

H-1B VISA

Basic Use and Requirements

The H-1B visa is for foreign workers who hold “specialty” occupations. A specialty occupation is one which:

requires theoretical and practical application of a body of highly specialized knowledge to fully perform the occupation and which requires the attainment of the equivalent of an American bachelor’s degree or higher in a specific specialty as a minimum for entry into the United States.

In short, an H-1B is available for most recognized professional positions. The H-1B visa allows a foreign national to work only for the company that filed the petition, and it is valid for six years total per worker (up to three years granted initially, with three additional years available on extensions).

Eligibility Criteria

- The job must pay the greater of the “prevailing wage” or the “actual wage” for U.S. workers at the same experience level. Proof of meeting this criteria is receipt of a Labor Condition Application certified by the Department of Labor;
- The job can be documented as a “specialty” occupation as defined above (e.g., it is not a clerical or “blue collar” position or “para” professional);
- The employee can be documented as having the appropriate educational credentials and experience (usually a relevant bachelor’s degree and/or pertinent experience).

Advantages

- Allows U.S. companies to hire foreign nationals whether or not they have any parents, subsidiaries or affiliates abroad.
- Allows for dual intent and thus the processing of a “Green Card” application while residing in the U.S. and traveling internationally.

Special Notes

- The H-1B visa is generally “locked in” with respect to the company, work site and wage, and any changes require that an amendment be filed with USCIS.
- Processing can take 2 to 4 months; however, premium processing is available where the USCIS will respond within 15 days for an additional fee.
- Employees who have previously held H-1B status can begin working for a new employer as soon as the H-1B transfer petition is filed. To be eligible, the employee must have entered the U.S. lawfully, had an H-1B petition filed on

his or her behalf before the expiration of his or her most recent status, and cannot have worked without authorization since his or her last entry to the U.S.

- Under the American Competitiveness in the Twenty-First Century Act (“AC21”), H-1B workers with a pending employment-based immigrant petition (I-140), and on whose behalf a labor certification application or I-140 was filed more than 365 days prior to end of the six year maximum stay in H-1B status, can extend H-1B status in one-year increments beyond the six-year timeframe until Adjustment of Status is completed. Additionally, those who meet the application deadline for extension of H-1B status past six years can receive three year extensions of H-1B status if the I-140 has been approved and the individual is subject to the Immigrant Visa backlog.

STEPS OF THE CASE

Step 1 - Initial Preparation

Once the candidate accepts the job offer, HR provides the job description, salary, start date, employee contact information, and any other available documents to our office. We then contact the employee and request they fill out our questionnaire and assemble the remaining required documents listed in our checklist. The Employee or HR sends us the Employee’s remaining supporting documentation.

Step 2 - Labor Condition Application (LCA)

In all H-1B cases, companies are required to prove to the U.S. Department of Labor (“DOL”) that they are paying the higher of the following: either the actual wage paid to other employees similarly employed in similar situations within the company, or the “prevailing wage” for that position based on either the DOL’s wage statistics or an available alternative wage survey. The company’s compliance is demonstrated by completion and transmission of a Labor Condition Application (“LCA”) form to the DOL for certification. If appropriate, the company can request an LCA for multiple employees, using a “Blanket” LCA, which allows the company to avoid the LCA process for certain future hires. Upon filing of an LCA, the employer is required to give notice to other employees by posting the LCA (either in hard copy or via an intranet posting).

Step 3 - The Visa Petition Process

After completion of the LCA the applicable forms and supporting letters are drafted, the following information is submitted to the USCIS:

- Resume and copy of employee’s passport and prior USCIS documents;
- Copies of degrees, diplomas and school records;
- Academic equivalency evaluations of foreign degrees, and English translation if needed;

- Brochures, promotional material or articles about the company;
- Company annual report or financial statements;
- Required USCIS forms (Form I-129 and H Supplements Form G-28); and
- Company letter supporting the visa petition.

Step 4 - Approval

When the USCIS Service Center approves the petition, they issue an Approval Notice (Form I-797), which is received by the employer’s agent or attorney and transmitted to the employer or employee, as instructed by the employer. The employer will also receive a courtesy copy of the Approval Notice directly from USCIS.

- If the petition for an extension of stay or new petition has been approved, an employee still in the country will receive his/her Form I-797 Approval Notice and the next time the employee leaves the country, s/he should go to the U.S. consulate to get the visa issued (see Step 5). The employee will be issued a new Form I-94 (showing H-1B status) upon re-entering the U.S. (see Step 6).
- If the employee is outside the country, confirmation of the approval notice is sent to the nearest U.S. consulate where the employee has elected to get the visa issued (Step 5).

Step 5 - Visa Issuance

This step is required before the employee can be work-authorized only if, at the time the petition was filed, the employee was: (1) in the U.S. in a “visa waiver” status; or (2) outside the U.S.

In most cases, the employee simply reports to the consulate in his or her home country with a valid passport, a copy of the petition as filed, and original USCIS Approval Notice (Form I-797) to have the visa issued and affixed to the passport. Visa-issuing policies are specific to the Consulate you are processing at; therefore, it is important to check with the specific Consulate prior to attending. Consulates in certain countries are less cooperative in issuing visas than others (e.g., Guangzhou, PRC and certain posts in India and may require extensive documentation). For more information on visa issuance, please review our visa application memo.

Step 6 - Entry into the U.S.

When the employee arrives at his/her port of entry (the airport or U.S. border crossing), a Customs and Border Protection (CBP) officer will examine the individual’s passport, visa and USCIS Approval Notice, and then stamp his/her Form I-94 and allow entry.

Employees are always reminded to review their I-94 document to ensure it lists the proper employer and date of expiration of their status (status expiration should match the I-797 Approval Notice unless individual’s passport expires beforehand – in which case

the I-94 may be limited by the passport expiry).