

What is an H1B and Who Should Know About It?

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H1B – Specialty Occupation

The H-1B nonimmigrant visa allows companies and other employers in the United States to temporarily employ foreign workers for up to six years in occupations that require the theoretical and practical application of a body of highly specialized knowledge and a bachelor's degree or higher in the specific specialty, or its equivalent. H-1B specialty occupations may include fields such as architecture, engineering, mathematics, physical sciences, social sciences, medicine and health, education, business specialties, accounting, law, theology, and the arts.

Who Needs to Know About H1B visas?

The H1B is a very popular visa category as it can be very useful for a large number of potential applicants. So, who can benefit from this flexible employment-based visa?

- Students completing their studies in F1 status who are graduating with a bachelor's or advanced degree are designed to be the typical H1B applicants. Specific provisions exist to assist the transition from OPT to H1B.
- Students who have multiple years of OPT ahead of them should also look carefully at the H1B visa as it is still a lottery, and they should maximize their attempts to make the lottery;
- Individuals with other nonimmigrant visas that don't allow for employment (H4 dependents, etc.) or are running out of validity period (L1B, etc.).
- Professionals who are working in a status that ties them to a specific employer such as L1 visa holders or E visa holders.
- Professionals who are abroad – there is no geographic limit on H1B lottery submissions.
- Individuals who need a visa status that provides “dual intent” to allow them to easily pursue an employment-based green card in the United States.

H1B Cap and the Lottery

The number of new H1B Nonimmigrant visas is limited by law to 65,000 a year, and they must be submitted before April 1 for jobs that begin October 1 of that same year. In addition, there are an extra 20,000 H1B visas available for beneficiaries who hold a US master's degree. When there is anticipated demand for more than the 85,000 available H1B visas, the USCIS is required to conduct a lottery for the selection of H1B visas. The current H1B lottery takes place in multiple stages. Initially a lottery for H1B applicants who hold US master's degrees is conducted. Then, the remaining US master's degree applicants are added to the larger applicant pool, and a lottery for the remaining 65,000 available visas is conducted. Finally, a lottery is conducted in the summer for any unused H1B visas. This process is conducted electronically, and selected applicants are informed very quickly if they have made the H1B Cap.

Cap Exempt Employers

H-1B workers who are petitioned for or employed at an institution of higher education or its affiliated or related nonprofit entities, a nonprofit research organization, or a government research organization are not subject to the H1B cap. These H1B petitions may be filed at any time and are not subject to the lottery rules.

Key Aspects of H1B Petitions

Employers should be informed about all the aspects of H1B nonimmigrant workers as regulations cover their placement, pay, and qualifications. As discussed, H1B workers must hold at least a bachelor's degree, and they must also be employed in a position that at least requires the equivalent of a bachelor's degree. The definition of specialty occupation is complex and requires careful review.

Dependents of H1B visa holders can also obtain H4 status. However, H4 status does not by itself allow for work authorization. Only the spouses of H1B visa holders with an approved Immigrant Worker Petition that is subject to backlogs in obtaining

permanent residence can apply for work authorization in H4 status.

Fees

H1B Petitions require filing fees to be paid to the Department of Homeland Security. The US immigration service is fee-based and relies entirely on these fees to provide its services. The fees for H1B petitions are complex and they can be significant. Below, please find the current breakdown of H1B petition filing fees; there is also an optional additional premium processing fee should that service be available for the H1B Cap. Below is a list of the current fees with a higher range provided for employers that have more than 25 employees:

- H1B Registration fee, to participate in the lottery: \$210
- Base Nonimmigrant petition filing fee: \$460 - \$780
- Asylum program fee: \$300 - \$600
- Fraud prevention and detection fee for all new H1B Petitions: \$500
- AICWA Fee (Imposed by the American Competitiveness and Workforce Improvement Act of 1998):
 - \$750 – for employers with 1 to 25 full-time employees
 - \$1500 – for employers with 26 or more full-time equivalent employees
- Public Law 114-113 Fee, only applicable for employers with 50 or more employees and more than 50% of employees are working under H1B or L1 status: \$4,000
- Premium Processing Fee, guarantees a response from USCIS on a petition in 15 days: \$2,805

The Labor Condition Application

H1B petitions must be accompanied by a certified Labor Condition Application from the Department of Labor. This application includes certain attestations, a violation of which can result in fines, bars on sponsoring nonimmigrant or immigrant petitions, and other sanctions to the employer. The application requires the employer to attest that it will comply with the following labor requirements:

- The employer/agent will pay the H-1B worker a wage that no less than the wage paid to similarly qualified workers or, if greater, the prevailing wage for the position in the geographic area in which the H-1B worker will be working.
- The employer/agent will provide working conditions that will not adversely affect other similarly employed workers.
- At the time of the labor condition application, there is no strike or lockout at the place of employment.
- Notice of the filing of the labor condition application with the DOL has been given to the union bargaining representative or has been posted at the place of employment.

Prevailing Wages

Pursuant to the Labor Condition Application, the H1B employer must offer to pay the actual wage or the prevailing wage level for the H1B occupational classification in the proposed area of employment, whichever is greater, based on the best information available. For example, a prevailing wage for a computer engineer could be a lower figure in a specific region, but if all similarly placed employees in the company are paid a higher figure that wage must be offered to the H1B worker. Accordingly, the prevailing wage must equal the average of the rate of wages paid to other workers similarly employed in the area of intended employment. Employers must be careful in identifying the specific wage ranges and areas of employment.

Material Changes Matter

US Citizenship and Immigration Services and Department of Labor regulations of H1B workers are strict and complex, with fines and penalties abound for the unwary. H1B employers must abide by the material terms of the H1B petition that they

submit. Changes to job title, job duties, job location, salary, benefits, and any other material changes can have significant consequences. For example, H1B workers cannot be “benched,” and significant penalties can be incurred for violations.

Compliance

The H1B program has been subject to significant oversight in recent years, and that trend is only set to continue. Current regulations have increased the statutory authority for work site visits and compliance with the terms of H1B visas and the Labor Condition Application. Employers and H1B workers need to be aware that compliance is a key part of the H1B program and should be prepared for potential site visits.