for a specialty occupation worker, the position offered is in a specialty occupation, and the prospective employee is qualified for the position.

Employer's Need for the Worker

Most large businesses will have no problem demonstrating need for an H-1B worker. Problems most commonly arise when the business is a small or newly created company. The best way to avoid unnecessary Requests for Evidence (RFEs) is to ensure that all the relevant information about the company is included with the application. This information should include financial documents showing adequate finances to support the company and pay the H-1B worker, incorporation documents, any company literature, and printouts from the company website, etc.

The Position

To qualify for an H-1B, the position must be a specialty occupation. This is done by demonstrating that a bachelor's or higher degree or its equivalent is normally the minimum requirement for entry into the particular position, the degree requirement is common to the industry in parallel positions among similar organizations, the position is so complex or unique that it can be performed only by an individual with a degree, or the employer normally requires a degree or its equivalent for the position.

Qualifications for the Position

To show that a foreign national is qualified for the position, he or she must have a United States bachelor's or higher degree required by the specialty occupation from an accredited college or university, a foreign degree determined to be equivalent to a United States bachelor's or higher degree required by the specialty occupation from an accredited college or university, 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, or education, specialized training, and/or progressively responsible experience that is equivalent to completion of a United States bachelor's or higher degree in the specialty occupation, and have recognition of expertise in the field.

If an H-1B applicant has met all the requirements for a bachelor's degree or higher, but the degree has not yet been awarded, the applicant may submit the following alternate evidence: a copy of his or her final transcript or a letter from the Registrar confirming that all of the degree requirements have been met.

Multiple Filings

Since obtaining an H-1B visa has become more competitive over the last few years, as H-1B numbers have run out shortly after the filing period for the start of the fiscal year has begun, USCIS has adopted a new rule on multiple filings by the same employer. The purpose of the new rule is to ensure that all employers have a fair and equal chance of acquiring H-1Bs for their workers, instead of flooding USCIS with multiple applications for the same individual.

USCIS will now either deny or revoke multiple petitions filed by an employer for the same H-1B worker. If a duplicate application is filed for the same worker, USCIS will not refund the filing fees.

However, related employers, such as a parent company and its subsidiary, may file multiple petitions on behalf of the same foreign worker for different positions, based on legitimate business need.

Duration of H-1B Status

Under current law, one can be in H-1B status for a maximum period of six years at a time. After this time, the H-1B worker must leave the United States for a period of one year before another H-1B petition can be approved. Certain foreign workers working on US Department of Defense projects may remain in H-1B status for 10 years. Also, certain foreign nationals may extend their H-1B status beyond the 6-year period in one year increments if either 365 days or more have passed since the filing of any application for labor certification so the foreign national can obtain status as an EB immigrant, or 365 days or more have passed since the filing of an EB immigrant petition.

Employment under an H-1B Visa

H-1B visa holders may only work for the petitioning US employer and only in the H-1B activities described in the petition. The petitioning US employer may place the H-1B worker on the worksite of another employer if all applicable rules (such as Department of Labor rules) are followed. H-1B aliens may work for more than one US employer, but must have a Form I-129 petition approved by each employer.

As long as the employer/employee relationship exists, an H-1B alien is still in status. An H-1B alien may work in full or part-time employment and remain in status. An H-1B alien may also be on vacation, sick/maternity/paternity leave, on strike, or otherwise inactive without affecting his or her status.

Changing Employers

It is important to note that an H-1B is employer specific. Therefore, an H-1B is valid only for the petitioning employer. Each time a worker moves to a new employer, a new H-1B application is required.

If an H-1B worker changes employers, he or she does not need to go to a US embassy or consulate to get a new visa stamp. According to the US Department of State, as long as the visa has not expired, the applicant remains in H-1B classification.

When an H-1B worker changes employers, the new application does not count against the H-1B cap. However, if an employee transfers from a cap-exempt employer to one who is not exempt from the H-1B cap, then the cap limit will apply to the new application.

