

The H-1B Visa and the Employment Based Green Card: Explaining the Difference

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Among the various ways in which foreign nationals can enter and legally work in the United States are two similar but distinct pathways. First, there is the H-1B non-immigrant visa, and second is the employment-based green card or immigrant visa. Some aspects of the two programs are similar and even overlap, but there are other features that are radically different. Whether you are a business that is interested in employing a qualified foreign professional, or you are a professional who is seeking to explore options for employment in the United States, this article will answer your questions regarding the two programs.

There is often some confusion among employers and employees alike regarding the criteria for the two programs, which unfortunately can sometimes result in failing to utilize them. The motivation for this article is to provide a clear and concise explanation to employers and employees so that they can utilize the program that best suits them and not shy away from them because they have not understood the programs fully.

H-1B Petitions

The H-1B program allows employers to employ foreign nationals in specialty occupations for a temporary period of up to three years. Foreign national employees can spend a total of six years in H-1B status. An exception to that rule applies to certain foreign nationals with an approved employment-based green card petition (I-140).

United States Citizenship and Immigration Services (USCIS) caps the number of H-1B visas issued at 65,000 per year, with an additional 20,000 visas reserved for applicants possessing a master's degree or higher.

Determining Eligibility

The basic criteria for an H-1B employee are detailed in the guidance provided by USCIS:

1. The employee must have an employer-employee relationship with the petitioning U.S. employer.
2. The employee's job must qualify as a specialty occupation by meeting certain specified criteria.
3. The employee's job must be in a specialty occupation related to his or her field of study.
4. The employee must be paid at least the actual or prevailing wage for the occupation, whichever is higher.
5. An H-1B visa number must be available at the time of filing the petition unless the petition is exempt from numerical limits.

Who can apply for the H-1B visa?

The applicant must be a well-qualified person who has been offered a job in the United States for a term of three years or less at the outset. If the visa is granted, it can be extended for a further three years if the employer still requires the visa holder's services at that stage.

The types of jobs that can qualify for an H-1B visa are quite broad and include those in the following fields: sciences and mathematics, information technology, engineering, architecture, medicine, business and accounting, theology and the arts, education, the law, and other fields.

The H-1B Annual Lottery

If you are familiar with the H-1B process, you may have heard of the chaos of "Cap Season," the weeks leading up to the H-1B lottery. Previously, all cap-subject H-1B petitions had to be prepared in full and received by USCIS no later than the first week of April. USCIS would then select 65,000 regular cap petitions (+20,000 master's cap petitions) for processing from the thousands it received.

Thankfully, the horrors of "Cap Season" are behind us, since USCIS implemented a new registration system to streamline the lottery process.

Now, employers interested in filing an H-1B petition simply need to complete an online registration form, which USCIS opens for a 14-day period in March. At random, USCIS selects 65,000 regular cap registrants and 20,000 master's cap registrants. After the selection lottery, notifications are issued to the selected registrants. Only applicants who received selection notifications are permitted to file cap-subject petitions.

The new system has drastically improved efficiency for employers and attorneys by eliminating the need to fully prepare petitions which would not be adjudicated.

It is important to note that some petitions are not subject to the annual quota. These include petitions filed by universities, nonprofit research organizations, and government research organizations, as well as petitions for applicants who already hold H-1B status and are requesting to amend or extend their stays.

Labor Condition Application

Once a petitioner receives their registration selection notice, they must file a Labor Condition Application (LCA). The LCA is an attestation that the petitioning employer will pay the H-1B employee either:

- a wage equivalent to all other workers with similar experience and qualifications for the position; or
- the prevailing wage level for the occupational classification in the area of employment.

The employer is required to pay the employee the higher of the two figures. Processing time for the LCA is usually one week. A copy of the certified LCA signed by the petitioning employer must be filed with the H-1B petition.

Processing Times

H-1B applications can be submitted and processed in a matter of weeks. The H-1B process is much quicker and preparation is much less time-consuming than a traditional employment-based green card application. Once the LCA is certified, the attorney prepares and files the H-1B petition, which includes Form I-129, the certified LCA, and additional supporting documentation. Applicants requesting expedited processing by USCIS can pay an additional fee for "premium processing," which guarantees processing within fifteen calendar days. Therefore, the H-1B petition can be prepared, filed, and approved fairly quickly in contrast to an employment-based green card application, which can take months in preparation, filing, and approval.

Identify Potential Candidates As Soon As Possible

U.S. employers may offer positions to overseas candidates who have recently obtained U.S. degrees. In this case, the

employee will be able to start work on Optional Practical Training (OPT). However, once this relatively short period ends, H-1B sponsorship will be required if the employer seeks to retain the employee's services.

For employers considering H-1B sponsorship of an employee, it is critical to speak with an immigration attorney well ahead of the registration period in March to ensure timely entry into the H-1B lottery. Having adequate time to prepare is invaluable for filing a petition which will survive USCIS scrutiny without additional delay. We recommend consulting with one of our esteemed immigration attorneys as soon as a potential candidate is identified.