H-1B Portability

In October 2000, former President Clinton signed the American Competitiveness in the Twenty-First Century Act (AC21). Under the portability provisions of the act, those who already have approved H-1B petitions can begin working for a new employer as soon as the new employer files an H-1B application on his or her behalf. Prior to this act, the worker had to wait for the new petition to be approved before he or she could begin working for the new employer.

H-1B Filing Fees

There are four government filing fees for H-1B cases:

The first is the base Form I-129 filing fee, which applies to every H-1B application.

The next fee is the worker retraining fee. This fee is \$1500 for most employers. Those employers with less than 25 full-time equivalent employees in the US (including employees of affiliates and subsidiaries) pay a fee of \$750. This fee may be combined with the Form I-129 base fee or may be paid separately. There are circumstances where an employer is exempt from this retraining fee. These include:

- The employer is an institutions of higher education as defined in the Higher Education Act of 1965;
- The employer is a primary or secondary education institute;
- The employer is a nonprofit organization or entity related to, or affiliated with an institution of higher education;
- The employer is a nonprofit research organization or governmental research organization, that is primarily engaged in basic research and/or applied research;
- The employer is a nonprofit entity which engages in an established curriculum-related clinical training or students register at the institution.
- The petition is the second or subsequent request for an extension of stay filed by the employer;
- The petition is an amended petition that does not contain any requests for extension of stay filed by the employer;
- The purpose of the petition is to correct a USCIS error.

The third fee is the Fraud Detection and Prevention fee of \$500. This fee must be paid separately from the other fees, and must be paid directly by the employer or the employer's representative. Only those petitioning for workers under the US-Chile and US-Singapore Free Trade Agreements are exempt from this fee.

The final fee, is an optional fee that an employer can choose to use on a case-by-case basis. This is the \$1000 premium processing fee that guarantees that a case will be processed within 15 business days.

USCIS Guidance and Policy on Filing an H-1B Application

As H-1B laws have changed over the years, USCIS has posted many memorandums and fact sheets on its website offering advice and guidance on the filing of H-1B petitions:

- H-1B petitions can be filed no more than six months in advance of the requested start date.
- USCIS will use random selection to adjudicate H-1B applications if it receives too many cases to count towards the annual limit.
- A duplicate copy of the petition must be submitted if the beneficiary will be seeking nonimmigrant visa issuance abroad. This copy must be clearly labeled as a copy so that USCIS does not think that it is a duplicate filing.
- All H-1B applications should be labeled in red ink as to what type it is: standard, Chile/Singapore, cap-exempt, Master's, fashion model etc.
- USCIS will not refund filing fees for duplicative or multiple H-1B petitions.
- If a petition incorrectly indicates that it is exempt from the H-1B cap, the petition will be denied if no H-1B visa numbers are available and the filing fees will not be returned.

Fashion Model H-1B Applications

For a fashion model to qualify for an H-1B, it must be established that the fashion model has attained prominence in the field and that the work to be done by the foreign fashion model requires the services of a prominent fashion model.

An H-1B application for a fashion model should include documentation, certifications, affidavits, writings, reviews, or any other to establish that the beneficiary is a fashion model of distinguished merit and ability. The application should also include copies of any written contracts between the petitioning employer and the beneficiary, or summaries of any oral agreements if there is no written contract.

To show that the position requires a prominent fashion model, the employer must establish that the services to be performed either involve events or productions which have a distinguished reputation, or will be performed for an organization or establishment that has a reputation for employing prominent persons.

To show that a fashion model has “distinguished merit and ability”, the foreign national must establish two of the following:

- He/she has achieved national or international recognition and acclaim for outstanding achievement in his or her field as evidenced by reviews in major newspapers, trade journals, magazines, or other published material;
- He/she has performed and will perform services as a fashion model for employers with a distinguished reputation;
- He/she has received recognition for significant achievements from organizations, critics, fashion houses, modeling agencies, or other recognized experts in the field;

- He/she commands a high salary or other substantial remuneration for services evidenced by contracts or other reliable evidence.

Family Members of H-1B Visa Holders

The dependents of H-1B visa applicants, such as spouses and children, are allowed to enter the US on the H-4 visa. However, unlike some other derivative visa statuses, one cannot work in the US on an H-4 visa, and those that do work are in violation of their visa status.