There Can Be Delays If USCIS Is Not Satisfied

USCIS can issue a Request for Evidence (RFE) if it is not satisfied with the contents of an application. RFEs cause delays that most employers cannot afford if they want to get their staffing right for the next year. While RFEs cannot be avoided entirely, detailed crafting of the employee's job description and the job's location, category, and duties greatly reduce the chances of an RFE being issued.

The Employment-Based Green Card

While an H-1B visa generally authorizes an employee to work for a U.S. petitioner for up to six years, the U.S. employer may also petition for permanent residence for an employee by filing Form I-140. Obtaining an employment-based green card is a longer and more intense process than obtaining an H-1B visa. However, obtaining a green card is ultimately more rewarding as it allows the holder and any dependent family members to live permanently in the United States. Further, permanent residents can generally apply for U.S. citizenship after five years of living in the United States.

Permanent Labor Certification (PERM)

Similar to the H-1B visa process, the petitioning U.S. employer must submit a permanent labor certification request with the Department of Labor. This process is known as the PERM process. The PERM process is much more intensive than the LCA process for H-1Bs, as the information supplied in the labor certification request must confirm, with suitable evidence, that there is a lack of availability of U.S. citizen or permanent resident workers for the proposed position. As part of the process, the employer must advertise the job through various means and maintain a detailed recruitment report, carefully documenting all contact with candidates who express interest in the position.

Advertisements in Newspaper or Professional Journals

The U.S. employer must generally place an advertisement on two different Sundays in the newspaper of general circulation in the area of intended employment most appropriate to the occupation and most likely to bring responses from able, willing, qualified, and available U.S. workers. This is not a requirement for an H-1B visa and can make the employment-based green card more difficult to obtain.

Recruitment Report

The U.S. employer must also prepare a recruitment report signed by the employer or the employer's representative describing the recruitment steps undertaken and the results achieved, the number of hires, and, if applicable, the number of U.S. workers rejected, categorized by the lawful job-related reasons for such rejections. The DOL Certifying Officer, after reviewing the employer's recruitment report, may request the U.S. workers' resumes or applications, sorted by the reasons the workers were rejected.

The Green Card Applicant Can Be Working For Another Employer In H-1B Status

If the employee is already in the U.S. on an H-1B visa, the petitioning employer does not necessarily need to be the same employer as the H-1B employer. It can be another employer who wishes to employ that person after they obtain their green card. After the Labor Certification is approved by the DOL, the same employer files an I-140 immigrant petition. The person applying for the green card will have to wait for visa availability and will need to fill in a form to change their visa status if they are already living in the United States, or go through consular processing in their home country.

Green Card Annual Number Restrictions By Country

Unfortunately, like H-1B visas, employment-based green cards are subject to quotas. There are annual caps on employment-based visa categories, resulting in significant waiting lists for applicants from certain countries.

There is a fixed quota of green cards issued every year which depends partly on the country and partly on the category of employment. Currently, the annual number of green cards issued is 140,000. Countries such as India and China are subject to long backlogs due to the huge number of applicants that belong to these countries. In comparison, applicants from less populated countries have a shorter wait period to obtain a permanent resident visa.

Green Card Employment Categories

1. EB1 (28.6% of quota)—Priority Workers. Priority workers are comprised of the following three sub-groups:
 1. Foreign nationals with extraordinary ability in sciences, arts, education, business, or athletics
 2. Foreign nationals that are outstanding professors or researchers with at least three years of experience in teaching or research and who are recognized internationally.
 3. Foreign nationals that are managers and executives are subject to international transfer to the United States.
2. EB2 (28.6% of quota)—Professionals Holding Advanced Degrees or Persons of Exceptional Ability. Qualifying EB2 candidates must possess a Ph.D., master's degree, or five years of progressive post-baccalaureate experience *or* exceptional ability in the sciences, arts, or business.
3. EB3 (28.6% of quota)—Skilled Workers, Professionals, and Other Workers not classifiable as EB1 or EB2 workers.
4. EB4 (7.1% of quota) —Special Immigrants. This group includes certain religious workers, employees or previous employees of the U.S. government, and U.S. Armed Forces, translators.
5. EB5 (7.1% of quota)—Employment Creation. The EB5 categorization is for immigrant investors who make a substantial investment in a U.S. commercial enterprise which will create or preserve 10 permanent, full-time jobs for qualified U.S. workers.

Conclusion

In sum, both the H-1B visa and the employment-based green card application processes are lengthy and involve significant information and documentation to be provided. Confusing the process, or presenting insufficient or incorrect information can derail, prolong, or even lead to rejection of the applications. It can help significantly if you have the assistance of an experienced U.S. immigration attorney to advise and assist you with each step of the visa process.